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SURVIVAL OF THE FITTEST: PROOF BY AFFIDAVIT

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1. INTRODUCTION

A. Municipal by-law enforcement

Traditional legal thinking holds that municipal governance must strive for peace, order and good government while promoting the health, safety and welfare of the inhabitants of the municipality. Even the emerging notion of widening parameters of municipal powers[1] *mandates prosecution from time to time of municipal bylaws violations and enforcement of civil remedies to eradicate offending improvements on lands within municipal jurisdiction.*

Various devices are provided to municipalities to judicially enforce peace, order and good government. All enabling statutes throughout Canada and relevant Rules of Civil Procedure whenever applicable also provide evidentiary supplements to bolster the fact finding process central to trial in courts of civil and criminal jurisdiction.

Deciphering these evidentiary supplements requires a journey in evidence law where the common law beacons forcefully. Enters the affidavit.

All Canadian civil justice systems allow affidavit evidence in summary proceedings. Moreover, prosecutions in courts of quasi-criminal and penal jurisdiction make proof of certain issues easier by affidavit ranging from the existence of a by-law, the fact that a municipal council resolution has been adopted to events of misconduct. This calls for consideration

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[1] Bellomo, J. Jerald, "**Escaping the Straitjackets of Tradition: Municipalities' Widening Parameters of Power**" IMLA's 2004 Annual Meeting, San Antonio, Texas

of the use and misuse of affidavits. It also raises the broader consideration of the conceptual affidavit landscape.

Survey of this peculiar landscape can be better achieved by reviewing for comparative purposes the Rules of Procedure from New Brunswick, Ontario and British Columbia and topical Canadian case law.

B. Enters the affidavit – common law beacons

In civil justice[2], summary proceedings are dynamic components of due process.[3] They are increasingly used to expedite matters[4] where the regulatory environment allows evidence in written form, which would otherwise have to be given

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[2] The cardinal principle of liberal interpretation is the quintessential dogma of the **Rules of Court**. It defines access to summary proceedings: **Rule 1.03(2)**, **Rules of Court of New Brunswick**, **Rule 1.04(1), Rules of Civil Procedure, Ontario, Rule 1(5), Supreme Court Rules, British Columbia**

[3] The impetus that impelled Canadian civil procedure reforms had a three-pronged underpinning:

(a) more open disclosure of each party's case before trial;

(b) simplification and modernisation of procedure and language; and

(c) more convenient, expedient, and less expensive procedures where fairness would allow.

[4] For example, **Rule 22** (New Brunswick), **Rule 20** (Ontario) and **Rule 18** (British Columbia) allow a motion for summary judgment. **Rule 23** (New Brunswick) and **Rule 21** (Ontario) provide for a motion for the determination of questions before trial; in British Columbia, **Rule 34** allows for proceedings on a point of law. In fact, the **Rules of Court** of New Brunswick originally allowed at least 213 motions and applications of various nature. See: Ryan, Patrick, A.A. **"Motions and Applications"** New Brunswick Practice Manual, pp. 134-174

orally.[5] *This requires consideration of the evidentiary foundation of summary proceedings: the affidavit.*

No single statute governs the content of affidavits. The common law rules. At most, use of affidavits in judicial settings requires compliance with several substantive and formal requirements.[6] *Moreover, there is little precious schooling on this topic despite its critical importance.*

Law schools' curriculum and law societies' continuing legal education programs have consistently focussed their attention on other evidentiary and advocacy issues. Gradual erosion of global drafting skills and knowledge in this field of practice has been the end result of this lack of attention.[7]

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[5] See generally Mr. Justice Ronald Stevenson (now retired), **"The Basic Rules Respecting Affidavits, Motions, and Applications"**, New Brunswick CLE – Lunch and Learn, January-February 1993

[6] **Rule 4.05** (New Brunswick), **Rule 4.06** (Ontario) and **Rule 51** (British Columbia). **Rule 39.01** (New Brunswick), **Rule 39** (Ontario), Part 26, **Rules 298-305** (Alberta) and **Rule 51(10)** (British Columbia). The following statutes deal with commissioners of oaths and limited aspects of proof by affidavit: **Commissioners for Taking Affidavits Act**, R.S.N.B. 1973, c. C-9, **Commissioners for Taking Affidavits Act**, R.S.O. 1990, c. C-17, **Evidence Act**, R.S.B.C. 1996, chapter 124. All other Canadian jurisdictions have similar provisions. Affidavits were originally unknown to the common law. They were used only in the Court of Chancery. In that Court, the Lord Chancellor would read written depositions taken down before a chancery official.

[7] See generally Teed, Eric, Q.C., **"A Handbook for Commissioners of Oaths"**, Saint John, New Brunswick, 4th Edition, 1975. It appears to be a chronic problem throughout the common law world. Paul Venus, a solicitor in Australia, noted recently:

> **"Affidavits and witness statements have become increasingly important aspects of modern civil litigation. Yet it is somewhat surprising that there is relatively few texts devoted in whole or even in part to this topic. Perhaps in part, this is because the topic is an amalgamation of evidentiary and civil procedure issues.": "Drafting Documents for Use in Court: Affidavits & Witness Statements",**

Lawyers, however, are duty-bound to enlighten their clients on the required and permissible content of affidavits. They are expected to show care and regard to accuracy or detail, which one would expect of a solicitor in drafting a formal document to be completed by his client under oath.[8] *They also have the duty to object to the admissibility of faulty affidavits.*[9] *This should be cause for considerable trepidation. Dereliction of duty has consequences. Failure to take issue with the admissibility of a defective affidavit may well cause a court to consider it as part of the evidential record.*[10]

What are the legal requirements for affidavits?[11]

Faculty of Law of New South Whales, Sydney, Australia, March 20, 2004, page 2.

[8] ***Rideout v. Stanley*** [1950] 1 W.W.R. 92 (Sask. K.B.) As was bluntly said elsewhere:

> **"If you want success as an advocate, a very good start is to look and sound like an advocate, prepared and in charge of the material. This extends to the appearance of your written material, which should be and also look like documents that are important enough to have a claim to attention."**

Bryson, John, **"Affidavits"** (1999), 18 Aust. Bar Review 166

[9] Bastarache, Michel, (then a Justice of the New Brunswick Court of Appeal), **"Affidavit Evidence in the Family Division"**, Family Law CLE (New Brunswick), April 25, 1997

[10] ***Walsh v. Nicholls and CGU Insurance Company of Canada*** [2004] N.B.C.A. 59, par. 83

[11] The starting point of this quest is set out as follows in the various rules of court:

Rule 4.01 (1) (New Brunswick) provides as follows:

"Format

(1) Every document in a proceeding shall be produced legibly on one side of good quality white paper with

2. PUBLIC POLICY CONSIDERATIONS

Conflicting public policy issues collide when courts deal with affidavits in summary proceedings.

A court must weigh its core obligation to provide fair and expeditious solutions to litigation with the critical need to achieve due process. Trials have traditionally been regarded as the essence of procedural justice and deprivation thereof the mark of procedural injustice. There can, however, be proceedings in which, because they do not involve any genuine issue that

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> **margins of approximately 4 centimetres. The characters used shall be at least 12 points or 10 pitch size. The lines shall be at least one and one-half lines apart, except for quotations from authorities which shall be indented and single-spaced.**
>
> **(2) The name of each person who signs a document shall be typed, stamped, or legibly printed beneath his signature."**
>
> **Rule 4.01(1)** (Ontario) provides as follows:
>
> **"A document in writing in a proceeding shall meet the following standards:**
>
> **1. The text shall be printed, typewritten, written or reproduced legibly, with double spaces between the lines and a margin of approximately 40 millimetres on the left-hand side.**
>
> **2. The characters used shall be of at least 12 point or 10 pitch size.**
>
> **3. Good quality white paper or good quality near white recycled paper 216 millimetres by 279 millimetres shall be used."**
>
> **Rule 4(1)** (British Columbia) provides as follows:
>
> **"(2) Unless the nature of the document renders it impracticable, every document prepared for use in the court shall be in the English language, legibly printed, typewritten, written or reproduced on 8½ inch x 11 inch durable white paper or durable off-white paper."**

requires a trial, the holding of a trial is unnecessary and, accordingly, represents a failure of procedural justice. In such proceedings, the successful party has been both unnecessarily delayed in the obtaining of substantive justice and being obliged to incur added expenses. Summary judgment motions are mechanisms provided to alleviate these failures of procedural justice.[12] *Affidavits are essential devices supporting these and other motions.*

Instances under the various rules of court where affidavits are used are generally those in which the attainable goal is to secure a just and least expensive determination on their merits without the necessary systemic delays inherent to regular pre-trial and trial procedures. However, affidavits are court documents governed by the rules of court and courts will frown upon their misuse.

Availability and usefulness of affidavits come with a duty to use them properly within the framework of rules of court. Rules have been enacted with the intention that their provisions be observed. Failure to adhere to the rules almost invariably operates to defeat this objective.[13]

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[12] ***Irving Ingerman Ltd. v. Galanis*** (1991), 83 D.L.R. (4th) 734 (C.A., Ont.) page 739.

[13] ***Weldon v. Kavanagh and Formac Publishing Co.*** (1989), 94 N.S.R. (2d) 181 (N.S.C.A.) The Court concluded with the following:

> **"I respectfully submit that judicial resources are sufficiently scarce, that the time of the Court should not be taken up with applications supported by defective documentation. If the proper material required to support an application exists, it is not too much to ask that counsel provide it."**

The affidavit is therefore a critical stepping stone in the ever-lasting quest for an efficient system of civil justice.

