

LEGISLATION REGARDING COMMISSIONERS FOR SWEARING OATHS

I. INTRODUCTION

To the Executive Committee of the British Columbia Branch of the Canadian Bar Association, I wish to present the following:

REPORT ON LEGISLATION FOR APPOINTING
COMMISSIONERS FOR TAKING AFFIDAVITS

The Evidence Act, R.S.B.C. 1979, C. 116 and amendments thereto contains provisions which set out who can be Commissioners for taking Affidavits for British Columbia.

A commissioner for taking affidavits for British Columbia may administer oaths and take affidavits, declarations and affirmations concerning any cause, proceeding, matter or thing before any court in the Province and any matter in connection with an oath, affidavit, affirmation, solemn declaration or statutory declaration is permitted, authorized or required by law.

It has been argued that by restricting the persons who can perform the formalities, which we refer to as "sworn statements", may result in and cause unnecessary cost, delay and inconvenience to the public, including lawyers.

It is acknowledged that the purpose of "sworn statements" is to ensure the veracity and reliability of the information given.

This report is devoted to an examination of the inadequacies of the existing law and proposals for change in this Province which will reduce the delay, costs and inconvenience to the public as it relates to who can be a commissioner for taking affidavits for British Columbia.

The March 1989 Volume 1, Number 2 issue of Bar Talk requested any member interested in making comment to "write to me". The issue generated very little comment. There were no responses from the public at all. I received three responses from sole practitioners in Penticton, Kelowna and Princeton, one response from a former sole practitioner, one response from a retired judge and a response from the office of the Judge Advocate General. However, the submissions received were favourable to my basic proposals.

II. THE PRESENT LAW

The Statutes of British Columbia variously require that a person furnishing a statement or information pursuant to statutory provisions, verify the statement or information on oath, affirmation, by affidavit, or by solemn or statutory declaration. They are all designed to ensure accuracy and honesty. Indeed, even the technical distinctions are blurred. Section 29 of the Interpretation Act RSBC 1979, C. 206 and amendments thereto provides that an:

". . . "affidavit" or "oath" includes an affirmation, a statutory declaration, or a solemn declaration made under the Evidence Act or under the Canada Evidence Act; . . ."

The Evidence Act, RSBC 1979, C. 116, Section 29(2) provides that the effect of a statement solemnly declared or affirmed should be that of a statement sworn on oath or by affidavit.

The following includes material from notes on "Solemn Declarations and Affidavits" appearing in the Benchers' Bulletin, No. 2 of February, 1985.

There are important differences between affidavits and solemn declarations, and the procedure for "taking" each differs.

An affidavit is a document in which the affiant takes an oath that the contents of the affidavit are true.

In a solemn declaration the declarant does not take an oath, but only "solemnly declares" the truth of the contents.

Solemn declarations are authorized by the B.C. Evidence Act RSBC 1979, c. 116, Section 77:

"A . . . commissioner authorized to take affidavits . . . may receive the solemn declaration of any person voluntarily making it before him in attestation of the execution of any writing, deed or instrument, or of the truth of any fact, or of any account rendered in writing, in the following words:

I, A.B., solemnly declare that [state the facts declared to], and I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same legal force and effect as if made under oath."

See also the Canada Evidence Act, RSC 1970, c. E-10, s. 38.

A person who makes, in either an affidavit or a solemn declaration, a statement with respect to a matter of fact, opinion, belief or knowledge, knowing that the statement is false, commits an indictable offence and is liable to imprisonment for 14 years (Criminal Code s. 131).

The leading cases on the procedures to be following in the taking of affidavits and solemn declarations are:

Re Collins (No. 2) (1905) 10 CCC 73 (B.C. Co. Ct.)
King v. Phillips (1908) 14 CCC 239 (B.C. Co. Ct.)
R. v. Nier (1915) 25 CCC 241 (Alta. C.A.)
R. v. Schultz [1922] 2 WWR 582 (Sask. C.A.)
R. v. Rutherford (1923) 41 CCC 240 (Sask. C.A.)
R. v. Whynot (1954) 110 CCC 35 (N.S.C.A.)
R. v. Nichols [1975] 5 WWR 600 (Alta. S.C.)
R. v. Chow (1978) 41 CCC (2d) 143 (Sask. C.A.)

