

i
CIVIL LITIGATION

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Chapter 3

Chambers Practice¹

Effective July 1, 2010, chambers practice in the Supreme Court of British Columbia will be governed by new Supreme Court Civil Rules, B.C. Reg. 168/2009 (the “SCCR”). This chapter will use the terminology and procedure mandated by the SCCR as of July 1, 2010 and will refer to the Rules of Court, B.C. Reg. 221/90 as “the former Rules”.

[§3.01] Introduction

1. Matters Heard in Chambers

Matters heard in chambers comprise a large part of a litigation practice. All interlocutory applications (unless made in the course of trial), all originating applications, and all applications for summary judgment are heard in chambers (SCCR 22-1).

The procedures for chambers applications in civil proceedings are set out in SCCR 8-1, 8-2, 16-1 and 22-1.

2. Jurisdiction—Judge or Master?

The starting point for all chambers applications is to determine the legal basis for the order sought. The majority of chambers applications are based on the Supreme Court Civil Rules, and it is always worth considering and reviewing the rule governing the application you intend to make.

The order must be one the court has jurisdiction to make. Many chambers applications are heard and decided by masters. Masters are court officials appointed under the *Supreme Court Act*. Masters have more limited jurisdiction than judges. Generally, a master will hear:

- (a) all interlocutory applications authorized by the Supreme Court Civil Rules, whether contested or not;
- (b) applications that will result in final orders where no determination of fact or law is required;
- (c) uncontested foreclosure petitions.

1. **H. William Veenstra** of Jenkins Marzban Logan LLP, Vancouver substantially revised this chapter in January 2010. William Veenstra has been revising and updating this chapter annually since March 2002. Reviewed and revised in February 1995 by Mark M. Skorah, Harper Grey Easton; reviewed and revised in January 1996 by Leonard M. Cohen, Vancouver. Substantially revised in March 1998, March 1999 and in February 2000 by Craig P. Dennis, Sugden, McFee & Roos, Vancouver.

The jurisdiction of a master is founded in section 11(7) of the *Supreme Court Act* and in SCCR 23-6. The Practice Directions of May 22, 1990 summarize the limitations on a master’s jurisdiction. [*Note: this Practice Direction is likely to be reissued under the new SCCR and lawyers should look to the Court website for confirmation on this issue.*] Examples of orders a master does not have jurisdiction to make are final orders under SCCR 9-7, orders granting injunctive relief, and orders based on the inherent jurisdiction of the court.

The party setting down the hearing must indicate on the notice of application whether the application is within the jurisdiction of the master and if not, the reason why.

The most appropriate form of address to a master is “Your Honour”. A judge is addressed as “My Lord” or “My Lady”.

The forum for an appeal from an order made in chambers differs depending on whether a judge or a master made the order. An appeal from a judge’s order lies to the Court of Appeal, as of right if the order is final, or with leave if the order is interlocutory (*Court of Appeal Act*, R.S.B.C. 1996, c. 77, ss. 6–7).

To appeal a master’s order, there are two potential forums. An appeal lies as of right to a judge of the Supreme Court in chambers (SCCR 23-6(8)). An appeal also lies to the Court of Appeal, with leave, in the case of interlocutory orders (*White v. International Sources Ltd.* (1997), 46 B.C.L.R. (3d) 379 (C.A.)).

Abermin Corp. v. Granges Explor. Ltd. (1990), 45 B.C.L.R. (2d) 188 (S.C.) sets out the standard of review most often applied on appeals from a master’s order to a Supreme Court judge. For purely interlocutory matters an appeal will not succeed unless the master’s order was clearly wrong. A less deferential standard of review applies to final orders or orders “vital to the final issue in the case”. In those cases a rehearing is the appropriate form of appeal. See more recently *Adroit Resources Inc. v. Tresor Resources Ltd.*, 2008 BCSC 623.

3. When to Apply

Applications in chambers are normally made after a proceeding has been commenced. However, there are rare occasions—pre-judgment garnishing orders are an example—when applications can be made in an “intended action” before the action is even commenced.

Supreme Court Civil Rule 8-1(5) provides that an application must be set for 9:45 am on a date on which the court hears applications. In Vancouver, there are sittings of both master’s chambers and judge’s chambers on almost every court day. Both

New Westminster and Victoria also have masters and/or judges hearing chambers matters most – but not all – days. Counsel should consult with the particular registry to find out on what days there will be chambers sittings—in some registries there may only be chambers sittings once a week or sometimes even less often. In those circumstances, keep in mind that an application may be set for hearing at another registry within the same “judicial district” in which the proceeding was commenced (SCCR 8-2(1)). Thus, for example, an application in an action filed in the Vernon registry may be set for hearing at chambers in Kelowna.

Note that there are two or three days each year when as a result of judicial conferences there are no regular chambers sittings.

When the action is proceeding under SCCR 15-1 (fast track litigation), SCCR 15-1(7) prohibits the making of most interlocutory applications until after a case planning conference or trial management conference has been held. Supreme Court Civil Rule 15-1(8) lists the exceptions to SCCR 15-1(7), and SCCR 15-1(9) allows a judge or master to relieve a party from the requirements of SCCR 15-1(7).

[§3.02] Procedures on Applications in Chambers

1. Applications without an Oral Hearing

A party can obtain some orders without an oral hearing: these are often referred to as “desk order”. When all parties affected by an order in an action consent, SCCR 8-3 sets out the procedure. When the nature of the application in an action is such that notice need not be given, SCCR 8-4 governs. Similar rules apply to proceedings that, pursuant to SCCR 2-1(2), are commenced by petition or requisition, and are either consented to by all parties or do not require notice (SCCR 17-1).

An application for a desk order is made by filing a requisition, a draft order, and supporting material or evidence of consent to the application. There is no restriction on the type of order that may be made by desk order, but the material filed must satisfy the judge or master that the application is appropriate for proceeding in that manner. If the registrar, master or judge has concerns about the application, then the application may be rejected or, in appropriate cases, a judge or master may give directions, including a direction that the application be spoken to (SCCR 8-3(3), 8-4(3) and 17-1(5)).

Among the more frequent grounds for rejection of desk orders are:

- (i) in the case of a consent order, a party of record has not consented and it is not clear to the registrar that the party is not affected by it;

- (ii) the court believes that notice must be given; or
- (iii) the draft order is unclear or makes little sense.

In some situations, counsel will make an application for which notice is not required, or which could otherwise be handled by desk order, in chambers. Supreme Court Civil Rule 8-2 explicitly contemplates this possibility. Examples of situations in which this will occur are situations where the application is urgent and cannot wait for ordinary processing of desk orders, or where the order sought is complex or unusual and will require some explanation. The procedure for these applications is set out in the next section.

2. Preparing an Application to be Heard in Chambers

The bulk of chambers applications are dealt with by way of a hearing. Applications to be heard in chambers are initiated by a notice of application in Form 32 for interlocutory applications in proceedings (SCCR 8-1(3) and (4)), or by petition in Form 66 for proceedings referred to in SCCR 2-1(2) (SCCR 16-1(2)). The discussion in this section focuses on the procedure by notice of application. The procedure for dealing with an application by petition, which is similar, is briefly discussed in § 3.02.10.

(a) Notice of Application

Most chambers applications are initiated by a notice of application. The most important element of a notice of application is the list of the order(s) sought. Counsel should state, with precision, the order requested, with each part of the relief sought in separate numbered or lettered paragraphs. A notice of application must also:

- (a) briefly summarize the factual basis for the application;
- (b) set out the rule, enactment or other jurisdictional authority relied on for the orders sought, and any other legal arguments on which the orders sought should be granted; and
- (c) list the affidavits and other documents on which the applicant intends to rely.

All of this must be accomplished within a 10 page limit (SCCR 8-1(4)). Lawyers should keep in mind that the factual summary is just that—a summary—and the affidavits themselves may contain a more fulsome explanation of the underlying facts.

Many lawyers include a statement in a notice of application that the “pleadings and proceedings herein” will be relied upon. Such a statement

serves no useful purpose and does not discharge a party's responsibility to list the material to be relied upon (*Keenoy v. Keenoy* (1921), 59 D.L.R. 699 (Sask. Q.B.)).