3. FORMAL REQUIREMENTS OF AN AFFIDAVIT

A. Definition and purpose

An affidavit is a voluntary declaration of facts written down and sworn to by the deponent before an officer authorized to administer oaths.[14] *The content of an affidavit is evidence, just as if the deponent were testifying in a courtroom.*[15] *It must therefore contain statements of facts in concise and succinct form*[16] *either based on knowledge or belief since it is the vehicle by which evidence is put before a court.*[17] *As a corollary to this definition, it can be concluded that an affidavit is*

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[14] ***Zemlman v. Feder*** (2001), 54 O.R. (3d) 15 (Ont. Div. Ct.) citing Black's Law Dictionary, 7th ed. The word "deponent" appears to be more in use in the United States of America than elsewhere in the common law world, but "deponent" and "affiant" have grown to be synonymous. They will be used with equal meaning in this article.

Eric Teed, Q.C., note 7, at page 8 suggested the following definition:

> **"An affidavit is a written statement of facts signed by the person making the statement, who is called the deponent, and sworn to by the deponent as to its truth, before an official, authorized to administer oaths."**

[15] Salhany, Roger E., **"Preparation and Presentation of a Civil Action"**, Butterworths Canada Ltd., Markham, Ontario, 2000, page 24.

[16] ***Trainor v. Trainor*** (1991), 87 Nfld. & P.E.I.R. 37 (P.E.I. Sup. Ct., Trial Div., McQuaid, J.)

[17] Fradsham, Allen, **"Chambers Advocacy – Alberta Practice Guide – Civil Litigation"**, Carswell, Scarborough, Ontario, 1997, page 6.

testimony and it must be therefore confined to facts. It should not contain speculation.[18]

Although the sole purpose of an affidavit is to give evidence in summary proceedings,[19] *admissibility is always subject to the general law of evidence and the overriding discretion of a court. It may refuse to accept a defective affidavit.*[20]

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[18] Morton, James C., and Freeman, Michael E., **"Written Advocacy"**, Butterworths Canada Ltd., Markham, Ontario, 2000, page 52.

[19] **Rule 39.01(1)** (New Brunswick), **Rule 39** (Ontario) and **Rule 52(8)** (British Columbia)

[20] ***Dixon v. Gibson*** (1931), 40 O.W.N. 60 (Master). In ***Barefoot v. Paranet Services***, [2000] N.S.R. (2d), the court said at paragraph 13:

> **"I considered the appropriate and proper contents of affidavits in *Waverly (Village Commissioners) et al. v. Nova Scotia (Minister of Municipal Affairs) et al.* (1993), 123 N.S.R. (2d) 46, and I refer to the decision of the Nova Scotia Court of Appeal in *Wall v. 679927 Ontario Ltd. et al.* (1999), 176 N.S.R. (2d) 96 where the court determined that an affidavit which had similar deficiencies to the defendant's affidavit in this proceeding should have been rejected by the Chambers Judge. In that case, the court determined that the whole structure of the affidavit was improper and was fundamentally misconceived. Although some of the material was not particularly objectionable, the whole affidavit was struck. At p. 110 Cromwell J.A. stated:**
>
> > **'... that the Chambers judge erred in failing to make a clear ruling on the admissibility of the Carter affidavit. It was central to his conclusions and its admissibility, in its entirety, was objected to and the objection was fully argued. Moreover, significant portions of the affidavit are clearly irrelevant, scandalous or consist of innuendo and conjecture. The affidavit is so fundamentally defective that the court should not be required to take it apart in pieces to preserve some possibly admissible material. It should have been struck.'"**

Affidavits must be distinguished from statutory declarations. Similar in many respects, their source differs nonetheless. An affidavit is used in court proceedings governed by rules of court or a statute. The statutory declaration is a sworn statement made only by authority of a statute outside the scope of legal proceedings and is governed by federal[21] or provincial[22] statutes as the case may be.[23]

Both sworn documents contain statements, the truth of which is buttressed by sanctions imposed on those who knowingly make statements that are false.

B. The framework of an affidavit

There are five mandatory parts[24] and one optional part to an affidavit:

(i) the heading;

(ii) the deponent's identification;

(iii) body of the affidavit:

1. - basic drafting challenges

2. - knowledge

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[21] ***Evidence Act***, R.S.C. 1999, Chap. E-5

[22] ***Evidence Act***, R.S.N.B. 1973, Chap. E-11; ***Evidence Act***, R.S.O. 1990, c. E-23; ***Evidence Act***, R.S.B.C. 1996, c. 124

[23] For example, affidavits are specifically required under all land transfer legislation throughout Canada to establish marital status.

[24] Teed, Eric, Q.C., note 7, page 20. Note, however, that there may be additional parts in certain jurisdictions as, for example, British Columbia where the **Rules** provide for a backing sheet.

3. - admissible hearsay: belief

4. - affidavit evidence and expert opinion

(iv) the signature of the deponent; and

(v) the jurat.

The optional part is:

(vi) the exhibits:

1. - documentary exhibits

2. - non-documentary exhibits

(i) <u>the heading</u>

The first part of any affidavit is the heading. The affidavit must be entitled in the cause or matter for which it is sworn. There are only two possible options allowed under the rules of court to set out the style of cause of any matter.[25]

As court documents[26]*, affidavits must contain the following:*

(a) *the name of the court and, if applicable, the division of the court;*

(b) *the name of the judicial district in which the proceedings are conducted, if applicable;*

(c) *the court file number;*

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[25] **Rules 16.06(1)** and **(2)** (New Brunswick), **Rules 14.02, 14.05(1)** and **14.06(1)** (Ontario), **Rules 4(4), 8** and **10** (British Columbia)

[26] See **Rule 4** (New Brunswick), **Rule 4** (Ontario) and **Rule 51(1)** (British Columbia) generally

(d) *the style of proceedings, which, except in an originating process, may be abbreviated where there are numerous parties, to show the names of the first party on each side followed by the words "and others";*

(e) *the title of the document;*

(f) *the date of the document; and*

(g) *the name of the party filing or serving the document or his solicitor.*[27]

(ii) <u>the deponent's identification</u>

The second part of an affidavit is the identity of the deponent. This portion of the affidavit must clearly show:

(a) *the identity of the deponent by stating his name in full;*

(b) *the place of residence of the deponent; and*

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[27] See **Rule 4.02(1)** (New Brunswick), **Rule 4.02(2)** (Ontario) and **Rules 4(4), (5), (6), (7), (7.1), (8)** and **(9)** (British Columbia). Courts in Alberta have already declined jurisdiction to hear an application because the affidavit was not in conformity with the Alberta Rules of Court. Both cases held that under the rules, the affidavit is a required document and its presentation is therefore a condition precedent to the hearing of the application: ***Knight v. Knight*** (1992), A.J. 751 & ***MEP v. Regional Children's Guardian*** (1988), 88 A.R. 115 (Q.B.)

(c) *if the deponent is a party or the solicitor, agent or employee of a party, it shall state that fact.*[28]

Moreover, if the deponent swears to the affidavit as a representative of a corporation, he must clearly establish his standing in the affidavit after having obtained proper prior authority for doing so.[29]

(iii) body of the affidavit

The third part of the affidavit is the body or content.

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[28] **Rule 4.05(1)(a)** (New Brunswick), **Rule 4.06(1)(c)** (Ontario), and **Rule 51(2)(a)** and **(b)** (British Columbia). The Ontario rule does not specify that this portion of the affidavit must show the place of residence of the deponent. The Ontario rule, however, provides that an affidavit shall be in Form 4D. See **Rule 4.06(1)(a)**. The British Columbia rule has a similar requirement (form 60). See **Rule 51(2)(d)**. But see the added requirements in British Columbia:

> **"Rule 51(2.1)**
>
> **(2.1) An affidavit, other than an affidavit of service or of delivery, must be endorsed, in the top right hand corner of the title page, with**
>
> **(a) the initials and surname of the deponent,**
>
> **(b) the sequential number of the affidavit made by that deponent in the same proceeding, and**
>
> **(c) the date on which the affidavit was made,**
>
> **as in the following example:**
>
> **J. Doe #3**
>
> **July 24, 2000."**

[29] ***Bank of Montreal v. Brown*** (1956), 21 W.W.R. 287 (B.C.S.C.), ***Debly v. M. Gordon & Sons Ltd.*** (1956), 6 D.L.R. (2d) 94 (N.B. Co. Ct.)

Any affidavit used in a proceeding governed by the rules of court must be expressed in the first person. It follows that it must be written in direct speech. The true substance of what is going on is that the witness is giving evidence to the court; the lawyer is not reporting the witness evidence.[30] *Because of the required style, the affidavit must be written in narrative form.*

The affidavit must also be confined to a statement of facts within the personal knowledge of the deponent, except as provided otherwise under the rules of court. This seemingly simple requirement has however produced a flow of case law that is testimony to a chronic lack of understanding of basic evidentiary principles.

A sworn statement of facts is not a pleading. The former is evidence whereas the latter is mere assertion.[31] *Echoing a statement of claim as a means of producing a sworn statement of fact without more produces a defective affidavit. Great care should be exercised in drafting affidavits. Both pleadings and affidavits should contain facts, but there are marked differences between the two types of documents. Affidavits, unlike pleadings, form the evidence that goes before the court and are subject to the rules of evidence to enable the court to fulfil its fact-finding function. They should be drafted with the same respect for accuracy and the rules of evidence as is exercised in the giving of viva voce testimony.*[32]

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[30] Bryson, John, **"Affidavits"**, note 8

[31] *Pleadings are not evidence:* ***McCain et al. v. McCain Food Groups Inc. et al.*** (1993), 189 N.B.R. (2d) 169 (Q.B., Stevenson)

[32] ***Waverley (Village) v. Nova Scotia (acting Minister of Municipal Affairs)*** (1993), 126 N.S.R. (2^{d}) 147, affirmed 127 N.S.R. (2^{d}) 298 (C.A.), leave

The body of an affidavit must be divided into numbered paragraphs. Each paragraph should be confined as far as possible to a particular statement of fact.[33] *A paragraph that extends over many pages or is divided into a great number of sub-paragraphs does not comply with that requirement.*[34]

1. - Basic drafting challenges –

The body of an affidavit establishes several challenges to the drafter:

(a) *it is imperative to clearly identify and review the rule or the statute pursuant to which the affidavit is being prepared.*[35] *Three compelling reasons support this apparently innocuous requirement:*

(i) *the material to be submitted must comply with the law governing the substantive application and the law governing the*

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to appeal to S.C.C. refused (1995), 140 N.S.R. (2d) 240 (note), see page 4 [1993] N.S.J. No. 151

[33] **Rule 4.05(1)(a)** (New Brunswick) and **Rule 4.06(5)** Ontario. As the British Columbia rule is silent on this topic, the common law still applies to the same effect.