From these authorities the following conclusions should be drawn as to the correct procedure to be followed in the taking of affidavits and solemn declarations:

1. In the case of affidavits and solemn declarations, the commissioner must be satisfied that the affiant or declarant understands the contents of the documents. This may be done in any of three ways:
 - (a) by the commissioner reading the entire document aloud to the affiant or declarant;
 - (b) by the affiant or declarant reading the entire document aloud to the commissioner; or
 - (c) by the affiant or declarant stating to the commissioner that he or she understands the contents of the document.
2. In the case of an affidavit, the affiant must swear that the contents are true. In normal circumstances this may be accomplished by the commissioner stating to the affiant:

"Do you swear the contents of this affidavit are true, so help you God?"

and the affiant responding in the affirmative.
3. In the case of the solemn declaration, the declarant must make his or her declaration in the language of the statute. In most circumstances, this may be accomplished by the commissioner stating to the declarant:

"Do you make this solemn declaration conscientiously believing it to be true and knowing that it is of the same legal force and effect as if made under oath?"

and the declarant responding in the affirmative.

Originally, justification for the requirement of an oath was founded on a belief that it was a summoning of divine vengeance upon false swearing, whereby if the swearer stood unharmed, spectators knew that the Divine judgment had pronounced him to be

a truth-teller.

As society became increasingly secular, this theory of the oath became more subjective; a method of reminding the swearer of the divine punishment in store for false-swearing, and thus putting him in a state of mind calculated to speak only the truth. As Jeffries C.J. exhorted:

"For that God in Heaven may justly strike thee into eternal flames and make thee drop into the bottomless lake of fire and brimstone, if thou offer to deviate the least from the truth, and nothing but the truth."

Some of the more common oaths and affirmations in use in British Columbia today by those who are commissioners for taking affidavits in British Columbia are:

1. Standard Civil Oath

This is the most commonly used oath. It is sworn by the witness as he holds the Bible in his bare right hand.

"Do you swear that the evidence you shall give to the court touching the matter in question shall be the truth, the whole truth, and nothing but the truth, so help you God?"

2. Standard Affirmation (in lieu of Oath) (made by witness with bare right hand raised)

Section 21 of the Evidence Act reads:

- "21. (1) If in a court or in any proceeding,
- (a) a person called to give evidence objects to taking an oath, or is objected to as incompetent to take an oath, and the presiding judge is satisfied of the sincerity of the objection of the witness from conscientious motives to be sworn or that the taking of an oath would have no binding effect on his conscience; or
 - (b) the presiding judge is satisfied that the form of oath which a person called to give evidence declares to have a binding effect on his conscience is not such that it can be taken in the court or other place where the proceedings are being held, or that it is not fitting so to do, and the presiding judge directs,
- the person shall, instead of taking an oath, make the following affirmation:
- I solemnly promise, affirm and declare that the evidence given by me to the court (or as the case may be) shall be the truth, the whole truth and nothing but the truth.
- (2) In those cases, on the person making the affirmation, his evidence shall be taken in the

court or proceeding, and the affirmation is of the same force and effect as if the person has taken an oath in the usual form."

3. Interpreter's Oath (with Bible in bare right hand)

"Do you swear that you shall well and truly interpret the evidence between the court and the parties in question from the English language to the _____ language and from the _____ language to the English language according to the best of your skill and understanding, so help you God?"

4. Interpreter's Affirmation

"Please raise your right hand and repeat after me: I solemnly promise, affirm and declare that I shall well and truly interpret the evidence between the court and the parties in question from the English language to the _____ language and from the _____ language to the English language according to the best of my skill and understanding."

5. Stenographer's Oath (with Bible in bare right hand)

"Please raise your right hand and repeat after me: I solemnly promise, affirm and declare that I shall well and truly take down the evidence herein and, if required, transcribe it according to the best of my ability."