Similarly, the inclusion in the list of affidavits to be relied upon of words like "such further and other material as counsel may advise" is redundant. The rule requires that all material be listed, so a party seeking to rely on other information will have to obtain leave to introduce that other information and give an explanation of why it was not originally included. That party runs the risk of the court refusing to consider the new material or, alternatively, of an adjournment being granted to the opposing party on the basis that proper notice was not given, or of the court (see *Leskun v. Leskun* (2004), 31 BCLR (4th) 50 (CA)). It is clear that the court *may* rely on material not specified in a notice of application, either generally or under SCCR 22-1(4)(e) (*Lackmanec v. Hoffman* (1982), 3 W.W.R. 714, 15 Sask. R. 1, 133 D.L.R. (3d) 502 (C.A.); aff'g (1980), 15 Sask. R. 10 (Q.B.) (statement of claim, collective agreement and union constitution looked at); *Nichols v. Gray* (1978), 9 B.C.L.R. 5, 8 C.P.C. 141 (C.A.) (statements of counsel at hearing held admissible as "other evidence" under the predecessor to SCCR 22-1(4)(e)). But it is not required to do so if other parties will be prejudiced.

Counsel is responsible for preparing any evidence required at the hearing of the application. Evidence on chambers applications is usually given by affidavit. See §3.03 for a full discussion of affidavit drafting. Supreme Court Civil Rule 22-1(4) empowers the court to hear oral testimony of a witness but this seldom occurs. Documents other than affidavits that are frequently referred to in chambers applications include pleadings, previous orders, previous reasons for judgment and, for applications under SCCR 9-7, notices to admit, discovery transcripts and expert reports.

A notice of application must also specify the date and place for the hearing of the application. The date must be at least 7 days after the notice of application is served, or 14 days in the case of an application under SCCR 9-7 (SCCR 8-1(8)). Counsel must be realistic as to the time it will take for parties to respond. Counsel also should keep in mind that applications that will require more than 2 hours to be heard must be booked with the court registry on days when the registry expects to have judges available (SCCR 8-1(6)). As well, as noted above, not all registries will have chambers hearings every

business day, so in registries other than Vancouver it is important to check and ensure that there will be a judge or master sitting in chambers on the day you select.

The place an application is to be heard is dealt with in SCCR 8-2. Normally an application is heard in the registry in which an action was commenced, but SCCR 8-2(1) permits an application to be heard at any other registry in the same judicial district, or at any other registry to which all parties consent. However, an applicant who selects an inappropriate location may face costs consequences (SCCR 8-2(3)).

Once counsel has finalized the written material needed for the application, the notice of application and all affidavits (that have not already been delivered for a prior application) must be filed in the court registry and then served, along with any notice that the applicant is required to give under SCCR 9-7(9), on each party of record and any other person who may be affected by the order sought (SCCR 8-1(7)).

If the nature of the application is such that there is nobody to whom notice must be given, but is not being dealt with by way of desk order, there is no need for service of the application. Presumably in such a case the notice of application would provide for hearing a day or two after it was filed. Counsel would appear in court on the date specified and explain the basis for the application. Counsel should also be prepared to deal with any questions as to whether notice should have been given.

(b) Notice of Response

In most cases, notice will have to be given to at least one other party. Any person who wishes to respond to an application must prepare an application response in Form 33 as well as prepare any responsive affidavits needed to support the application response.

The application response will indicate, for each order sought on the notice of application, whether the application respondent consents, opposes, or takes no position with respect to such order. It will also contain a brief summary of the factual and legal bases on which the orders opposed should not be granted, and lists the affidavits and other documents on which the application respondent will rely. The application response is subject to the same 10 page limit as the notice of application (SCCR 8-1(10)) If the application respondent has not already provided an address for service in the proceeding, it must do so on its application response (SCCR 8-1(11)).

The application response as well as originals of any supporting affidavits that have not already been filed must be filed in the court registry within 5 days after service of the notice of application, or 11 days in the case of an application under SCCR 9-7 (SCCR 8-1(9)). The application respondent must also deliver, not later than 2 days before the date set for hearing, two copies of the application response, any new affidavits, and any notice under SCCR 9-7(9) to the applicant and one copy to each other party of record (SCCR 8-1(12)).

(c) Reply Materials

The original applicant may serve reply affidavits on the other parties not later than noon on the day before the day set for the hearing (SCCR 8-1(13)).

Reply affidavits should be responsive to matters raised in the application respondent's affidavits, and should not be used simply to put forward evidence that should have been included in the original application. It is not necessary to repeat evidence that appears already in the affidavits originally delivered with the application.

In the absence of a court order or consent of all parties, no party may file further affidavits beyond those served with the application response and in accordance with SCCR 8-1(13).

(d) Application Record

For any application that is opposed, the applicant must file with the registry, not later than noon on the day before the hearing, an application record. An application record combines all of the documents the court will need to refer to in a convenient bound format and is intended to make chambers proceedings more efficient. It is not required for applications that are unopposed, although there is no rule against filing one in those situations as well.

Since the application record is what is seen by the judge or master deciding the application, its contents are key. It is customary to circulate a draft index among counsel in advance for comment. In any event, the index to the application record must be served on all parties not later than noon on the court day before the hearing (SCCR 8-1(17)). Typically, all parties will prepare a binder of their own with materials organized in the same manner as the copy that is to be used by the judge or master.

The application record must contain (SCCR 8-1(15)):

- (i) a title page, with a style of cause and the names of all lawyers who are appearing;
- (ii) an index;
- (iii) filed copies of the notice of application and any application responses;
- (iv) copies of every filed application and pleading and every other document (apart from a written argument) that is to be relied on at the hearing.

The contents of the application record should be either consecutively numbered throughout the document or separated by tabs. Unless the application record is being filed electronically, it should be contained in a 3 ring binder, cerlox bound, or placed in some comparable secure binding (SCCR 8-1(15)).

If there are cross-applications being heard at the same time, then the parties should, so far as is possible, prepare a joint application record that can be used for both applications (SCCR 8-1(18)).

If the application is a summary trial application under SCCR 9-7, then *all* filed pleadings should be included in the application record (SCCR 8-1(15)(b)(vi)).

There are certain other documents that *may* be included in the application record (but are not required to be). They include a draft order, a written argument (if permitted – see discussion below), a list of authorities, and a draft bill of costs. An application record should *not* contain affidavits of service, copies of authorizes, or any other documents (unless all parties consent).

The application record will normally be returned to the applicant at the conclusion of the hearing (unless judgment is reserved) (SCCR 8-1(19)). Only the filed original documents will be retained in the court file.

(e) Written Argument

Both the notice of application and application response require inclusion of a summary of the facts and legal argument supporting or opposing the application. The underlying rationale is that these arguments will be read by the other side in advance, and allow them to adequately respond, and they may also be read by the judge or master in advance of the application (depending on when the judge or master was assigned to hear the application). [Note however that in many cases the judge or master hearing an

application will have little or no opportunity to review the materials, so counsel should not assume that anything has been read before the hearing commences.]

Supreme Court Civil Rule 8-1(16) prohibits the parties from providing any further written arguments to the court, except in the event the application is estimated to take more than 2 hours. That is intended to prevent parties from holding back on their true position until the last minute, and to avoid any need for adjournments in the event parties are taken by surprise.

Where applications are estimated to take more than 2 hours, it is likely that the 10 page limit on the notice of application and application response will be inadequate to fully explore the underlying facts and legal issues. In many complex applications, the parties will agree to exchange written arguments in advance of the hearing, or they may already have a good understanding of the positions that are to be taken by each side. In those cases, it is permissible to file written arguments at the hearing.

3. Calculation of Time

It is important for counsel to understand how to calculate time limits in order to understand and apply the SCCR.

Supreme Court Civil Rule 22-4(1) governs the calculation of time. It provides that if a period of less than 7 days is prescribed by the SCCR or an order of the court, then holidays shall not be counted. Holidays are defined in s. 29 of the *Interpretation Act*, and include Sundays as well as many statutory holidays. Thus, Sundays are not counted if the time period specified is less than 7 days (but Saturdays are).