[34] Bryson, John, **"Affidavits"**, note 8.

[35] Salhany, Roger E., **"Preparation and Presentation of a Civil Action"**, Op. Cit., note 14, at page 23. For example, **Rule 21.04(2)** (New Brunswick), **Rule 22.02** (Ontario) and **Rule 18(1)** (British Columbia) have specific requirements as to the content of an affidavit. Furthermore, **Rule 7.06** (New Brunswick) specifically provides what must be stated in an affidavit of a litigation guardian. If an affidavit is to be used in the context of a proceeding provided for by a specific legislation, it is imperative to review the relevant portion of that legislation to clearly identify the factual requirements of the content of the affidavit.

procedure for making the actual application;[36]

(ii) *a court must have jurisdiction in the first place to grant the relief sought as a motion may be premature if a step in the proceedings has yet to be satisfied; and*

(iii) *the material has to meet the test that must be established before relief can be granted.*[37]

(b) *knowledge of the relevant case law is mandatory to identify beforehand what are the factual requirements of the content of an affidavit.*[38] *Topical evidentiary requirements have to be covered in the affidavit. Their sources are to be found either in the case law, the relevant statute or the appropriate rules of court;*

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[36] For example, affidavits used for a labour related injunction in New Brunswick are restricted to personal knowledge. See Section 34(5), ***Judicature Act***, R.S.N.B. 1973, c. J-2.

[37] The most obvious example of this fundamental requirement is in the context of a **Rule 21.08** (New Brunswick) motion to set aside default judgment. Although **Rule 21.08** (New Brunswick) establishes the legal framework for such a motion, nothing is set forth in the Rule as to what must be stated in an affidavit. Case law must therefore be resorted to since the seminal case of ***Brunswick International (Canada Ltd.) v. Albert*** (1975), 12 N.B.R. (2d) 296 (C.A.). In Ontario, **Rule 19.08** provides a similar framework for this motion and as well, case law must be resorted to: ***Lenskis v. Roncaioli*** (1992), 11 C.P.C. (3d) 99 (Ont. Gen. Div.); affirmed (1996), 45 C.P.C. (3d) 57 (Ont. C.A.). See also **Rule 17(12)** (British Columbia) and relevant case law. See generally Emery, Michael G. "**Your Case in Print: The Importance of Affidavit Material**", The Litigator (Ontario Trial Lawyers Association), Fall 2003, page 43

[38] ***Morris v. Morris*** (1997), 197 N.B.R. (2d) 205 (C.A.)

(c) *as stated above, the contents of an affidavit should be restricted to a chronological statement of facts in plain and simple language. It should be concise and to the point. The basic principle is that affidavit evidence must be comprehensive and relevant.*[39] *Moreover, there must be complete and accurate disclosure of all facts and documents relevant to the determination of any motion and application.*[40] *Obviously, drafting an affidavit requires the drafter to canvass all relevant information while considering all applicable principles.*[41] *The public policy rule that governs this common law principle rests on consideration of equity. The affidavit that satisfies this rule necessarily provides the adverse party with all necessary information so as to be able to reply to the proceeding. It is therefore appropriate to call for the inadmissibility of an improper affidavit or the striking out of offending portions thereof. Otherwise, the admissibility of such a defective affidavit would violate the rules of natural justice;*[42]

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[39] Bastarache, Michel, note 9.

[40] See the codification of the common law rule in **Rule 39.01(6)** (Ontario), which requires full and fair disclosure on motion or application without notice. In New Brunswick, the common law rule to the same effect still prevails: ***B.B.M. Bureau v. Cybernautes*** (1992), 8 C.P.C. (3d) 293 (Gen. Div.) and ***Lynian Ltd. v. Dubois***(1990), 45 C.P.C. (2d) 231 (Gen. Div.)

[41] ***Goldfluss v. 306569 Ont. Ltd.*** (1977), 4 C.P.C. 296 (H.C.)

[42] ***NPP & NEP v. Regional Children's Guardian*** (1988), 88 A.R. 115 (Q.B.)

(d) *relevance of any affidavit is always determined by the nature of the proceedings, admissions, if any, and the pleadings. Affidavits that do not directly bear on the issue are not relevant and are likely to be struck out as irrelevant, frivolous and vexatious*[43] *although affidavits purporting to address credibility issues may be admissible. There is no place in affidavits for speculation or inadmissible evidence;*

(e) *facts must be distinguished from arguments and opinions; if the affidavit is the sole domain of the former, the latter is the domain of pre-hearing briefs and advocacy. An affidavit should not contain, or act as a substitute for, argument.*[44] *An affidavit should not take on the flavour of a plea or a summation;*[45]

(f) *the language used in an affidavit must be plain and clear to the deponent as it is he, as opposed to the person who took the oath, who could be cross-examined on it;* [46]

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[43] ***Waverley (Village) v. Nova Scotia (acting Minister of Municipal Affairs)***, note 32

[44] ***Karpow v. Go Vacations Canada Ltd.*** (1994), 154 A.R. 303 (Master)

[45] ***Waverley (Village) v. Nova Scotia (acting Minister of Municipal Affairs)***, note 32. See also ***MacDonald v. Workers' Compensation Board (N.S.)*** (1995), 145 N.S.R. (2^{d}) 301 (N.S.S.C.)

[46] The deponent must be able to easily understand what he or she is called upon to say in the affidavit. Plain language must be the standard.

(g) *it is good practice to complete an affidavit with a statement clearly identifying the regulatory or statutory purpose and the relief for which the affidavit is being sworn.*[47]

2. - Knowledge -

The fundamental rule of drafting is that an affidavit used in an application should mainly be confined to statements of fact within the personal knowledge of the deponent.[48] *It can also contain statements of the deponent's information and belief with respect to facts that are not contentious. However, the deponent in a motion may make a factual statement as to his information and belief if the source of his information and the reasons for his belief therein are specified in the affidavit even if the fact is contentious.*[49]

The difference is critical; contentious hearsay in an application is not evidence at all[50] *since contentious statements*

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[47] For example, that paragraph could provide that:

> "This affidavit is sworn to in support of a motion seeking an order setting aside the noting in default of the defendant pursuant to **Rule 21.03** of the **Rules of Court** of New Brunswick and to allow the said defendant to issue a Statement of Defence within 20 days of the order of this Honourable Court."

[48] **Rule 39.01(5)** (New Brunswick), **Rule 39.01(5)** (Ontario) and **Rule 51(10)** (British Columbia)

[49] **Rule 39.01(4)** (New Brunswick). Note, however, that it is impossible for Summary Judgment Motions and subject to Section 34 of the ***Judicature Act***, R.S.N.B. 1973, Chap. J-8. See also **Rule 51(10)(a)** (British Columbia)

[50] Morton, James C., and Iacovelli, Michael J., **"Procedural Strategies for Litigators"**, Butterworths Canada Ltd., Markham, Ontario, 1998, page 60.

cannot be deposed to on the basis of information and belief in an originating process.[51]

3. - Admissible hearsay: belief -

Information and belief in an affidavit exists when the factual information and its sources are stated together with the deponent's stated belief in the accuracy of the information.[52]

The admissibility of statements of belief in an affidavit is predicated on disclosure of the source of information and the reason for the deponent to believe it.[53] *Failure by the deponent to clearly set out the source of his information and his reason to believe it regarding facts for which he does not have personal knowledge will cause that portion of the affidavit to be disregarded.*[54] *It may well be fatal to the entire proceeding for*

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[51] ***Re: Becker*** (1986), 57 O.R. (2d) 495 (Surr. Ct.) and see also **Rule 51(10)(b)** (British Columbia), which restricts the use of an affidavit in the following way:

> **"An affidavit may state only what a deponent would be permitted to state in evidence at a trial except that, if the source of the information is given, an affidavit may contain statements as to the deponent's information and belief, if it is made...**
>
> **(b) by leave of the Court under Rule 40(52)(a) or 52(8)(e)."**

Hearsay evidence in affidavits in applications or trials is subject to leave of the court in British Columbia: ***Chamberlain v. School District #36 (Surrey)*** (1998), B.C.S.C. (CanLII) and ***Home Equity Development v. Crow et al.*** (2002), B.C.S.C. 546.

[52] ***Owners: Condominium Plan No. 7620990 v. Pirie*** (1982), 22 Alta.L.R. (2d) 91 (Master), pp. 95-96.

[53] ***Attorney General of Canada v. Maillet*** (1984), 54 N.B.R. (2d) 411 (Q.B., Godin, J.), ***Canini v. Canini*** (1986), 67 N.B.R. (2d) 330 (Q.B., Fam. Div., Boisvert, J.), and ***Printing House Ltd. v. Quenneville*** (1971), 3 N.B.R., (2d) 295 (Co. Ct., Bujold, J.)