Note: Section 23 of the Evidence Act permits an oath to be sworn with uplifted hand:

"23. If any person to whom an oath is administered desires to swear with uplifted hand, in the form and manner in which an oath is usually administered in Scotland, he shall be permitted to do so, and the oath shall be administered to him in that form and manner without further question."

4. Uncommon Oaths

Note section 22 of the Evidence Act:

"22. Where a person has taken an oath, the fact that the person had, at the time, no religious belief, or that the form of oath customary for persons of his religious belief differs from the oath taken, does not affect the validity of the oath."

(a) Chinese Non-Christian Oaths

(i) Paper Oath

The witness writes his name on a piece of paper and takes the following oath while burning the paper:

"The evidence which you shall give to the court shall be the truth, the whole truth, and nothing but the truth, or your soul shall be consumed by fire as is this paper."

(ii) Saucer Oath

The witness, on taking the stand, kneels down, and the Clerk places in his hand a China saucer whereupon the witness breaks it against the box. The Clerk then administers the following oath:

"You shall tell the truth and the whole truth; the saucer is cracked and and if you do not tell the truth, your soul will be cracked like the saucer."

(iii) Candle Oath

A lighted candle is placed on the ledge of the witness box. This witness places his right hand over his heart and repeats after the Clerk:

"I will tell the truth, the whole truth and nothing but the truth, and if I do not may my soul be extinguished as I quench this flame."

The witness then extinguishes the candle.

(b) Japanese Oath

"Please raise your right hand and repeat after me: the statement I shall make before the court shall be in the whole nothing but the truth according to the custom, religion, and belief of this country and my own."

(c) Hindu Oath (on the Bhagavadgita)

"Please repeat after me: I solemnly affirm that the evidence which I shall give in this case will be true; I will conceal nothing and no part of my evidence shall be false."

(d) Islamic and Moslem Oath (on the Koran)

"Please repeat after me: I solemnly affirm that the evidence which I shall give in this case will be true; I will conceal nothing and no part of my evidence shall be false."

(e) Orthodox Jewish Oath (on the Pentateuch)

Standard Christian oath to be taken with head covered and one of the first five books of the Bible to be kissed.

(f) Sikh Oath (on the Guru Bani)

"Do you swear that the evidence you shall give to this court, touching the matter in question, shall be the truth, the whole truth, and nothing but the truth according to your faith in your God and in your Bible, so help you God?"

(g) Doukhobor Oath

A loaf of bread, some salt and a jug of water is placed before the witness.

"Do you swear before these symbols of your faith: bread, salt and water, that the evidence you shall give to this court, touching the matters in question, shall be the truth, the whole truth, and nothing but the truth?"

(h) Scottish Oath (Covenantor)

"Please raise your right hand and repeat after me: I swear by the Almighty God as I shall answer to God at the Great Day of Judgment that I will speak the truth, the whole truth, and nothing but the truth, so help me God."

(i) Scottish Oath (Alternate Form)

"Please raise your right hand: Do you swear according to the custom of your Country and the Religion you profess that the evidence you shall give shall be the truth, the whole truth an nothing but the truth?"

(j) Buddhist Oath

"Please raise your right hand and repeat after me: I declare, as in the presence of Buddha, that I am unprejudiced, and if what I shall speak shall prove false, or if by colouring truth others shall be led astray, then may the three Holy Existences, Buddha, Dhamma and Pro Sangha, in whose sight I now stand, together with the Devotees of the twenty-two Firmaments, punish me and also my migrating soul."

The relevant sections of the British Columbia Evidence Act, RSBC, 1979, c. 116 dealing with who can be appointed as Commissioners for Taking Affidavits for British Columbia are as follows:

"Appointment

63.(1) The Attorney General may appoint, by order, commissioners for taking affidavits for British Columbia.

(2) An appointment under subsection (1) may be made for a period and subject to restrictions, exceptions, terms and conditions that the Attorney General sets forth in the order.

Fee

64. No person shall be appointed under section 63 unless he has paid to the Crown in right of the Province a fee prescribed by the Lieutenant Governor in Council.