Also note that some of the time limits are clear days, while others are not. When a calculation of time is expressed as “clear days”, or as “at least” or “not less than” a number of days, then the first and last days are excluded (*Interpretation Act*, s. 25(4)). Otherwise, the first day is excluded and the last day included (s. 25(5)).

Finally, when documents are served or delivered after 4:00 p.m. on a day, they shall be deemed to have been served or delivered on the next day that is not a holiday (SCCR 4-2(3) and (6)).

4. Short Leave Applications and Applications to Extend the Time Requirements under the Rules

The time limits set by the SCCR will not be appropriate in every circumstance. In some cases (generally on grounds of urgency) the court will hear an application before the regular time limits have

expired. In other cases (generally when the time provided by the court rules is not sufficient to allow the application respondent to prepare) the time limits will be extended.

The usual practice is for counsel for a party seeking a reduction or extension of time limits to first approach counsel for the other parties. In most cases, counsel are able to work out such matters among themselves. A judge or master when deciding an application to reduce or extend time limits will balance such matters as the urgency of an application, its complexity, the prejudice to the applicant arising from further delay, and the prejudice to the application respondents from any lack of time to respond. Most counsel are able to predict reasonably well how such an application will be decided, and work matters out among them without incurring the expense of an unnecessary court application.

The general jurisdiction of the court to extend or shorten time limits is found in SCCR 22-4(2). However, there is a specific provision for short notice applications (SCCR 8-5). The application is generally brought in a summary manner by filing a requisition in Form 17 (SCCR 8-5(2)). On a short notice application, the court will typically fix the date and time for the main application to be heard as well as a schedule for the exchange of documents (SCCR 8-5(4)).

A party seeking a short notice order must establish that there is some urgency to the application so that it would be inappropriate to require the applicant to wait for the expiry of the time limits that would normally apply. Although the application may be made without notice (SCCR 8-5(2)), it is customary to advise other parties that short notice will be sought, and a judge or master hearing such an application may ask what each party’s position is on the matter, and whether the other parties are available on the proposed hearing date. There may be very good reasons why the opposing party will oppose an application for short leave. For example, the opposing party may be out of town, the client or counsel may require the full time allowed in order to properly respond, or may argue that the substantive application is not urgent and need not proceed on an urgent basis.

A party seeking an extension of time must establish that the ordinary time limit is insufficient. It is prudent to seek an extension of time before the time frame has expired, but the passing of the ordinary time frame is not a bar to seeking an extension (SCCR 22-4(2)).

5. Setting Matters Down in Chambers

Most applications with a time estimate of two hours or less are heard in regular chambers. Materials, including the application record, are filed with the chambers registry not later than noon the day before the hearing, and would be scheduled for hearing in a chambers courtroom along with numerous other similar applications set for two hours or less.

An application that is estimated to take more than two hours is not, however, heard in regular chambers. Supreme Court Civil Rule 8-1(6) requires that a hearing date be reserved through the court registry. In Vancouver, time is reserved with the trial division (604.660.2853). It is common to have to wait several weeks for a hearing date. However, in cases of urgency it may be possible to obtain an earlier date. Because the court registries schedule on the assumption that a substantial portion of the cases set for hearing will not proceed—either because of settlement or for some other reason—it is unfortunately also not uncommon to find that there are not enough judges to hear all scheduled applications when the hearing date arrives. If this happens, the application will be scheduled for the next available date that is convenient for all counsel.

Hearings will also be booked through the court registry, whether or not the time estimate is over two hours, if a particular judge or master is seized of a matter and is to hear further applications.

In order to schedule a hearing in one of these circumstances, it is often necessary to write to the court registry. All counsel communicating with the court should be aware of the Practice Direction as to Correspondence with the Court – Procedure, issued January 16, 2006.

In case of emergency in Vancouver for example, urgent injunction applications that cannot wait to be heard on the next scheduled chambers day, an after-hours application may be arranged by calling 604-833-4642. (See Notice to the Profession of October 9, 2009.)

6. Adjournments

Not every hearing will go ahead on the date specified in the original notice of application. It may be that the parties end up agreeing to do some or all of what was sought in the application, or it may be that the application is not ready to be heard on the date set out originally. In those cases, provided that all parties who were to appear at the hearing agree, the application can be removed from the chambers hearing list by way of a requisition “adjourning” the application. It is important to specify on the requisition that it is made “By Consent”—the registry will not accept a requisition adjourning an application unless it so provides.

A matter may be adjourned “generally”—that is, to no fixed date—or it may be adjourned to a specific date. A matter that is adjourned generally may be rescheduled by way of a further requisition referring to the earlier notice of application, that it was adjourned generally, and that it should be reset.

In many cases the parties will agree as to an adjournment. Even if a party is not happy to have a matter delayed, it makes sense to agree to an adjournment (and reduces costs to all parties) if it is obvious that the hearing would be adjourned in any event.

If not all parties agree to an adjournment, the party seeking an adjournment will have to attend court and apply to the judge or master who was to hear the application for an order adjourning the application. If you are in regular chambers, you should advise the court clerk that there will be an adjournment application (give a time estimate) and then, if the adjournment is not granted, argument on the main application. In many cases, depending on time estimates, any adjournment applications will be heard early on in the day and separately from argument on the main application.

A consent adjournment may be made:

- (a) until 9:00 am of the day set for hearing, by filing a requisition (either by filing at the registry during regular hours or by fax filing); or
- (b) after 9:00 am communicated in person in the chambers courtroom.

Adjournments made in person should be followed up with a filed requisition in order that the court file properly reflects the course of events.

7. The Day of the Hearing

Each day in chambers, the registry staff prepare a chambers list of applications scheduled for the day. All applications scheduled for regular chambers say that they are to be heard at 9:45 a.m. You should arrive between 9:45 a.m. and 10:00 a.m. and check in with the clerk in the courtroom. The clerk will deal with consent adjournments and confirm time estimates for applications that will proceed. This is also a convenient time for opposing counsel to discuss whether it is possible to agree about all or part of the application. The judge or master will enter the chambers at or shortly after 10:00 a.m. The usual practice is for uncontested applications to be heard first, then contested applications with the order of hearing determined by the time estimates (the shortest applications heard first). Most counsel wait in or near the courtroom because, from time to time (particularly in Vancouver or New Westminster), longer applications will be referred to other judges or masters who become available.

Effective chambers advocacy—what you actually say when your application is heard—is dealt with in §3.04 below.

At the conclusion of the hearing, consider whether you need to ask for a specific order as to costs. (The types of orders that may be made are beyond the scope of this chapter: see *Practice Material: Civil Litigation*, Chapter 7.)

8. Fax and Electronic Filing

Many documents are filed by manually filing paper copies to the court registry during regular business hours. However, SCCR 23-2 and 23-3 provide for filing of documents by fax or by electronic filing. Note that fax filing is only available for certain registries, and electronic filing is only available to persons who have entered into electronic services agreements with the Court Services Branch. Not all documents can be filed under these rules. However, in appropriate cases these rules may provide means to save both time and expense.

9. Summary Trial

Supreme Court Civil Rule 9-7 provides for the court to decide a case or an issue based on affidavit, transcripts, and other written evidence. It is discussed in detail in *Practice Material: Civil Litigation*, Chapter 4.

An application for judgment under SCCR 9-7 generally follows the same procedure as any other chambers application. However, as noted above, the rules provide an extended notice period. The extended notice period afforded to a application respondent to a SCCR 9-7 application reflects that a summary trial is a trial on the merits, which could result in final disposition of an action.

10. Originating Applications

Supreme Court Civil Rule 2-1 permits certain applications to be made by originating application. A common example is an application for judicial review under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. Typically these applications are heard and decided based on affidavit evidence.