[54] See for example ***Kelly v. McLean***, CanLii, N.B.C.A. 2003 (decision dated December 18, 2003), ***Canadian Imperial Bank of Commerce v. High-Tech***

which the affidavit is sworn.[55] *However, the wording used is important. If a deponent attests to the best of his knowledge where the content of his affidavit is shown to be mostly within personal knowledge, that phrase will not establish that the affidavit is based on belief where circumstances indicate otherwise.*[56]

The affidavit in the context of admissible hearsay evidence must clearly distinguish between knowledge and belief since the general rule of drafting is that an affidavit must be based on knowledge except where otherwise authorized. This is primarily designed to restrict hearsay.[57] *Failure to do so may cause a court to strike out the affidavit.*[58] *Affidavits should contain an explicit assertion in the knowledge statement that the deponent has personal knowledge of the matters deposed to except where stated to be based on belief.*[59]

Woodworkers Ltd. (1991), 110 N.S.R. (2d) 420 (Supreme Court, Trial Division), ***Lexogest Inc. v. Manitoba (Attorney General)*** (1990), 71 D.L.R. (4th) 538 (Man.Q.B.), ***Halwa v. Phillips*** (1987), 81 A.R. 182 (Master)

[55] ***Province of New Brunswick v. Carleton Enterprises Ltd.*** (1974), 8 N.B.R. (2d) 19 (Q.B., Stevenson, J.)

[56] ***Smith, Kline & French Laboratories Ltd. v. Novopharm Ltd.*** (1984), 79 C.P.R. (2d) 103 (F.C.A.)

[57] Watson, Garry D. **"The Effect of the New Rules of Civil Procedure on Evidence in Civil Cases"**, Special Lectures of the Law Society of Upper Canada 1984, **Law in Transition: Evidence**, 1984, Richard DeBoo, Ontario, p. 183. See **Rule 4.05(2)** (New Brunswick), **Rule 4.06(2)** (Ontario) and **Rule 51(10)** (British Columbia).

[58] ***Csak v. Mokos*** (1995), 18 R.F.L. (4th) 161 (Ont. Master); reversed in part (1996), 2 C.P.C. (4th) 385 (Cont. Gen. Div.)

[59] ***Waverley (Village) v. Nova Scotia (acting Minister of Municipal Affairs)***, note 32

The requirement regarding facts set out on the basis of belief applies to each statement of that nature. If there is only one source, a blanket statement is sufficient. However, it is better practice to identify each source of information in relation to each fact where there are several sources.[60]

It is inadequate for a deponent to swear that he is advised and believes without more. What is required is a statement as to who advised the deponent and some reason for why the advisor would know that he was talking about and therefore could be believed.[61] *This however runs contrary to what appears to be a widely-followed practice. This practice is not sound:*

> ***"Were it not for the authorities cited by Mrs. McNeil for the appellants, I might think that the stipulation as to given grounds for the belief on the affiant was satisfied by the words "I am advised" and indeed, I think that most practitioners and perhaps most judges might assume that to be the case. There are, however, a number of cases which are to the contrary and one of these is Gilbert v. Estiles (1889) 13 P.R. 121 (C.A.) in which Street, J., and Falconbridge, J., as he then was, both concluded that an affidavit which merely said that the affiant was "credibly informed and believed certain facts" was insufficient."***[62]

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[60] ***Shepherd v. Central Guaranty Trust Co.*** (January 7, 1992), Doc. 91 – CQ – 10574 (Ont. Master). For example, it is acceptable to say that A is the source of the statements in paragraphs 1 to 10, B is the source of paragraphs 11 to 17 and so on.

[61] ***City Buick Pontiac Cadillac Ltd. v. Allan*** (1977), 6 C.P.C. 182 (Ont. High Court of Justice) at page 184.

[62] Ibid, p. 185

Affidavit material that contains evidence predicated on belief of the deponent must accordingly disclose at least:

> ***(a)*** *the source of the information. This source must be a natural person rather than a corporate body. A corporation cannot itself give information that can be used to substantiate a deponent's statement of belief. An affidavit on belief described as being supplied by the plaintiff corporation itself as opposed to a natural person will be invalid.*[63] *The reason why the source of such information must be given is because that is a material fact, which must be before a court. Information obtained from a person who wishes to remain anonymous may not be given since a source must be an identified person.*[64] *Likewise, belief held as a result of reading someone else's file is not properly grounded, as this is akin to belief held as a result of reading a newspaper. It is inadmissible hearsay;*

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[63] ***K. J. Preiswirck Ltd. v. Los Angeles – Seattler Motor Express Inc.*** (1957), 22 W.W.R. 93 (B.C.S.C.)

[64] ***Meier v. Canadian Broadcasting Corp.*** (1981), 19 C.P.C. 315 (B.C.S.C.) Information based on a source that is neither reliable or credible as, for example, the case of a minor as being the source is not valid. See ***B.(G.) v. B.(D.)*** (July 28, 1998), doc. Windsor 97 – D.V. – 30020 (Ont. Master). Furthermore, unspecified people as the source of the information is deficient and therefore lacks any probative value. ***W.(M.R.) v. M.(L.M.)*** (1996), 6 C.P.C. (4th) 51 (B.C.S.C.)

(b) *why that person has knowledge of the subject.*[65] *The information as to the source must be sufficient to permit a court to conclude that the information comes from a sound source and preferably the original source.*[66] *The rule therefore is that although affidavits used in interlocutory proceedings can be based on information and belief, the source of the belief must be specifically identified and the source should be the original source of information. Second-hand hearsay is not admissible.*[67] *It follows that information gathered from reading another person's file is not sufficient to ground an affidavit of belief;*

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[65] ***City Buick Pontiac Cadillac Ltd. v. Allen***, note 61

[66] ***Waverley (Village) v. Nova Scotia (acting Minister of Municipal Affairs)***, note 32

[67] In ***Savings and Investment Bank Ltd. v. Gasco et al.*** [1984] 1 All E.R. 296 (Ch. Div., Gibson, L.J.), the court said, at page 305:

> **"Further, I find it impossible to accept counsel for SIB's submission that it is sufficient in order to comply with r 5(2) that the deponent should identify only the source to him of his information even though it is clear that that source was not the original source. Thus, if the deponent was informed of a fact by A, whom the defendant knows not to have firsthand knowledge of the fact but who had obtained the information from B, I cannot believe that it is sufficient for the deponent to identify A as the source of the information. That, to my mind, would largely defeat the requirement that the sources and grounds should be stated and would make it only too easy to introduce prejudicial material without revealing the original source of hearsay information by the expedient of procuring as the deponent a person who receives information second hand. By having to reveal such an original source and not merely the immediate source, the deponent affords a proper opportunity to another party to challenge and counter such evidence, as well as enabling the Court to assess the weight to be attributed to such evidence."**

> ***(c)*** *that the deponent therefore believes the source of the information. Giving the source of information but not stating that the deponent believes the information he has received is improper. That affidavit will be inadmissible, as it violates the relevant rules of court.*[68]

The legal reason for this requirement is that at common law, affidavits containing vague statements without actual facts in support could be excluded. The affidavit must be so clear and circumstantial as to enable perjury to be assigned.[69] *This places on the deponent the onus of limiting the statements to truthful facts and to statements of belief that are reliable.*[70] *In effect, the deponent represents that the contents of the affidavit are true.*[71]

However, there are exceptions:

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[68] ***Bank of Montreal v. Brown*** (1956), 21 W.W.R. 287 (B.C.S.C.) and ***Debly v. M. Gordon & Sons Ltd.*** (1956), 6 D.L.R. (2^d) 94 (N.B. Co. Ct.)

[69] ***Paulson v. Beaman*** (1902), 32 S.C.R. 655

[70] Robichaud, Brigitte N. (now a Justice of the Court of Queen's Bench), **"Drafting Affidavits in Family Matters"**, Family Law CLE (New Brunswick), "Avoid the Pitfalls", October 24 and 25, 1986, citing as authority for the proposition ***Bennett v. Dowson*** (1828), 4 Bing 609. Mr. Ronald Stevenson suggested, however, that the best form is "I am advised by... and believe... " instead of "I am advised by... and verily believe...". According to this very able judge, the adverb "verily", though long used, adds nothing. Either the deponent believes the information or doesn't believe it. See note 5.

[71] ***Gerling Global General Insurance Co. v. Siskind, Cromarty, Ivey & Dowler*** [2002] O.J. No. 2107, page 6

(a) *a court is entirely authorized to disregard the invalid portions of an affidavit and act upon the valid portions;*[72]

(b) *furthermore, an affidavit that contains factual statements outside the personal knowledge of the deponent would nonetheless be allowed by a court under exceptional circumstances;*[73] *and*

(c) *finally, in very specific instances, if legislation allows it, the affidavit of the deponent may contain statements outside his knowledge without the requirement of setting out his information and belief.*[74]

4. - Affidavit evidence and expert opinion -

Nothing in the rules of court prohibits affidavits by experts. Although relevant rules do not appear to contemplate the use of opinion affidavits, an argument could be made that a

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[72] ***New Brunswick Electric Power Commission v. International Brotherhood of Electrical Workers*** (1977), 16 N.B.R. (2d) 361 (C.A.)

[73] ***New Brunswick Electric Power Commission v. International Brotherhood of Electrical Workers*** (1977), 16 N.B.R. (2d) 361 (C.A.), ***Fleck v. Baxter*** (1989), 94 N.B.R. (2d) 329 (C.A.)