Exceptions

65. Section 64 does not apply to the appointment of officers or employees or servants of the Crown in right of the Province or in right of Canada, or to officers or employees of veterans' organizations.

Powers of Commissioner

66. Subject to restrictions, exceptions, terms or conditions set forth in an order under section 63, and to section 68, a commissioner for taking affidavits for British Columbia may, in or out of the Province, administer oaths and take affidavits, declarations and affirmations concerning

- (a) any cause, proceeding, matter or thing before the Supreme Court or any other court in the Province;
- (b) any matter in connection with which an oath, affidavit, affirmation, solemn declaration or statutory declaration is permitted, authorized or required by law to be sworn, affirmed, declared or made.

Commissioners by Virtue of their Office or Employment

67. The following are, by virtue of their office or employment, commissioners for taking affidavits for British Columbia:

- (a) every judge of a court in the Province;
- (b) justices in the Province;
- (c) registrars, deputy registrars, district registrars and deputy district registrars of the Supreme Court or County Courts;
- (d) barristers and solicitors enrolled under the Barristers and Solicitors Act and not disbarred, disqualified or suspended from practice;
- (e) notaries public;
- (f) the clerk of each municipality in the Province;
- (g) the secretary of a regional district;
- (h) coroners;
- (i) government agents and deputy government agents;
- (j) provincial constables and municipal constables as defined in the Police Act holding rank of sergeant or higher;
- (k) other classes of office holder or employment the Attorney General prescribes.

68. (1) Every officer or employee of

- (a) the Crown in right of the Province;
 - (b) a municipality; or
 - (c) a community resources board under the Community Resources Board Act to whom the director of the Guaranteed Available Income for Need Act or the Superintendent of Family and Child Service has assigned powers or duties under the Guaranteed Available Income for Need Act, the Family and Child Service Act, the Child Paternity and Support Act or the Community Resources Board Act, is, by virtue of his office, a commissioner for taking affidavits for British Columbia in connection only with the performance of the powers and duties assigned to him.
- (2) Where the director of the Guaranteed Available Income for Need Act or the Superintendent of Family and Child Service revokes the power and duty of a person referred to in subsection (1), that person ceases to be a commissioner for taking affidavits for British Columbia.

Revocation

69. (1) The Attorney General may, by order, revoke the appointment of
- (a) a commissioner for taking affidavits for British Columbia;
 - (b) a commissioner for taking affidavits for British Columbia appointed prior to April 1, 1960;
 - (c) a special commissioner for taking affidavits within British Columbia appointed prior to April 1, 1960;
 - (d) a commissioner for taking affidavits in and for the courts of British Columbia appointed prior to April 1 1960,
- whether the appointment was made under this or any other statute of the Province.
- (2) The Attorney General may, by order, discontinue, for the period as may be designated in the order the application 67 and 68 to any person or group of persons.

Affidavits Sworn out of the Province for use in the Province

70. Oaths, affidavits, affirmations or statutory declarations administered, sworn, affirmed or made in any other province or territory of Canada or any country other than Canada before:
- (a) a judge, a magistrate or an officer of a court of justice or a commissioner authorized to administer oaths in the courts of justice of the province, territory or country;
 - (b) the mayor or chief magistrate of any city, borough

- or town corporate, certified under the seal of the city, borough or town corporate;
- (c) an officer of any of Her Majesty's diplomatic or consular services exercising his functions in any country other than Canada, including an ambassador, envoy, minister, charge d'affaires, counsellor, secretary, attache, consul general, consul, vice consul, proconsul, consular agent, acting consular general, acting consul, acting vice consul and acting consular agent;
 - (d) an officer of the Canadian diplomatic and consular service exercising his functions in any country other than Canada, including, in addition to the diplomatic consular officers mentioned in paragraph (c), a high commissioner, permanent delegate, acting high commissioner, acting permanent delegate, counsellor and secretary;
 - (e) a Canadian government trade commissioner and assistant Canadian government trade commissioner while exercising his functions in any country other than Canada;
 - (f) a notary public acting within the territorial limits of his authority, and certified under his hand and official seal; or
 - (g) a commissioner authorized by the laws of the Province of British Columbia to take affidavits are as valid and effectual, and are of the same force and effect, to all intents and purposes as if the oath, affidavit, affirmation or statutory declaration had been administered, sworn, affirmed or made in the Province before a commissioner for taking affidavits or other competent authority of the same nature.