Except when notice of the application is not necessary (in which case the process is as described in §3.03.1 above), an originating application is commenced by petition in Form 66. The petition and all supporting affidavits must be filed with the court, then served on all persons whose interests may be affected by the order sought (SCCR 16-1(3)). A petition respondent served with a petition has 21 days to prepare, file, and serve on the petitioner 2 copies of a response to petition (Form 67) together with any affidavits the petition respondent intends to rely on at the hearing (SCCR 16-1(4) and (5)). [The time is longer if the petition respondent resides

outside of Canada.] The petitioner may then file and serve affidavits in response and set the matter down for hearing, giving at least 7 days notice of the hearing (SCCR 16-1(6) and (8)).

Supreme Court Civil Rule 16-1 requires that the applicant prepare and file a petition record for the hearing of a contested petition, which is similar to the application record required in the event of a contested chambers application (SCCR 16-1(11)).

If a petition is contested and there are disputes of a nature that cannot be resolved based simply on the documents that have been filed, the court has discretion to order a trial (SCCR 22-1(7)(d)).

[§3.03] Affidavit Drafting²

1. Introduction

Most chambers applications will be supported by an affidavit or affidavits providing evidence as to the facts on which the application is based (where those facts do not appear from the record).

An affidavit is a written statement of evidence sworn by the person giving the evidence (“deponent”) before a person authorized to take affidavits. The general law of evidence and the SCCR permit (and sometimes require) the use of affidavits in legal proceedings. There is, however, no formal definition of an affidavit in the SCCR. There is a definition in s. 29 of the *Interpretation Act*, but it merely states that the term affidavit or oath “includes an affirmation, a statutory declaration, or a solemn declaration made under the *Evidence Act*, or under the *Canada Evidence Act*”.

A court relies on affidavit evidence in the same way as it relies on oral testimony, and accordingly, counsel should take every care when preparing affidavits to ensure that the affidavit tells the true story (*Rummens v. Cecil* (1910), 129 L.T. Jo. 263 (Ch. D.)). In addition to telling the true story, the affidavit should tell the *full* story.

Supreme Court Civil Rule 22-2 sets out certain requirements as to form for affidavits. Those requirements do not necessarily apply to affidavits required under other enactments. An affidavit meeting the requirements of a statute that authorizes its use may be received in a proceeding despite its failure to satisfy all the requirements of SCCR 22-2 (see SCCR 22-2(14) as well as *Banque d’Hochelaga v. Hayden* (1922), 1 W.W.R. 1054, 17 Alta. L.R.

² Subsections 1 to 10 of this section are based on a paper entitled “The Written Material” - prepared by Professor James P. Taylor for the CLE publication, *Chambers Practice* (February 1987). Modified in March 1998, March 1999 and February 2000 by Craig P. Dennis, Sugden, McFee & Roos, Vancouver. Modified in March 2001, July 2004, June 2005, August 2006 and January 2010 by H. William Veenstra, Vancouver.

277, 63 D.L.R. 514 (C.A.)). Generally, the forms prescribed by the Rules may be varied where necessary (SCCRs 22-7(1) and 22-3(1)).

Courts have held that formal irregularities do not affect the validity of an affidavit (*Crown Lumber Co. v. Hickie*, [1925] 1 D.L.R. 626 (Alta. S.C.A.D.)). Refer also to s. 67 of the *Evidence Act* (British Columbia) and SCCR 22-2(14), both of which allow the court to use a defective affidavit.

2. Swearing or Affirming

The words “swear” or, alternatively, “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. A recommended procedure is set out in section §3.03.9(c) below.

On what constitutes swearing or affirming an affidavit, see *Owen v. Yorke*, [1985] B.C.D. Civ. 1231-03 (S.C.):

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? . . .

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 complete. 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 can't 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.

Like witnesses in court, persons who object to swearing an oath may affirm instead (the *Evidence Act* (British Columbia) and *Canada Evidence Act*, s. 14). If an affidavit is affirmed rather than sworn, the words in the usual introductory paragraph and the jurat should be changed. For suggested wording see the Affidavit Precedents at the end of this chapter—Precedents 4(b) and 6(b).

3. When an Affidavit May Be Sworn

Generally, an affidavit is made and filed in a proceeding that is already commenced. However, an affidavit may also be made before the proceeding is commenced (SCCR 22-2(15)). In such a case, to ensure that the court is not misled into thinking that a proceeding has been commenced, it is customary to make the intended nature of the proceeding clear by heading the affidavit—“In the matter of an intended proceeding”.

4. Parts of an Affidavit

(a) Style of Proceeding

An affidavit is headed with the style and number of the proceeding. The heading in the affidavit may be abbreviated under SCCR 22-3(5) to name only the first plaintiff, defendant and other party, if any, followed by the words “and others”. The abbreviation “et al.” is no longer used.

Each affidavit must be endorsed, in the top right hand corner of the title page, above the style of proceeding, with the initials and surname of the deponent, the sequential number indicating whether it is their first, second, third, etc. affidavit, and the date on which the affidavit was made (SCCR 22-2(3)).

(b) Introductory Paragraph

An affidavit is expressed in the first person and shows the name, address and occupation of the deponent (SCCR 22-2(2)(a)). If the deponent has good reason to keep his or her address secret, it should be expressed as being in care of the appropriate party's address for delivery. If the deponent is retired, unemployed or has no particular occupation, state this. There is a distinction between an occupation, which refers to vocational function (that is, nurse, carpenter, lawyer), and employment, which refers to the deponent's employer. It is the deponent's occupation, rather than employment, that is required to be given by SCCR 22-2(2)(a).

There is authority that where the introductory paragraph omits the words “makes oath” or “swears” or “affirms”, the affidavit is inadmissible (*Allen v. Taylor* (1870), L.R. 10 Eq. 52, 39 L.R. Ch. 627 (Ch. D.); *Dobrinsky v.*

Kubara (1950), 1 W.W.R. 65 (Man. K.B.)). The better view is that this omission is an irregularity (*R. v. McKimm* (1903), 2 O.W.R. 163 (H.C.)). This case may, however, be distinguishable because the opposing party was held to have waived his right to object by taking a fresh step in the proceedings.

5. The Deponent

(a) Corporate Party

A natural person must make an affidavit on behalf of a corporate party. That person must depose to his or her personal knowledge of the matters contained in the affidavit (*Bank of Montreal v. Brown* (1956), 21 W.W.R. 287 (B.C.S.C.)). For suggested wordings, see the Affidavit Precedents, Precedent 5(a)(2).

(b) Person with Direct Knowledge

Wherever possible, an affidavit should be made by a person who has direct knowledge of the facts deposed to (*Campbell v. Bartlett* (1979), 3 W.W.R. 571, 10 C.P.C. 194 (Sask. C.A.)). There are two reasons for this. First, hearsay evidence is not acceptable in certain applications. (See section below titled “Statements on Information and Belief”). Second, the evidentiary value of direct evidence is always greater than that of hearsay evidence. An affidavit on information and belief invites the inference that the party with direct knowledge is afraid to face cross-examination (*Meridian Printing (1979) Ltd. v. Donald* (1981), 4 W.W.R. 476, 12 Sask. R. 234 (Dist. Ct.)). When extraordinary or discretionary relief such as an injunction is sought, a court may decline to accept hearsay evidence unless there is an explanation as to why first-hand evidence is unavailable. (*Litchfield v. Darwin* (1997), 29 B.C.L.R. (3d) 203 (S.C.))

For suggested wordings when deposing to matters within direct knowledge, see the Affidavit Precedents, Precedent 5(a).

(c) Identifying Deponent's Relationship to Party

When the deponent is a party, or the lawyer, agent, director, officer or employee of a party, this fact must be stated in the body of the affidavit (SCCR 22-2(2)(b)). It is usual to state this in the first paragraph. For suggested wordings see the Affidavit Precedents, Precedent 5(a)(2) and 5(a)(3).

(d) Solicitor on Behalf of Client

For their own convenience and that of their clients, lawyers occasionally swear affidavits, deposing to facts told to them by their clients. When this is done, the body of the affidavit

should include a paragraph stating that the deponent is the client's lawyer and that the affidavit is made on behalf of the client. A lawyer swearing an affidavit on behalf of a client must consider the questions of admissibility and credibility that are involved when an affidavit is made on information and belief.