[74] ***Avco Financial Services Canada Ltd. v. Hogan et al.*** (1989), 96 N.B.R. (2d) 120 (Q.B., Riordon, J.) For example, paragraph 3(1) of the ***Garnishee Act***, R.S.N.B. 1973, Chap. G-2, allows for such an affidavit notwithstanding **Rule 39.01(4).** It follows that an affidavit drafted in accordance with paragraph 3(1) of that ***Act*** is allowable even though it is not in formal compliance with the **Rules of Court.** See also ***Smith v. Agnew*** [2001] N.B.J. No. 282 (C.A.) where the court held that the evidence on a motion under Section 265.6 may include expert reports that the parties intend to use at trial. In such cases, neither an affidavit by the authors nor their viva voce testimony is required.

properly drafted affidavit setting forth the expert's qualifications, his opinions, and the underlying factual basis should be admissible. However, proof by affidavit is not a license for non-compliance with the law of evidence.[75] *He who asserts a fact must properly prove it. As a result, merely attaching business documents and invoices prepared by a third party to the plaintiff's affidavit in proof of damages is hearsay as it does not meet the required standard of proof. This evidence must be adduced by the author of the documents; otherwise it is inadmissible hearsay.*[76]

Merely meeting the requirements for belief in an affidavit does not shield the affidavit from attack. An otherwise satisfactory affidavit can be disregarded as a result of any rule of evidence including the best evidence rule. This rule of evidence simply means essentially that counsel must adduce the best proof of the nature of the thing as it is possible in the circumstances. [77]

Similarly, evidence to prove cost of repairs of any nature should be clearly established along with their extent and their reasonableness. Testimony as to the amount paid for repairs without more is insufficient. A court should be given reliable evidence on which to decide the question of damages. To that end, a party is expected to have an affidavit of someone who is competent to testify as to what repairs were necessary, whether

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[75] See ***W.(M.R.) v. M.(L.M.)*** (1996), 6 C.P.C. (4th) 51 (B.C.S.C.), where it was said that the rule does not sanction any and all deviations from the rules of evidence and common sense.

[76] ***Ireland v. Colford*** (1991), 107 N.B.R. (2d) 229 (Q.B., Russell, J.)

[77] ***Doe D. Gilbert v. Ross*** (1840), 151 E.R. 696.

they were in fact carried out, and whether the charge for the repairs was fair and reasonable.[78]

Use of exhibits to an affidavit cannot be an excuse to introduce documentary evidence, which would otherwise violate the relevant rules regarding admissibility.[79]

Hearsay evidence is not admissible as a general rule of evidence law. That principle is also applied to affidavit evidence although the rule has been relaxed to facilitate chambers applications.[80] *It is settled law that a court should first analyse the evidence on the basis of the traditional hearsay exceptions. If the evidence does not meet the criteria for admissibility as an exception to the hearsay, then a court must assess its admissibility on the basis of the reliability–necessity approach. Necessity relates to such factors as the age of the deponent, the deponent having died or become physically or*

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[78] ***Mason v. Royal Insurance Canada and Mitchell, McConnell, Daniels Insurance Brokers Ltd.*** (1993), 126 N.B.R. (2d) 181 (C.A.)

[79] ***Lisanti v. Lisanti*** (1990), 24 R.F.L. (3d) 174; ***Welch v. Welch*** (1994), 27 C.P.C. (3d) 190 (Ont. Gen. Div.) settlement discussions excluded; ***Quinlan v. Neville*** (1994), 135 N.S.R. (2d) 398 (S.C.) without prejudice correspondence excluded; ***Reimer v. Alvarez*** (1997), 132 (Man.R.) (2d) 161 (Man. Master), where it was held that without prejudice communication referred to in an affidavit were deemed not to be admissible in evidence. Passages of the impugned affidavit were ordered to be expunged on the basis of the well-established common law principle that settlement ought to be encouraged and communications made in furtherance of settlement ought to be privileged.

[80] ***Wall v. Horn Abbott Ltd.*** [1999] N.S.R. (2d), para. 38, where the court noted that although that was the purpose of the relaxation of the hearsay rule, it did not mean to deny the normal procedural protections when the merits of a claim are being decided. See also ***Provincial Contracting Ltd. et al. v. Spence Aggregates Contracting Ltd.*** (N.S.C.A. 155039:1999). As Garry D. Watson points out, the relaxation of the primary affidavit evidence rule had been necessary as its prohibition against hearsay was more restrictive than it needed to be and narrower than the corresponding rule applied to witnesses testifying orally at trial. See note 57, p. 183.

mentally incapacitated, or for some reason is unable to testify. Reliability is also critical for hearsay evidence that could otherwise be admissible under the exceptions to the rule of hearsay, but evidence of its trustworthiness would also have to be adduced.[81]

Moreover, under certain circumstances, affidavits solely predicated on belief, that is hearsay affidavits, will impact negatively on the party who seeks to rely on them. In Ontario, rule 20.02 provides that affidavits for use on summary judgment motion may be made on information and belief but where appropriate, a court on the hearing may draw adverse inferences from a party's failure to deliver affidavits of persons having personal knowledge of contested facts.

In conclusion, the body of the affidavit should cover essentially the following points:

(a) *the source of the deponent's information;*

(b) *a simple, chronological outline of the relevant facts;*

(c) *the basis upon which the motion is made; and*

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[81] ***AYR Motor Express v. Clark*** (2000), 228 N.B.R. (2d) 26 (Q.B., Rideout, J.); ***Dill v. East Coast Lumber Ltd.*** (2000), 228 N.B.R. (2d) 184 (C.A.). See also ***The Queen v. Starr*** [2000] S.C.R. 144, James C. Morton, "**Hearsay: Is the Principled Approach Unprincipled?**", Annual Review of Civil Litigation (2003), page 63

(d) *any technical point essential to the success of the motion.*[82]

(iv) the signature of the deponent

The manner of the signing of the affidavit is not by itself important, as long as the deponent swears to the information set out in the affidavit as being his information.[83] *Consequently, the deponent may sign the affidavit in his usual manner or if impossible, he may place his mark on it in the presence of the person before whom the affidavit is sworn. The way by which the affidavit will be signed by the deponent will have consequences, however, on the content of the jurat.*[84]

Any alteration, interlineation or erasure in the body of the affidavit must be initialled before whom the affidavit is sworn.[85] *This is a strict obligation failing which that portion of the*

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[82] Stockwood, David, **"Civil Litigation"** (4th) Carswell, Scarborough, 1997, page 63.

[83] See Sections 13 and 14, ***Evidence Act***, R.S.N.B. 1973, Chap. E-11, and ***Watrous Credit Union v. Sikorski*** (1969), 70 W.W.R. 521 (Sask. Dist. Ct.) where the deponent swore to an affidavit without using the Bible. The court upheld the oath as the deponent intended and regarded himself as bound. See also ***Crown Lumber Co. v. Hickle*** [1925] 1 D.L.R. 626 (C.A.). Also, in ***Saccon (Litigation Guardian of) v. Sisson*** (1992), 9 C.B.C. (3d) 383 (Ont. Gen. Div.), it was held that an affidavit may be sworn by administering an oath making use of a "Holy Book", which binds the conscience of a deponent or by the Scottish form of oath of asking a deponent to raise his or her right hand while swearing that the contents of the document are true. If desire, an affirmation can be administered.

[84] **Rules 4.05(1)c)**, **4.05(8.1)** (New Brunswick) and **Rules 51(5)** and **(6)** (British Columbia)

[85] **Rule 4.05(10)** (New Brunswick), **Rule 4.06(9)** (Ontario) and **Rule 51(9)** (British Columbia)

affidavit may be ruled inadmissible unless compelling reasons are given to justify admissibility notwithstanding this flaw.[86]

(v) the jurat

The jurat is that portion of the affidavit that must be completed and signed by the person before whom the affidavit is sworn.[87] *It must set out:*

(a) *the date when it was sworn;*

(b) *the place where it was so sworn; and*

(c) *the fact that the affidavit was sworn before the person before whom it has been executed.*[88]

These are not empty requirements. Although failure to include the date is not by itself a fatal defect[89]*, an affidavit would nonetheless be a nullity if the words "before me" do not appear in the jurat unless, of course, a court grants special permission and admits it into evidence.*[90]

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[86] See ***Colt Investments Ltd. v. Sansai Securities Ltd.*** [1974], 1 W.W.R. 279 (B.C.S.C.), although such a drastic result could be avoided by reason of **Rule 2.02** (New Brunswick), **Rule 2.01** (Ontario) or **Rule 2(1)** and **Rule 51(11)** (British Columbia) if this omission has no significant consequence on the admissibility of this particular statement of facts.

[87] **Rules 4.05(11)** and **(12)** (New Brunswick), **Rule 4.06(1)(e)** (Ontario) and **Rule 51(3)(c)** (British Columbia)

[88] **Rule 4.05(13)** (New Brunswick), which codifies the common law.

[89] ***Paulson v. Beaman*** (1902), 32 S.C.R. 655

[90] ***Province of New Brunswick v. Carleton Enterprises Ltd.*** (1974), 8 N.B.R. (2^d) 20 (Q.B., Stevenson, J.) In ***Domtar Inc. v. 404599 Ontario Ltd. et al.*** (1991), 110 N.B.R. (2^d) 441 (Q.B., Miller, J.), the court allowed an

The signatures of the commissioner of oaths and the deponent must be legible. Their names must be plainly legible and should ideally be further elucidated by means of a rubber stamp or otherwise. Otherwise, indecipherable signatures are bound to be frowned upon as being unacceptable practice and the affidavits may be deemed inadmissible by a court.[91]

The commissioning of the affidavit entails for more than the simple signing of the jurat. Such a casual course of action is improper as the commissioner of oaths must also administer an oath or affirmation.[92] *Furthermore, a document has to be sworn before it can be called an affidavit. The failure of the deponent to specify the statements contained in the document were made under oath renders the document inadmissible as evidence.*[93] *However,*

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affidavit of verification of a claim of a lien in an action brought under the ***Mechanics Lien Act***, R.S.N.B. 1973, Chap. M-6, notwithstanding the omission of the words "before me" from the *jurat*.

[91] **Rule 4.01(2)** (New Brunswick)**, *Vinski v. Lack*** (1987), 61 O.R. (2d) 379 (Master) cited in Morton, James C., and Iacovelli, Michael J., "**Procedural Strategies for Litigators**", cited above, note 50, at page 61.

[92] ***Saccon (Litigation Guardian of) v. Sisson*** (1992), 9 C.P.C. (3d) 383 (Ont. Gen. Div.)