Commissioned Officers Empowered by Administer Oaths.

71. All commissioned officers of Her Majesty's naval, military and air forces of Canada on active service in or out of Canada and the Agent General for British Columbia are empowered to administer oaths and take and receive affidavits, declarations and affirmations in or out of the Province for use in the Province."

III. WHO ARE COMMISSIONERS FOR TAKING AFFIDAVITS FOR BRITISH COLUMBIA?

Most of these are set out in section 67 of the Evidence Act:

"67. The following are, by virtue of their office, commissioners for taking affidavits for British Columbia:

- (a) every judge of a court in the Province;
- (b) justices in the Province;
- (c) registrars, deputy registrars, district registrars and deputy district registrars of the Supreme Court or County Courts;
- (d) barristers and solicitors enrolled under the Barristers and Solicitors Act and not disbarred, disqualified or suspended from practice;
- (e) notaries public;
- (f) the clerk of each municipality in the Province;
- (g) the secretary of a regional district;
- (h) coroners;
- (i) government agents and deputy government agents."

Note, however, that the following are also commissioners by virtue of their office:

- (1) Social workers who meet the requirements of section 68, Evidence Act (note that powers are limited).
- (2) A master because, under section 15(3) of the Supreme Court Act, "Wherever a power is given to a registrar or district registrar under an enactment that power shall be deemed to be given also to a master". A similar provision is found under section 13(3) of the County Court Act.
- (3) A registrar of Small Claim Court because under section 13(2) of the Small Claim Act, a registrar of a Small Claim Court is deemed to be a registrar of a County Court.

Other individuals can be appointed by order of the Attorney General pursuant to section 63 of the Evidence Act.

Individuals applying for appointments must complete an application form provided by Court Services. If the individual falls within the guidelines confirmed by the Attorney General, an Order may be granted by the Attorney General appointing the individual as a Commissioner for Taking Affidavits subject to any restrictions as to length of appointment and authority under the Evidence Act as may be directed.

All appointments are limited in time to three year terms. Thereafter, applicants are required to reapply for an appointment.

Restrictions as to authority are outlined in the Order.

A fee of \$30.00 is required and must accompany the application unless the applicant is a Provincial Government Employee or a Federal Government employee or an officer or employee of a Veterans Organization.

According to the "Guidelines for Appointment of Commissioner's for Taking Affidavits", the Attorney General will order that a

person be appointed a Commissioner only where this is a demonstrated public need for the appointment. Appointments will not be made that would solely benefit a single person or single business establishment or that apparently are of a self-serving nature. Persons employed in the office of a lawyer in private practice or notary public are not to be appointed.

As a general rule only the following will be appointed in areas where lawyers, notaries public or government agents are readily available:

Officer or employee of:

- (a) Government of Canada;
- (b) Government of British Columbia;
- (c) Municipality;
- (d) Veterans organization (Royal Canadian Legion);
- (e) Duly elected council of a recognized Indian Band;
- (f) Financial institution (bank, trust company or credit union);
- (g) Trustee in Bankruptcy;
- (h) Grain elevator company.

It has been suggested that the appearance before a person authorized by law to administer an oath, affirmation or declaration may of itself, by impressing on the declaring the gravity and impact of the occasion, deter those who would commit fraud. It is my opinion that in contemporary circumstances people are just as likely to be deterred from making false statements by the threat of criminal liability as by the psychological impact of an appearance before a person authorized by law to administer oaths, or by the moral and religious sanctions thereby invoked.

I obviously cannot say for certain that the psychological, moral or religious aspects of the formalities count for nothing, but I am convinced that the threat of criminal liability by itself provides a sufficient deterrent to the making of false statements.