Before swearing an affidavit on behalf of his or her client, a lawyer must consider some questions. First, the lawyer must take care to ensure that tendering the evidence of the lawyer will not effect an inadvertent waiver of solicitor-client privilege. See on this issue *Murao v. Blackcomb Skiing Enterprises Ltd. Partnership*, [2003] B.C.J. No. 806 (S.C.) at para. 83, and *Re Mannix Resources*, 2004 BCSC 1315.

The lawyer must also consider whether swearing an affidavit will subsequently restrict that lawyer from acting as counsel in the matter, as a result of the rules governing “speaking to one's own affidavit”.

Chapter 8 of the *Professional Conduct Handbook* includes the following Rules:

9. A lawyer who gives *viva voce* or affidavit evidence in a proceeding must not continue to act as counsel in that proceeding unless
 - (a) the evidence relates to a purely formal or uncontroverted matter, or
 - (b) it is necessary in the interests of justice.
10. A lawyer who was a witness in proceedings must not appear as advocate in any appeal from the decision in those proceedings, when the lawyer's evidence may reasonably be expected to be an issue on the appeal.

The following statement by Judge J.P. van der Hoop, in the CLE publication, *Chambers Practice* (February 1982) reflects the general practice.

I have no objection to a lawyer speaking to his own affidavit. I get a little annoyed, however, when opposing counsel gets up and says I consent to my learned friend speaking to his affidavit and halfway through starts to argue that the facts are not true. The decision the chambers judge must make is whether or not there is

any issue arising from the facts as stated in the affidavit. If there is no issue over the facts, then speak to your own affidavit. I realize that frequently you are coming from a firm where you must use your own affidavit or be silent. If there is an issue arising out of the facts stated I do not care how much opposing counsel consents, I will not hear counsel on that affidavit because counsel then turns into a witness as well. That has to be cleared up before the affidavit is referred to.

The following are the reasons advanced against counsel acting as witness:

- (i) if counsel testifies, the court is compelled to assess his or her credibility as a witness, and this is incompatible with the assumption that counsel, as an officer of the court, meets the ethical requirement of never misleading the court;
- (ii) if counsel testifies, opposing counsel must attack his or her credibility, which is incompatible with the requirement that counsel treat each other with respect and professional courtesy;
- (iii) when the testimony of a witness previously examined by counsel is contradicted by counsel's own testimony, the credibility of the lay witness may be unfairly prejudiced. The credibility of counsel as a witness may be prejudiced because the trier of fact will regard counsel as an interested party. The result will be that counsel's duty to serve the best interests of his or her client is endangered and he or she may be compelled to withdraw.

It is clear that a lawyer is competent to testify on behalf of his or her client. In some cases counsel is obliged to do so. In *Roland Roy Fournures Inc. v. Maryland Casualty Co.* (1973), 35 D.L.R. (3d) 591 (S.C.C.), it was suggested that the trial judge erred in not requiring counsel to withdraw before testifying. It was stated at p. 594:

Counsel for the appellant was correct in saying that counsel [for the plaintiff] ought to have refrained from taking any part in the trial, not even to provide evidence pertaining to other points in the case. Nor should the judge have tolerated such participation.

The statement is *obiter*, since the court heard no argument on this point. It was deciding only the

question of competence.

Many strong statements have been made condemning the practice of counsel giving evidence. See, for example, Cartwright J. in *Stanley v. Douglas* (1952), 1 S.C.R. 260 at 274, 4 D.L.R. 689 where he quotes Ritchie C.J. in *Bank of British North America v. McElroy* (1875), 15 N.B.R. 462 (S.C.). See, more recently, *National Financial Services Corp. v. Wolverton Securities Ltd* (1998), 52 B.C.L.R. (3d) 302 (S.C.) at para. 7. For statements supporting the view of Judge van der Hoop, refer to *Pioneer Lumber Company v. Alberta Lumber Company* (1923), 32 B.C.R. 321 (C.A.), particularly the statements of Martin J.A.

6. Body

(a) Format

Supreme Court Civil Rules Form 109 is a standard form of affidavit. This form is, however, not mandatory (SCCR 22-2(d)).

The body of the affidavit must be divided into consecutively numbered paragraphs (SCCR 22-2(c)). As a matter of style, some argue that each paragraph of an affidavit should contain only a single sentence. Dogmatic adherence to this rule leads to some unfortunately long and complicated sentences. In my opinion, the better rule is that each paragraph should deal with a single matter. Long and complicated paragraphs can create difficulties, particularly when counsel wishes to draw the court's attention to a specific fact alleged in support of a proposition but lost within a long paragraph.

Since SCCR 22-2(a) requires that affidavits be in the first person, it is incorrect to use the form "Your deponent says . . ." (*Montaine, Black & Co. v. Sedore* [1982], B.C.D. Civ. 3650-02 (Co. Ct.)).

It is unnecessary to begin each paragraph with "that". Most affidavits, including the standard form, contains the word "That" in the preamble, making its use in each paragraph grammatically inappropriate.

The expression "and/or" should also be avoided wherever possible, since it leaves in doubt the facts being deposed to. Use instead "A or B or both".

(b) Figures, Not Words

Figures, not words, should be used to express dates and sums of money. As for other numbers, some lawyers follow the rule that ten and any number less than ten should be written as a word, and that any number larger than ten should be expressed in figures.

(c) Referring to Other Material

It is helpful to direct attention specifically to a particular pleading or portion of a pleading that is relevant to the application. This saves time in situations in which the pleadings are long and the facts are complex. It may prevent opposing counsel from obtaining an adjournment on the basis that he or she has not understood the nature of the application and consequently is unprepared. For suggested wordings in an affidavit to refer to other material on file, see the Affidavit Precedents, Precedent 5(h). (The Affidavit Precedents follow this section.) Statements in pleadings are not, of course, evidence. Admissions contained in pleadings, however, may have evidentiary value.

(d) Scandalous or Unnecessary Material

At any stage of a proceeding, the court may order any document that is unnecessary, scandalous, frivolous or vexatious to be amended or struck out, either completely, or in part (SCCR 9-5(1)).

The court may order that the entire affidavit be removed from the file, sealed by the registrar and destroyed after a period of time, or that an offending passage be expunged by the registrar in such a manner as to make it entirely illegible (*Black v. Canadian Copper Co.* (1917), 13 O.W.N. 255 (C.A.)).

(d) Statements on Information and Belief

(i) Final Orders

In general, an affidavit may state only what a deponent would be permitted to state in evidence at trial (SCCR 22-2(12)). Statements on information and belief are hearsay and when used in an application for a final order they are generally not admissible as proof of the truth of the matters deposed to. However, if statements on information and belief are not rendered for the truth of their contents, but rather to show that the statements were made, they do not offend the hearsay rule and may be included in applications for final orders. The court has discretion to order statements on information and belief to be entered as evidence in an application for a final order (SCCR 12-5(71), 22-1(4)(e) and 22-2(13)(b)(ii)). See also SCCR 12-5(59) to (65) on the use of affidavits. There is a good general discussion of these issues in *Ulrich v. Ulrich*, 2004 BCSC 95, 25 B.C.L.R. (4th) 171.

In applications for summary judgment, courts have permitted defendants to rely on statements made on information and belief in affidavits in reply on the issue of whether the matter is appropriate for summary resolution. Because a successful defence is often based on facts that emerge only in discovery or at trial, the courts have held that a defendant should not be deprived of the right to defend an action merely because he or she cannot tender proof of those facts before discovery (*Memphis Rogues Ltd. v. Skalbania* (1982), 38 B.C.L.R. 193, 29 C.P.C. 105 (C.A.)), citing with approval *Federal Business Development Bank v. Pallan* (1978), 9 B.C.L.R. 59 (S.C.)).

(ii) Interlocutory Orders

Statements on information and belief are permitted as of right in respect of applications for orders that are not final orders under SCCR 22-2(13), provided that the source of the information is given. SCCR 22-2(13) is an enabling rule of general application and is not to be interpreted as restricting other rules or provisions which merely require the deponent to depose to a belief (*Soucy v. Routhier* (1967), 68 D.L.R. (2d) 154 (S.C.N.B.A.D.)).