[93] ***Grand Lodge, A.F. & A.N. of Canada v. Lumbard Scotch Whisky Ltd.*** (1993), 49 C.P.R. (3d) 394 (T.M.Opp.B.D.) Although the Rules in New Brunswick and Ontario are silent on the issue of when an affidavit is made, British Columbia provides as follows:

> "**Rule 51(3)**
>
> **(3) An affidavit is made when**
>
> **(a) the affidavit is sworn or affirmed by the deponent,**
>
> **(b) the deponent**
> **(i) signs the affidavit, or**

the fact that an affidavit would not contain the words "make oath and say as follows" is a technicality that can be dispensed with.[94]

Commissioning an affidavit triggers a limited liability on account of public policy considerations. The representations that the lawyer makes in commissioning the document are limited to the identity of the deponent, the place and time when the document is sworn, and that the deponent has sworn that the contents of the document are true. If any of those representations should subsequently turn out to be untrue, inaccurate or misleading, then the issue will become one of whether the lawyer was negligent in the manner in which he confirmed those representations. For example, if a lawyer commissioned a deponent's affidavit without making reasonable inquiries to determine the identity of the deponent, then the lawyer might be liable in negligent misrepresentation to a party who relied on the document if it subsequently transpires that the person who swore the document was not, in fact, the named deponent.[95]

(ii) where the deponent is unable to sign the affidavit, places his or her mark on it, and

(c) the *jurat* of the affidavit is signed by the person before whom it is sworn or affirmed."

Rule 51(4) provides that:

"In an affidavit or in a certificate placed on an exhibit, the word "sworn" shall be deemed to include the word "affirmed"."

[94] ***University of Manitoba v. Smith Carter Architects and Engineers Inc.*** (1995), 103 Man.R. (2d) 117 (Master) affirmed (1996), 28 C.C.L.T. (2d) 143 (Man. Q.B.)

[95] ***Gerling Global General Insurance Co. v. Siskind, Cromarty, Ivey & Dowler*** [2002] O.J. No. 2107, page 6

Administering an oath to a deponent requires that certain steps be followed. After insuring the deponent has signed the affidavit and understands the contents, only then can the commissioner administer the oath.[96] *A person should not be*

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[96] Eric Teed, note 7, suggested the following:

> **"After insuring the deponent has signed the affidavit and understands the contents, the commissioner administers the oath in the following form:**
>
> **The deponent holds in his hands a copy of the Old or New Testament.**
>
> **The commissioner indicating the signed affidavit asks, "do you swear that the statements made in this affidavit by you subscribed (signed) are true, so help you God?".**
>
> **The deponent, still holding the Bible, answers, "yes".**
>
> **The commissioner then completes the *jurat* in the affidavit."**

Consideration must also be given to sections 13 and 15 of the ***Evidence Act***, R.S.N.B. 1973, Chap. E-11, with respect to the administration of an oath and to section 14 for the authority for affirming instead of swearing an affidavit:

> **"13 Where an oath may be lawfully taken, it may be administered to a person while such person holds in his hand a copy of the Old or New Testament without requiring him to kiss the same, or, when he objects to being sworn in this manner or declares that the oath so administered is not binding upon his conscience, then in such manner and form and with such ceremonies as he declares to be binding.**
>
> **15 Where an oath has been administered and taken, the fact that the person to whom it was administered and by whom it was taken did not at the time of taking the oath believe in the binding effect of the oath does not, for any purpose, affect the validity of the oath."**

As to affirmation:

> **"14(1) Where a person... required or desiring to make an affidavit... refuses or is unwilling to be sworn on grounds of conscientious motives, the... person qualified to take affidavits... shall permit such person, instead of being sworn, to make solemn affirmation by using the words,**

permitted to swear to an affidavit if he does not understand the contents of the affidavit or the nature of the oath or affirmation. A lawyer commissioning an affidavit should assiduously ensure that the deponent has read and understands its contents. The duty is to satisfy oneself that the witness thoroughly understands that to which the deponent is going to swear.[97] *The commissioner must not be satisfied on that question by anyone but the deponent himself.*

Affidavit evidence can only be entitled to the same weight as oral evidence if those who swear affidavits realise that the obligation of the oath is as serious when making an affidavit as it is when making statements in the witness box.[98] *It follows that the swearing of an affidavit is no trifling matter as it always entails a potential of civil and criminal liability.*[99]

An affidavit may be sworn in various ways including by administering an oath with or without making use of a holy book, which binds the conscience of a deponent, or by the Scottish form of oath of asking a deponent to raise his right hand while swearing that the contents of the documents are true. The

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"I do solemnly affirm"

> **14(2) Such solemn affirmation... is of the same force and effect as if such person had taken an oath in the usual form."**

97 ***Bourke v. Davis*** (1889), 44 Ch. D. 110

98 Emmett, Arthur, **"Practical Litigation in the Federal Court of Australia: Affidavits"** (2000), 20 Aust. Bar Rev 28

99 See Scott, Richard, Q.C., **"Commissioning an Affidavit: Civil and Criminal Responsibility"**, Solicitor's Journal, (New Brunswick) Vol. 19, N^{o} 1 (Fall 2002), page 7

threshold is met when the method used to administer the oath clearly binds the conscience of the deponent. If necessary, an affirmation can be administered.

In an ideal setting, an affidavit is the work product of the co-operation between the person administering the oath and the deponent. In certain occasions, the particularities of the deponent or the fact that there are multiple deponents requires additional consideration for the commissioner of oaths. Where an affidavit is made by two or more deponents, there should be a separate jurat for each deponent, unless all the deponents are sworn before the same person at the same time.[100]

On the other hand, certain deponents may be challenged:

(a) *if the deponent is illiterate or blind, the commissioner of oaths should certify in the jurat that the affidavit was read in his presence to the deponent who appeared to understand it, and that the deponent signed the affidavit or placed his mark on it in his presence;*[101]

(b) *if the deponent is physically unable to sign or place his mark, the deponent must direct another person to sign the affidavit in his name and the commissioner should certify in the jurat that the*

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[100] See **Rule 4.05(7)** (New Brunswick) and **Rule 4.06(4)** (Ontario)

[101] See **Rule 4.05(8)** (New Brunswick), **Rule 4.06(7)** (Ontario), **Rule 302** (Alberta), and **Rule 51(5)** (British Columbia). See also ***Kassop v. Day*** (1904), 36 N.S.R. 430 (C.A.) regarding the formal requirements to be followed whenever commissioning an affidavit for an illiterate person.

affidavit was signed in the name of the deponent by that other person while in the presence of the latter and under his direction;[102]

(c) *if the deponent is linguistically challenged and does not understand the language used in the affidavit, the commissioner should certify in the jurat that the affidavit was interpreted to the deponent by him or in his presence by a named interpreter sworn by him to interpret the affidavit correctly.*[103]

Finally, it is now accepted practice that an affidavit be sworn before the solicitor for the party using or filing it or before a commissioner of oaths or notary public who is a partner, agent or employee of such solicitor, although the affidavit cannot be sworn before the party.[104]

This modern practice is contrary to the common law. At common law, a party could not sign an affidavit before his own solicitor or a partner of his solicitor. The old rule had its origin when much evidence was taken by affidavit and given by deponents who were often illiterate or semi-literate. A court then had to ensure that the person taking the affidavit read it over to the deponent and explained it to him, a duty which the

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[102] See **Rule 4.05(8.1)** (New Brunswick)

[103] See **Rule 4.05(9)** (New Brunswick), **Rule 4.06(9)** (Ontario), **Rule 303** (Alberta), and **Rule 51(6)** (British Columbia)

[104] See **Rule 4.05(12)** (New Brunswick)

solicitor drawing the affidavit might, in perfect good faith, treat lightly as being unnecessary.[105]

(vi) the exhibits

There is finally an optional part to an affidavit: the exhibit. When should an exhibit be used?

The deponent can testify to the content of a relevant document, but if it is relevant, it should be an exhibit. It is not permissible to simply file a document with a court in a motion record; the document must be proven by affidavit.[106]

Exhibits can be documentary or non-documentary.

1. - Documentary exhibits -

Generally, a documentary exhibit should be:

(a) *identified by the person before whom the affidavit is sworn as the exhibit referred to; and*

(b) *attached and filed with the affidavit.*[107]

There is an exception, however, to this general rule where it is impractical to do so or the person to be served has a copy.

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[105] ***Bluenose Lanes Ltd. v. Richardt*** (1975), 13 N.S.R. (2d) 518, page 522; ***Peters, Re*** (1978), 22 Nfld. & P.E.I.R. 54

[106] ***Warren Industrial Feldspar Co. v. Union Carbide Canada Ltd.*** (1986), 54 O.R. (2d) 213 (H.C.)

[107] **Rules 4.05(3), (4), (5)** and **(6)** (New Brunswick) and **Rule 4.06(3)(a), (b), (c)** (Ontario), and **Rule 311** (Alberta)

The most obvious example would be very bulky documents. In those circumstances, the deponent who would rather not attach such a bulky documentary exhibit to his affidavit has to show cause in the affidavit for not doing so and ask permission from the court to proceed in that fashion.[108]

In British Columbia, however, documentary exhibits are dealt with somewhat differently. An exhibit referred to in an affidavit must be identified by the person before whom it is made by signing a certificate placed on the exhibit.[109] *An exhibit exceeding five pages and referred to in an affidavit need not be filed. That affidavit must however be made available for the use of the court and for the prior inspection of a party to the proceeding.*[110] *When a documentary exhibit does not exceed five pages, a true reproduction must be attached to the affidavit and to all copies served or delivered. Finally, each page of the documentary exhibits referred to in an affidavit other than an affidavit of service or of delivery must be numbered sequentially, beginning with the first page of the first exhibit and ending with the last page of the last exhibit:*

> ***(a)*** *on the original exhibits and on all copies that are served or delivered; and*

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[108] See **Rule 39.01(2.1)** (New Brunswick)

[109] See **Rule 51(7)** (British Columbia). See also ***Matous v. The Superintendent of Motor Vehicles*** (2003), B.C.S.C. 1561, ***Hart v. The Superintendent of Motor Vehicles*** (2001), B.C.S.C. 1143, and ***Neill v. The Superintendent of Motor Vehicles*** (2004), B.C.S.C. 775.