The words "make oath and say" in the introductory paragraph of an affidavit mean that the person making the affidavit is swearing an oath, in the same manner as a witness testifying orally in court. At one time, a notary public or commissioner would administer the oath in the same manner as a court clerk, with the deponent holding a Bible and assenting to the words of the oath. Today, these formalities are not usually observed, and courts have stated that formal irregularities do not affect the validity of an affidavit: Crown Lumber Co. vs. Hickie et al [1925] 1 WWR 279, 21 ALTA LR 128, [1925] 1 DLR 626 (CA). See also section 74 of the B.C. Evidence Act and Rule 51(10).

One of the more recent judicial pronouncements on what constitutes swearing or affirming an affidavit comes from

Proudfoot, J., in Philip Owen vs. Bruce Yorke, Unreported, December 6, 1984, No. A843177, Vancouver (SC):

"What constitutes the swearing or affirming of an affidavit? Is it sufficient merely to have the document signed, as occurred in this case before me? . . .

In perusing the authorities it would seem something more than mere signing is required. See the case of Crown Lumber Co. Ltd. vs. Hickle & O'Connell [1925] 1 WWR 279, specifically at page 283. That something more is required is also illustrated by the case of Regina vs. Nicols and Regina vs. Chow. Indeed these are criminal cases and one could argue there are different standards of proof and thus different requirements. That argument, however, really doesn't need to be considered. An affidavit that is not sworn in the appropriate fashion cannot attract any legal sanctions and that is wherein the mischief is created. It would be no deterrence or protection if no legal sanction followed. If no more than a mere signing is necessary, where is the deterrence? . . .

I do not for one minute state that what is required are some specific words engraved in granite; indeed not. What is required, though, is that the person swearing or affirming is asked and replies to some simple fundamental inquiry as to the veracity of the content. Some such inquiry is necessary. I repeat, nothing elaborate; no Bible is necessary, no elaborate ceremony, but, rather, a simple inquiry which places some special meaning to the document that is completed. What we have in the case at bar is at best the witnessing of a signature . . . That is not enough. The Respondent's argument that the document itself is the legal act cannot be successful. The affixing of the signature does not end the process, something further is required . . .

The integrity of the procedure of swearing or affirming an affidavit is so fundamental that such procedures are not to be compromised."

IV. IMPLICATIONS OF THE PRESENT SYSTEM

1. Delay and Inconvenience

There would appear to be a demonstrated public need for the appointment of a legal secretary or articled student in a sole practitioner's office as a commissioner for taking affidavits for British Columbia. It would assist the public at no cost and reduce the delay and inconvenience where a sole practitioner must attend before another commissioner within the same community, which can increase the cost and create delay, especially if it is particularly late in the day, evenings or on holidays.

2. Recommendations for Reform

I recommend that the Attorney General change the guidelines for appointment of commissioners for taking affidavits from not appointing persons employed in the office of a lawyer in private practice to appointing a legal secretary or articulated student in the office of a sole legal practitioner on the following terms and conditions:

- (a) the legal secretary or articulated student must satisfy the sole legal practitioner that he or she understands and is familiar with the rules surrounding taking sworn statements;
- (b) the sole legal practitioner would then recommend and complete an application form for the legal secretary or articulated student and pay the required \$30.00 fee;
- (c) the Attorney General would then by order appoint the individual as a commissioner for taking affidavits subject to the following restrictions which would be outlined in the order:
 - (i) the use of the commissioner would be restricted to the internal use of the sole practitioner's law firm and not for commercial gain;
 - (ii) the commission would be restricted to a one year term and would automatically terminate on the legal secretary or articulated student ceasing to be employed by the sole practitioner or if the sole practitioner ceased to be a sole practitioner.

FOOTNOTES

1. Bencher's Bulletin, No. 2, February, 1985
2. Lady Lisle's Trial (1685) 11 How. St. Tr. 325
3. Evidence Act RSBC 1979, c. 116
4. B.C. Court Forms, McLachlin & Taylor 1985 Butterworths