(iii) Distinguishing Between Final and Interlocutory Orders

Prior to 2010, the predecessor to SCCR 22-3(13) referred to “interlocutory orders”. While the new rules seek to eliminate this terminology, it is used in many case authorities, will continue to be used by many counsel, and may help with understanding the new rule. The classic definition of an interlocutory order is found in *Gilbert v. Endean* (1878), 9 Ch. D. 259. The Court defined it as an order that maintains the *status quo* until a final determination of a question is made, or an order that gives directions with respect to the conduct of an action. A final order is an order that determines the rights or status of parties. However, orders that are interlocutory in form may be final in effect. For example, in *Rossage v. Rossage* (1960), 1 All E.R. 600 (C.A.), an application to suspend visiting rights, statements on information and belief were held to be unacceptable because the order, although interlocutory in form (in that it could be altered at any time in the best interests of the child) was

final in effect (in that it decided rights between the parties). The case was cited with approval in *Re CJOR Ltd.* (1965), 53 W.W.R. 633 (B.C.S.C.).

In *Glazer v. Union Contractors Ltd.* (1960), 34 W.W.R. 193, 26 D.L.R. (2d) 349 (B.C.C.A.), the Court said that in proceedings such as contempt of court, the issue is not so much whether the proceedings are final or interlocutory as whether they are so severed from the general suit that they are to be treated as something separate in nature and not as incidental to the suit. If so, affidavits on information and belief will not be accepted.

(iv) Source of Information

Even where statements on information and belief are acceptable in affidavits, the source of the information must be given (SCCR 22-2(13)(a)). If the source is not given, the court may disregard the statements in question, or the entire affidavit (*Tate v. Hennessy* (1901), 8 B.C.R. 220 (S.C.); *Scarr v. Gower* (1956), 18 W.W.R. 184, 2 D.L.R. (2d) 402 (B.C.C.A.); *Meier v. C.B.C.* (1981), 28 B.C.L.R. 136 (S.C.)).

Many lawyers include a standard paragraph in all affidavits such as, "I have personal knowledge of all facts deposed to except where stated to be on information provided to me by an identified person and in each such case I believe the identified person and I believe the statement I make to be true". This practice can be dangerous because it may mislead deponents and lawyers into thinking that statements made on information and belief can properly be included in all affidavits. Statements on information and belief are acceptable only in applications for interlocutory orders and in cases where the court grants leave (SCCR 12-5(71), 22-1(4)(3) and 22-2(13)).

It is preferable for the person drafting the affidavit to be forced to consider each deposition as to hearsay specifically and individually.

A common and recurring error made with respect to third-party statements is the failure to distinguish between third-party statements that the deponent believes and wishes the court to believe, and third-party statements that the deponent wishes

to record as having been made, but which he or she does not believe and does not ask the court to believe or which do not constitute hearsay in any event (an admission). The use of the standard recitation as to statements on information and belief obscures this potential difficulty and the court, and the drafter, can be misled.

It is not sufficient to state that the source is a "corporation" without naming a specific person (*Re Mintz; Malouf v. Mintz* (1930), 24 Sask. L.R. 290, 11 C.B.R. 227, 2 D.L.R. 777, [1930] 1 W.W.R. 198 (C.A.); *Preiswerck (K.J.) Ltd. v. Los Angeles-Seattle Motor Express Inc.* (1957), 22 W.W.R. 93 (B.C.S.C.)). Generally, an informant's desire for anonymity is insufficient reason for refusing to name him or her (*Meier v. C.B.C.*, *supra*). However, if the informant desires anonymity, this should be stated in the affidavit.

The source of information should be described in detail and any facts that enhance the credibility of the source should be given.

When statements on information and belief are permitted, disclosure of the source of the information is the only requirement imposed by the Rules. The case of *R. v. Board of Licence Commissioners (Point Grey)* (1913), 18 B.C.R. 648, 5 W.W.R. 572 (C.A.) is sometimes cited for the proposition that evidence on information and belief will not be received unless the deponent's statement on information and belief is corroborated by some person who speaks from his or her own knowledge. This is not now, and never has been, the law in British Columbia.

(v) Public Interest Exception

In a case filed by a taxpayer involving the public interest, the court accepted an affidavit including statements on information and belief, even where the belief and the grounds of belief were not deposed to, on the basis that an action of this type should not be defeated on technical objections (*Wilin Construction Ltd. v. Dartmouth Hospital Commission* (1977), 75 D.L.R. (3d) 145 (N.S.S.C.A.D.)).

(vi) Double Hearsay

Generally speaking, double hearsay (that is, “I am informed by my secretary that X told her . . .”) is not admissible even on interlocutory applications (*Trus Joist (Western) Ltd. v. United Brotherhood of Carpenters and Joiners of America Loc.* 1958, [1982] 6 W.W.R. 744 (B.C.S.C.)).

(vii) Lawyer Informed by Client

See section 6(c) above.

(viii) Opinion Evidence

Opinion evidence may be given by affidavit, provided that the expertise of the deponent and the basis for the opinion are stated (*Trus Joist (Western) Ltd., supra*). For suggested wordings, see the Affidavit Precedents, Precedent 5(h)(4).

7. Exhibits

An exhibit is a document or object referred to in an affidavit. The person before whom the affidavit is sworn must identify the Exhibits. This is done by referring to the exhibit in the affidavit by a letter, and then endorsing the exhibit itself with a certificate as follows: “This is Exhibit [letter] referred to in the affidavit of [name] made before me on [month/day, year], [signature of person taking oath]” (SCCR 22-2(8)). When referring to the exhibit in the affidavit, a simple style is preferable: “I attach a true copy of the letter [or other document] as Exhibit ‘A’” as opposed to the more elaborate formulations. In the case of a documentary exhibit not exceeding ten pages, SCCR 22-2(9) requires that a true reproduction must be attached to the affidavit and to all copies served or delivered. Where a document is longer than 10 pages, the lawyer may choose under SCCR 22-2(9) not to attach (or serve) it, and in that case the affidavit should state “the letter [document] is Exhibit ‘A’ to this affidavit”. An exhibit referred to in an affidavit need not be filed but must be made available for use by the court and for inspection by other parties (SCCR 22-2(9)).

Notwithstanding the wording of the rule, the usual practice in British Columbia is to deliver a copy of all documentary exhibits to each party, and a party who does not receive a copy of an exhibit will normally immediately request it.

Each page of the documentary exhibits referred to in the affidavit must be numbered sequentially (SCCR 22-2(10)).

As to what items should be included as exhibits, the general rule is that matters already before the court should never be attached as an exhibit. Attaching documents already filed in the proceeding as exhibits adds to costs without assisting the court in any way.

This material should simply be referred to in the exhibit.

The contents of an exhibit should not be summarized in the body of an affidavit. The exhibit speaks for itself.

Parties sometimes seek to rely on statements made in exhibits as evidence of the truth of those statements. Such evidence may be admissible as hearsay evidence on interlocutory applications, or as an admission against interest if the author of the document is the opposing party. However, if the deponent of the affidavit wishes to adopt a statement in the exhibit as his or her own evidence, that should be reflected in the text of the affidavit itself (*Ulrich v. Ulrich*, 2004 BCSC 95, 25 BCLR (4th) 171).

8. Jurat and Signature

(a) Form and Location of Jurat

The jurat is the clause that states where, when and before whom the affidavit was made. The jurat should immediately follow the last line of text. At least one line of text should appear on the page where the jurat is printed, to forestall allegations that material was removed after swearing. The jurat is usually placed on the left side of the page, leaving room for the deponent's signature on the right.

An omission of the words “Sworn before me” from the jurat has been held a fatal defect (*R. v. Bloxham (Inhabitants)* (1844), 6 Q.B. 528; *Watrous Credit Union Ltd. v. Sikorski* (1969), 70 W.W.R. 521 (Sask. D.C.)). In another case, omission of these words was held to be an irregularity of form only (*Eddows v. Argentine Loan and Agency Co.* (1890), 59 LF Ch. 392 (Ch.)). See s. 67 of the *Evidence Act*, R.S.B.C. 1996, c. 124.