[110] See **Rule 51(8)** (British Columbia).

(b) *even though one or more of those exhibits is not attached to the affidavit.*[111]

2. - Non-documentary exhibits -

Although the general rule for exhibits makes sense for documents, it is entirely impractical for non-documentary exhibits as, for example, a surveillance videocassette.

Admissibility of a non-documentary exhibit requires that an affidavit must state that that exhibit has been produced and shown to the deponent. It should not be attached to the affidavit or filed therewith, but should be left with the Clerk of the Court of Queen's Bench or the Registrar of the Court of Appeal as the case may be for use of these courts. Upon disposition of the proceeding or motion in respect to which the affidavit was filed, that non-documentary exhibit will be returned to the party who filed the affidavit or his solicitor unless ordered otherwise.[112]

4. INADMISSIBLE AFFIDAVITS

A. Defective and inappropriate affidavits

A court may refuse to grant a motion or an application if the affidavit in support of that proceeding is not in compliance with the formal requirements of the rules of court. It is therefore a condition precedent, the failure of which would impeach the

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[111] See **Rule 51(8.1)** (British Columbia).

[112] **Rule 4.05(5)** (New Brunswick) and **Rule 4.06(3)(b)** (Ontario)

proceeding.[113] *In most cases this would be a fair result unless, given the particular circumstances at hand, such an outcome would be inequitable since the various formal requirements under the Rules are basic checks and balances provided to guarantee fairness and due process.*

On the other hand, if defective affidavits are inadmissible, so are prolix affidavits. Owing to a lack of proper understanding of evidentiary law, affidavits, especially in the family division of superior courts, are often afflicted by verbosity. This predicament is known to all Canadian jurisdictions.[114]

Any such documents have little, if any, probative value and are generally accorded the weight that they deserve. It is deplorable practice to file long, rambling, narrative style affidavits in family law matters. To further compound the problem, such affidavits frequently include the deponent's personal opinion of a wide variety of matters, hearsay, as well as the deponent's interpretation of his or her rights under law.[115]

An affidavit deemed by a court to be needlessly lengthy with unnecessary inflammatory statements may be struck out as being scandalous, impertinent, and immaterial.[116] *Likewise, an affidavit cannot be properly used to set out suspicions, opinions,*

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[113] ***Lévesque et al. v. Borrel et al.*** (1997), 190 N.B.R. (2d) 334 (Q.B., Russell, J.)

[114] ***Weinberger v. Weinberger*** (1995), 11 R.F.L. (4th) 9 (Sask.Q.B.)

[115] ***Trainor v. Trainor*** (1991), 87 Nfld. & P.E.I.R. 37 (P.E.I. Sup. Ct., Trial Div., McQuaid, J.) See also Garry D. Watson, note 57

[116] ***Black v. Canadian Copper Co.*** (1917), 13 O.W.N. 255 (Ont. Chambers); ***Edwards v. Shuber*** (1988), 30 C.P.C. (2d) 290 (Ont. Master)

innuendoes, and beliefs that are not set out clearly with a factual foundation.[117] *Affidavits of that nature are, generally speaking, of little use to a court and regarded by it in equal degree.*[118] *The court supervises its own process and should not be put in a position where its own records are encumbered by scandalous allegations. This court may strike them out either by virtue of its own inherent authority or by virtue of the power prescribed in rules of court.*[119]

Even when material based on information and belief is potentially admissible, it is still a matter within the discretion of the court.[120] *The evidentiary burden in motions for contempt is a fine example of this principle. Affidavits based on information and belief are not admissible in contempt proceedings, proceedings usually interlocutory in nature.*[121]

The exercise of this judicial discretion depends on:

(a) *whether the source and ground of the information and belief is specified in the affidavit so that a*

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[117] ***Mr. Shredding Waste Management Ltd. v. New Brunswick (Minister of Environment and Local Governments)*** 2004 N.B.C.A. 69; ***Agricultural Development Board (N.B.) v. Great Tantramar Cattle Co.*** (1997), 190 N.B.R. (2d) 335 (Q.B., McIntyre, J.)

[118] ***Trainor v. Trainor***, note 115

[119] ***Adelaide Capital Corp. et al. v. Smith's Field Manor Development Ltd. et al.*** (1994), 129 N.S.R. (2d) 241 (N.S.S.C., Saunders, J.) p. 246

[120] ***Wiley, Lowe & Co. v. Gould*** [1958] O.W.N. 315 (H.C.)

[121] ***Bee Chemical Co. v. Plastic Paint & Finish Specialities Ltd.*** (1980), 15 C.P.C. 288; leave to appeal to Supreme Court of Canada refused 33 N.R. 83 N

court may assess the validity of the evidence sought to be introduced;

(b) *whether any rules of evidence are offended by the admission of the evidence (e.g., the best evidence rule, hearsay, opinion evidence, etc.) and;*

(c) *whether procedural requirements have been met.*

The rules for the use of affidavit evidence apply equally to both trial and family matters. Affidavits in family proceedings should contain only relevant and important evidential matters. Past conduct of parties could not be considered on an interim custody application unless it related to parenting abilities. Those portions that contain argument or opinion, or which are irrelevant and scandalous will be struck out.[122]

The complicating factor in family matters is that affidavits are used more often than in regular trials and the issues that are canvassed often emotional.

Often, family litigation erupts over violation of an intimate trust with the resulting outrage. Motions for interim relief, motions for variation of orders, motions for enforcement of orders, applications all require the completion and execution of an affidavit. As a result, particularly with respect to motions for interim relief, it is not unusual to be served with lengthy affidavits from more than one person. It appears to be the norm to receive affidavits which are 50 to 70 paragraphs in length with

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[122] ***Dlouhy v. Dlouhy*** (1995), 130 Sask.R. 285 (Q.B.) and see **Rule 307** (Alberta)

numerous attachments, including expert reports and assessments, letters from experts, letters from children, letters exchanged between counsel, some of which were written on a without prejudice basis. Bluntly stated, it is unacceptable.[123]

In this context of highly charged personal emotions, counsel has an extra burden in drafting affidavits. Counsel should and must curtail client's natural propensity to be verbose and belligerent by insisting on relevancy only. As in any proceeding where an affidavit is used, it is not appropriate for a witness to state as a fact some conclusion that is to be drawn by the court itself. Opinions and conjecture of the deponent are not proper evidence before a court. It is not proper in an affidavit to speculate about the adverse party's motivation or to state an opinion or argument.[124]

The essential challenge for lawyers is to at least have a sound knowledge of the rules of court and to respect the wording of the rules when drafting affidavits. What a deponent wishes to swear to does not necessarily comply with the rules. The solicitor should take full instruction from the deponent and assess the relevance of that evidence after all relevant information is obtained. As was once said:

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[123] ***Weinberger v. Weinberger***, note 115.

[124] See ***Bildy v. Bildy*** (June 20, 1996), Doc. London F.D. 119 / 96 (Ont. Gen. Div.)

As solicitors, our role is one of fine tuning the drafting to meet the objectives of affidavits: admissible evidence."[125]

Courts have, in recent times, expressed in increasing greater clarity their views on the use and misuse of affidavits. With respect to an affidavit containing mostly irrelevant facts as well as having a medical certificate attached to it as an exhibit, the Court of Appeal in New Brunswick observed that this was contrary to the rules applicable to family court proceedings with respect to the admission of evidence and should be avoided. The court commented that the parties must be properly prepared for the hearing and abide by the Rules. Affidavit evidence must be comprehensive and relevant. Judges should not feel compelled to admit self-serving affidavits or information by counsel.[126]

B. Slanted affidavits

It has already been shown that an affidavit must fully and frankly disclose all relevant facts. Failure to state facts fairly and candidly and in such a way as to mislead the court as to the true facts is a cardinal sin. The court will, for its own protection and to prevent an abuse of its process, refuse to proceed any further with the examination of the merits.[127]

As a corollary to this principle, lawyers have an obligation to the court not to knowingly be involved in the preparation of false or misleading affidavits. This duty extends to include an

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[125] Robichaud, Brigitte N., note 70, page 181

[126] ***Morris v. Morris*** (1997), 187 N.B.R. (2d) 205 (C.A.), page 208

[127] ***Canada Rice Mills Employees Assn. (Vancouver), Re*** (1957), 10 D.L.R. (2d) 778 (B.C.S.C.)

obligation to correct an error in an affidavit once that error has come to the attention of the lawyer even if the latter was unaware of it at the time.[128] *If the client refuses to assent to that course of action, the lawyer should cease to act.*[129]

C. Solicitor's affidavit: courting with disaster

As a general principle, the use of an affidavit sworn to by a solicitor of a party is improper. In fact, a solicitor who makes an affidavit swearing to facts going to the merit of a motion is in the same position as a solicitor who finds himself on the witness stand – he should not be heard as both witness and counsel in the same matter."[130]

Moreover, the affidavit of a lawyer that contains legal opinion as well as his assessment of the adverse party's case is also improper. The court will not take notice of what one counsel or party perceives to be the motives or intention of the opposite party. These are matters that may be considered in argument when "truth" is not an issue.[131]

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[128] ***Myers v. Elman*** [1940] 4 All E.R. 484 (H.C.)

[129] Ibid.