(b) Capacity of Person Before Whom Affidavit is Made

The person before whom the affidavit is made should indicate his or her capacity in the jurat. However, failure to *indicate capacity* does not render the affidavit invalid where there is no statutory requirement that capacity be indicated (*Cameron-Hutt Ltd. v. MacMillen* (1933), 3 W.W.R. 241 (Sask. K.B.)).

(c) Several Deponents

The 1961 Rules provided that:

In every affidavit made by two or more deponents, the names of the several persons making the affidavit shall be inserted in the jurat, except if the affidavit of all deponents is taken at one time by the same officer [in which case]

it shall be sufficient to state that it was sworn by both (or all) of the “above-named” deponents.

This Rule is not found in the present Supreme Court Civil Rules and arguably, therefore, the practice of having several deponents swear one affidavit is no longer authorized. It could be argued that SCCR 1-3(1), 1-2(3) and 22-2(14) authorize such affidavits in an appropriate case. However, the safer practice is to have the second deponent file a separate affidavit adopting the contents of the first. For suggested wordings of the jurat where there is more than one deponent, and for adopting contents of another affidavit, see the Affidavit Precedents, Precedent 6(f).

(d) Deponent Who is Blind or Illiterate

If the deponent is blind or is unable to read, the person before whom the affidavit is made must certify in the jurat that the affidavit was read to the deponent in his or her presence, and the deponent appeared to understand the affidavit (SCCR 22-2(6)). For suggested wordings see the Affidavit Precedents, Precedent 6(c).

(e) Deponent Who Does Not Understand English

Where it appears that the deponent does not understand English, the affidavit should be interpreted to the deponent by a competent interpreter, who must certify by an endorsement in Form 109 on the affidavit that he or she has interpreted the affidavit to the deponent (SCCR 22-2(7)). For suggested wordings, see the Affidavit Precedents, Precedent 6(e).

(f) Signature

The deponent must sign the affidavit and the person before whom the affidavit is made must sign the jurat (SCCR 22-2(4)). The deponent should sign with his or her usual signature.

A deponent unable to sign an affidavit may place his or her mark on it (SCCR 22-2(4)). An affidavit by a person who could not make any mark at all was accepted by the court in *R. v. Holloway* (1901), 65 J.P. 712 (Magistrates Ct.).

The commissioner's signature should be placed on the page on which the jurat appears. To do otherwise is an irregularity as to form (*Pashko v. Canadian Acceptance Corp.* (1957), 12 D.L.R. (2d) 380 (B.C.C.A.)).

Affidavits prepared for filing in the Supreme Court of BC must include the name, legibly typed or written, of the commissioner before whom the affidavit was sworn as part of the jurat (see Supreme Court Practice Direction dated November 22, 2004).

9. Taking Affidavits

(a) Who May Take

The *Evidence Act*, R.S.B.C. 1996, c. 124, sets out, in sections 56 to 64, who is authorized to take affidavits. In British Columbia, affidavits may be taken only by the following statutorily empowered commissioners:

- (i) judges, justices of the peace, court registrars, lawyers in good standing, notaries public, municipal clerks, regional district secretaries, coroners, government agents, and other office-holders prescribed by the Attorney General by regulation (s. 60 of the *Evidence Act*);
- (ii) persons appointed by order of the Attorney General (s. 56 of the *Evidence Act*); and
- (iii) all commissioned officers of the Canadian Armed Forces (s. 64 of the *Evidence Act*).

Section 63 of the *Evidence Act* contains a list of those persons who are authorized to take affidavits outside of British Columbia for use in British Columbia.

Various statutes confer a limited power on certain persons to take affidavits in connection with their statutory powers and duties, including the *Agent General Act*, *Evidence Act*, *Geothermal Resource Act*, *Land Act*, *Land Title Act* and *Vital Statistics Act*.

(b) Counsel Taking Clients' Affidavits

The 1961 Rules rendered affidavits unacceptable if they were sworn before the solicitor acting for the party on whose behalf the affidavit was used, or before any agent of that solicitor. This provision is no longer included in the Supreme Court Civil Rules and consequently in British Columbia it is acceptable for lawyers, their partners and associates, to take affidavits from clients. Some reference works include discussions of the old Rule because it remains in effect in some jurisdictions, and cite old British Columbia cases to illustrate the operation of the Rule. Counsel in this province should not be misled into thinking they may not take affidavits from their clients.

(c) Safeguards to Follow When Taking an Affidavit

Note: the following passage includes material from notes on “Solemn Declarations and Affidavits” appearing in the February 1985 *Benchers' Bulletin*. The passage should be read with the provisions on affidavits and solemn declarations in Appendix 1 of the *Professional Conduct Handbook*.

A person who makes, in either an affidavit or a solemn (statutory) declaration, “a false statement under oath or solemn affirmation by affidavit, solemn declaration or deposition or orally, knowing that the assertion is false”, commits an indictable offence and is liable to imprisonment for 14 years (s. 131 of the *Criminal Code*). Consequently, commissioners who take affidavits should understand clearly the procedures involved, and should impress upon the deponent or declarant the seriousness of the oath.

The leading cases on the procedures to be followed in the taking of the affidavits and solemn declarations are: (*Re Collins (No. 2)* (1905), 10 C.C.C. 73 (B.C. Co. Ct.); *R. v. Phillips* (1908), 9 W.W.R. 634 (B.C. Co. Ct.); *R. v. Nier* (1915), 28 D.L.R. 373 (Alta. S.C.T.D.); *R. v. Schultz*, [1922] 2 W.W.R. 582 (Sask. C.A.); *R. v. Rutherford* (1923), 41 C.C.C. 240 (C.A.); *R. v. Whynot* (1954), 110 C.C.C. 35 (N.S.S.C.T.D.); *R. v. Nichols*, [1975] 5 W.W.R. 600 (Alta S.C.); *R. v. Chow* (1978), 41 C.C.C. (2d) 143 (Sask. C.A.).

From these authorities the following conclusions can be drawn as to the correct procedure to be followed in the taking of affidavits.

- (i) The deponent must be physically present before the commissioner.
- (ii) The commissioner must be satisfied that the deponent understands the contents of the document. This may be done by
 - the commissioner reading the entire document aloud to the deponent;
 - the deponent reading the entire document aloud to the commissioner; or
 - the deponent stating to the commissioner that he or she understands the contents of the document.
- (iii) The deponent must swear that the contents are true. In normal circumstances this may be accomplished by the commissioner asking the deponent, “Do you swear that the contents of this affidavit are true, so help you God?” Or where the affidavit is being affirmed, “Do you solemnly promise, affirm and declare that the evidence given by you is the truth, the whole truth and nothing but the truth?” and the deponent responding in the affirmative (see s. 20 of the *Evidence Act* and the *Affirmation Regulation*, B.C. Reg 396/89).

- (v) In case of a solemn (statutory) 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 asking 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. Also the *Handbook*, Appendix 1, Rule 1(e), which requires that the deponent orally state that the deponent makes the 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.

Section 38 of the *Canada Evidence Act* and s. 69 of the *Evidence Act* (British Columbia), which are also set out in Appendix 1 of the *Handbook*, specify the words. According to Appendix 1 of the *Handbook*, many of the requirements for the taking of affidavits described in this passage apply also to solemn declarations.

- (vi) The commissioner should ensure that the deponent is whom the deponent represents himself or herself to be. The deponent should in all circumstances acknowledge that he or she is the deponent. If the commissioner does not know the deponent personally, identification should be requested. The British Columbia Drivers License, which includes a photograph, is a good form of identification for this purpose. Alternatively, an introduction should be obtained from someone known to both the commissioner and the deponent. Note that Appendix 1 of the *Handbook* requires that the deponent acknowledge that he or she is the deponent.
- (vii) The deponent must sign the document, or where permitted by statute, swear that the signature on the document is that of the deponent (*Handbook*, Appendix 1, Rule 1(f)).