[130] ***New Brunswick Milk Dealers Association v. New Brunswick Milk Marketing Board*** (1984), 56 N.B.R. (2d) 413 (Q.B., Stevenson, J.). See Haines, Cedric, Q.C., **"L'affidavit d'un avocat dans les procédures de litige"**, Solicitor's Journal, (New Brunswick), Vol. 5, No 4 (Fall 1989), page 12. See also: ***Quinn et al. v. Moncton Hospital et al.*** (1991), 111 N.B.R. (2d) 7 (Q.B., Savoie, J.), and ***Savard Inc. v. Stone Container (Canada) Inc. et al.*** (1997), 192 N.B.R. (2d) 347 (C.A.)

[131] ***Roberts v. Légère*** (1996), 173 N.B.R. (2d) 1 (Q.B., Miller, J.), page 12

Poor practice and the misuse of affidavits also lead to the danger that a motion's judge may reject the lawyer's affidavit or refuse to expunge the offensive paragraphs or even if expunged, the loss of such paragraphs may render the affidavit ineffectual.

The client should make the affidavit because it is the deponent who may be cross-examined. Cross-examining the lawyer may well be unproductive. By having the lawyer make the affidavit instead of the client, an obtuse purpose may be served. In structuring the application in this way, the lawyer may be deliberately shielding his client while effectively blocking or frustrating an opponent from examining and testing under oath the relevancy of the very documents demanded. Before a lawyer decides to make an affidavit for use before a tribunal, he would be well advised to refer to the Code of Professional Conduct of the Canadian Bar Association.[132]

However, lawyers occasionally stray across the forbidden divide and swear to an affidavit. In New Brunswick, at least, the Court of Appeal has recently signalled its impatience at what it saw as conduct deserving of rebuke by assessing costs against the offending counsel personally or by denying costs to his client.[133]

The only narrow exception to this general rule is where the solicitor of record files an affidavit relating to procedural matters only or in cases involving strictly uncontested matters.

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[132] ***Dill v. East Coast Lumber Ltd.*** (2000), 228 N.B.R. (2d) 194 (C.A.), at paragraphs 7 and 8

[133] ***Walsh v. Nicholls and CGU Insurance Company of Canada***, note 10, par. 82 and par. 93

D. Untimeliness of an affidavit in response

The issuance of affidavits in response to a motion or an application is subject to the relevant rules of court regarding timeliness.

Affidavit evidence must be given timely. Under all rules of court, the party or person who wishes to give evidence by affidavit at a hearing must serve copy of his affidavit to the moving party and to any other person having had service of the notice within a certain number of days prior to the hearing. Delay in service of an affidavit is equivalent to depriving the responding party of the opportunity to effectively respond to the affidavit relied upon to establish the merit of the defence.[134] *The ever-present concern of natural justice at common law would render that affidavit inadmissible or at least call for an adjournment of the hearing.*

A court would reject an affidavit on grounds of unfairness where no satisfactory explanation is given as to why an affidavit has not been delivered timely prior to the hearing of the motion.[135]

E. Cross-examination on the affidavit

Cross-examination on affidavits is as of right or only upon permission depending on the jurisdiction. In New Brunswick, the examination of a deponent is not as of right and the exercise of

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[134] See as authority for this notion ***First Farm Inc. v. Henderson Surveys Ltd. et al.*** (1993), 135 N.B.R. (2^{d}) 51 (Q.B., Godin, J.)

[135] See ***Chitel v. Rodhbart*** (1984), 42 C.P.C. 217 (Ont. Master), affirmed (1985), 2 C.P.C. (2^{d}) XLIX (Ont. Div. Ct.), leave to appeal to Court of Appeal refused (1985), 15 C.P.C. (2^{d}) XLVIII (Ont. C.A.)

judicial discretion in this respect will depend on a combination of three factors:

> ***(a)*** *the element of surprise, which will stem from the examination of witnesses with respect to whom no notice has been given;*
>
> ***(b)*** *the relevance of the evidence to be heard;*
>
> ***(c)*** *the reasons (i.e., complexity, etc.) preventing the submission of the evidence by affidavit.*[136]

Lacking sufficient reasons to justify to a court that an order allowing cross-examination on an affidavit is warranted, leave will be refused.[137]

In Ontario, however, cross-examination of the deponent is available as a tool to challenge an affidavit.[138] *It is a right, however, that must be exercised with good judgment and with clarity of purpose lest the evidence given while under oath on cross-examination cures the defect of an otherwise faulty affidavit.*[139]

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[136] ***Jeffrey v. Université de Moncton*** (1985), 62 N.B.R. (2d) 115 (Q.B., Godin, J.). See also George A. MacAllister, **"Rule 39: Oral Evidence on Applications and Motions"**, Solicitor's Journal, (New Brunswick), Vol. 3, No 2 (Winter 1987), page 18.

[137] ***Woodstock (Town) v. Christie*** (1999), 208 N.B.R. (2d) 163 (Q.B., Clendenning, J.)

[138] See **Rule 39.02** (Ontario)

[139] ***Saccon (Litigation Guardian of) v. Sisson***, note 92. The affidavit had been improperly commissioned.

F. The permissiblity of affidavit in reply

In New Brunswick and Ontario, the rules of court do not allow affidavits in reply when the responding party has filed an affidavit in response. This clearly highlights the critical need of proper draftmanship in preparing an affidavit in support of a motion or an application. It has already been said that:

> ***"Judges should not accept that affidavits in Reply be submitted at the hearing. This is contrary to the Rules of Court and inconsistent with the purpose of proceedings by way of Notice of Application. The element of surprise must be avoided. (...) There are no provisions in the Rules regarding responses to the Reply. (...)***
>
> ***In the case of motions for Interim Orders, the same Rules apply. There is no reason to adopt a different set of Rules with regard to affidavits. If counsel is unprepared, his Motion should simply be denied."***[140]

These comments were made in relation to the use or misuse of affidavits in the Family Division of the Superior Court. They

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[140] Bastarache, Michel, note 9. It is however noteworthy that in British Columbia, in originating applications under **Rule 10** and in interlocutory applications under **Rule 44**, the following affidavits are allowed:

(a) affidavit in support of the application;

(b) affidavit in response from the adverse parties; and

(c) affidavit in reply from the applicant.

Unless all parties of record consent or the court otherwise orders, a party in these proceedings cannot deliver any affidavit additional to those listed above. See **Rule 10(8)** and **Rule 44(9)** (British Columbia)

apply with equal vigor to the practice before the Trial Division and in the Court of Appeal generally. In fact, from the perspective of the Bench, unauthorized use of affidavits is simply inappropriate.[141]

5. CONCLUSION

Affidavits as evidentiary tools are necessary components of an expeditious and equitable civil justice. It is, however, a generally misunderstood tool. Understanding and knowledge are nonetheless critical as use of affidavits in summary proceedings is a compelling requirement.[142]

The general principle is that summary proceedings must stand or fall on the material referred to in it unless a court allows further material to be filed under special circumstances.[143] *The applicant must establish all material facts by affidavit evidence and may not rely on the statements of his counsel to complete his evidence.*[144]

Effectiveness of an affidavit is a function of admissibility of evidence. Admission of evidence or denial thereof is therefore the test of effective affidavits. Of course, a court always has

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[141] ***Mutual Trust Co. of Canada v. OCCO Developments Ltd. et al.*** (1997), 190 N.B.R. (2d) 386 (C.A.)

[142] This is notwithstanding that **Rule 39.01(1)** (New Brunswick) and **Rule 39.01(1)** (Ontario) provide that on a motion or application, evidence may be given by affidavit unless directed otherwise by the **Rules** or by order. Although this rule seems to imply that affidavits are not mandatory, courts have steadfastly demanded that affidavits be submitted. Long standing judicial practice has made this permissive requirement an absolute obligation.

[143] ***R. v. Nesdoly*** [1938] 3 D.L.R. 185 (Sask. C.A.)

[144] ***United Maritime Fishermen Co-op and Bluenose Fisheries Ltd., Re*** (1989), 88 N.B.R. (2d) 253 (C.A.)

discretion to exclude defective portions of an affidavit while accepting the remaining portions complying with the Rules where the entire document is not contaminated.[145] *Severability issues, however, are by themselves an admission of failure of the drafter.*

Effectiveness of affidavit evidence is also a function of its limits in the context of the traditional role of courts of superior jurisdiction at common law. The various summary procedures provided for by the rules of court have not altered the fabric of the adversary system. The plenary trial remains the mode for the resolution of dispute. Motion judges ought never assess credibility, weighed evidence or find the facts in summary proceedings, as they are all in the province of the trial judge.[146]

Interlocutory motions afflicted by a credibility issue will be dismissed whereas applications with the same shortcomings will suffer a lesser fate as they will be converted to regular actions.[147] *Affidavit evidence is also subject to probative and weight value.*[148]

The most deceptive aspect of the affidavit is that it lies at the crossroads of evidence law, civil procedure and advocacy. The advocate in court and the lawyer preparing the advocacy material

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[145] ***Gordon v. Nova Scotia Teachers' Union*** (1983), 56 N.S.R. (2d) 324 affirmed (1983), 59 N.S.R. (2d) 124 (C.A.)

[146] ***Barter v. Barter*** (1996), 42 Alta.L.R. (3d) 221 (C.A.). See also Ontario Civil Practice – Carswell Canada, 2004 at page 479. See also Garry D. Watson, note 57 p. 182

[147] See **Rule 39.08** (New Brunswick) and **Rule 38.10(1)(b)** Ontario

[148] ***Alex Wilson Coldstream Ltd. v. Lapaco Paper Products Ltd.*** (1994), 55 C.P.R. (3d) 45

including the affidavit are both engaged in the art of persuasion. Part of that art is communicating the witness' evidence to the court in a clear and intelligible manner so as to attain the efficiency of adducing the evidence quickly and decisively.[149] *That is the ultimate advocate's challenge.*

[149] Bryson, John, **"Affidavits"**, note 8