10. Alterations, Erasures and Reswearing

Supreme Court Civil Rule 22-2(11) requires that the person before whom an affidavit is made must initial all alterations in the affidavit, and unless so initialed, the affidavit cannot be used in a proceeding without leave of the court. Although the SCCR do not require it, it is wise for the deponent, as well as the person before whom the affidavit is sworn or affirmed, to initial all changes. “Alterations” includes

interlineations, deletions, and additions. The usual method of making alterations is to place checkmarks at both ends of the alteration and to place initials between the checkmarks or in the margin opposite. Where blanks on a printed affidavit form are filled in, this does not constitute an alteration requiring initials (*Bel-Fran Invests. Ltd. v. Pantuity Holdings Ltd.* (1975), 6 W.W.R. 374 (B.C.S.C.)). Where paragraphs of a printed form are struck out, initials are required (*Colt Invests. Ltd. v. Sanai Securities Ltd.* (1974), 1 W.W.R. 279 (B.C.S.C.)).

If an affidavit is altered after it has been sworn, it cannot be used unless it is resworn. Reswearing can be done by the commissioner initialing the alterations, taking the oath again from the deponent, and then signing the altered affidavit. A second jurat should be added commencing with the word “resworn”.

11. Signing as a Notary or Commissioner

A member of the Law Society of British Columbia is entitled to take affidavits and statutory declarations both as a commissioner for taking affidavits in the province of British Columbia and as a notary public in and for the province of British Columbia. If the document will be used in British Columbia, whether in a court proceeding or otherwise, counsel will almost always sign as a commissioner. If there is a statutory requirement, or if the documents are for use outside British Columbia, whether in another province or elsewhere, counsel will sign the documents as a notary.

When taking a statutory declaration or swearing an affidavit, if counsel signs as a commissioner, all that is necessary is that counsel place his or her signature on the line above the words “a commissioner for taking affidavits in the province of British Columbia”.

When counsel is signing as a notary public counsel will place his or her signature above the words “a notary public in and for the province of British Columbia”. Over the signature counsel should then impress his or her notarial seal.

Some American jurisdictions may require, in addition to the statement that counsel is a notary public in and for the province of British Columbia, a statement as to whether and when the lawyer’s commission to sign as a notary public expires. So long as the lawyer remains a member in good standing of the Law Society of British Columbia, the lawyer’s commission never expires. Counsel may therefore insert the words “my commission never expires”. Alternatively, if being cautious and precise, counsel could insert the date that the current practice certificate expires—normally December 31 of that calendar year.

Whether counsel sign as a commissioner or a notary, it is good practice to stamp his or her name and address below the signature, to satisfy the requirement for the commissioner’s name to be legibly provided. This is mandatory for an affidavit that is to be used in the Supreme Court of British Columbia – see Practice Directive of November 22, 2004.

When counsel is asked to swear documents for use outside the province, it is good practice to ask the person who sent the documents whether there are any special requirements in that jurisdiction. If counsel is having documents sworn outside British Columbia for use in British Columbia, review s. 63 of the *Evidence Act* and ensure that there has been compliance by the person taking the statutory declaration or swearing the affidavit.

12. Content and Style

Most applications are decided on the facts, not the law. The way in which the facts are presented is, therefore, all-important. There should be an element of advocacy in the affidavit. This does not mean that the affidavit should be untrue, misleading or argumentative. What it does mean is that your affidavit should be clear, concise and compelling. In short, simply by reading the affidavit, the master or judge should be able to determine what the facts are, what the issue is, and form at least a preliminary opinion that the issue should be resolved in your favour.

How do you accomplish this? You must start with an understanding of the nature of the order you seek and the matters that you must prove to obtain that order. Then you should organize the facts so as to set out, in a clear way, each of the elements necessary to your application. Extraneous or irrelevant matters should not appear in an affidavit—they serve only to distract the master’s or judge’s attention from the issue at hand.

When preparing your affidavit, then, you may find the following checklist helpful:

- (a) Make a list of the issues which you must address to obtain the order you desire.
- (b) Make a list of the facts which bear on those issues.
- (c) Organize the facts in a logical way (for example, according to issue, or chronologically).
- (d) Present the facts in clear, simple sentences which have subjects, verbs and objects. Avoid the passive voice.
- (e) As a general rule, confine each paragraph in the affidavit to a single sentence (or at least matter).

- (f) Ensure that no extraneous or irrelevant matters appear in the affidavit.

Affidavits tend to be more persuasive when they are written in language that would be used by the witness, rather than in language counsel would use.

For detailed information on the preparation of affidavits, see *Affidavits* (Vancouver: CLE, December 1992), containing papers by Mr. Justice John Spencer, Mr. Justice Bruce Cohen, Mr. Justice Frank Maczko, and several practitioners.

13. Cross-Examination on Affidavits

Counsel should keep in mind when preparing affidavits of their own clients, and when reviewing affidavits of opposing parties, that the court has jurisdiction to order cross-examination of a party on an affidavit (SCCR 22-1(4)(a)). Cross-examination may be ordered where there is conflicting evidence on matters that are material to the application for which the affidavits are tendered. See *Brown v. Garrison* (1968), 63 W.W.R. 248 (B.C.C.A.), *Grinnell Co. of Canada Ltd. v. Retail, Wholesale and Department Store Union, Local 535* (1956), 18 W.W.R. (N.S.) 263 (B.C.C.A.) and, more recently, *Kvaerner U.S. Inc. v. AMEC E&C Services Limited*, 2004 BCSC 730 and *Best v. Capital Regional District*, 2006 BCSC 103.

When deciding whether to seek cross-examination on affidavits, it is important to keep in mind two factors: first, in the case of a cross-examination on affidavits, the entire transcript is put before the Court—the examining party is not entitled to pick and choose those questions and answers that are favourable to it; and second, when cross-examination is ordered, it is customary to order that the witnesses from both sides are to be examined. Whether to seek cross-examination is an important strategic decision, not to be taken lightly, and cross-examination on affidavits is rare in British Columbia.

14. Common Errors in Affidavits

(a) Errors in Form

- (i) Style of proceeding—inadequate information (e.g., missing action number, missing a plaintiff or defendant).
- (ii) Introductory paragraph—words other than “make oath and say” or “do solemnly, sincerely and truly affirm and declare”.
- (iii) Identifying the deponent's employer, but not the occupation.
- (iv) Using THAT to start each paragraph (which is unnecessary, even though some statutory forms fail to recognize this).
- (v) Incomplete or inaccurate references to attached or available exhibits. Failure to

complete exhibit stamps on exhibits or completing them improperly (SCCR 22-2(8) and (9)).

- (vi) Not attaching exhibits referred to or attaching exhibits that are already filed in the proceedings.
 - (vii) Missing information in the jurat, for example, wording other than “sworn before me” (SCCR 22-2(8)).
 - (viii) Failing to properly initial altered affidavits or failing to reswear affidavits changed after swearing (SCCR 22-2(11)).
 - (ix) Using “and/or” (use “A or B or both”).
 - (x) Using words for sums of money (use figures).
 - (xi) Verbosity—conciseness is a virtue.
 - (xii) Run-on sentences and long paragraphs.
- (b) Errors in Procedural Law and Evidence
- (i) General statement that the deponent has personal knowledge except where stated to be on information and belief. Some affidavits cannot use information and belief. It is preferable to consider hearsay problems for each paragraph. For example, some affidavits may contain paragraphs stating that the deponent wishes only to identify that a statement was made, not that it is believed.
 - (ii) Making statements on information and belief in matters where a final order is sought (SCCR 22-2(12)).
 - (iii) Where deposing on “information and belief”, failure to fully and accurately identify the source of the information. Almost always, the source must be fully identified. At the very least, give the name.
 - (iv) Use of double hearsay (for example, I am informed by the lawyer's secretary that X told her . . .).
 - (v) Giving opinion evidence without providing expertise of deponent and basis for opinion (*Evidence Act*, ss. 10 and 11, and common law).
 - (vi) Using third party statements where facts are within knowledge of the deponent (for example, using a secretary to depose on information and belief when the client should be the deponent).
 - (vii) Providing only part of the facts, exposing the deponent to loss of credibility on later cross-examination.

- (viii) Making arguments rather than stating facts.
- (c) Professional Responsibility
 - (i) Lawyer swearing own affidavit on matters that could be contentious (if you intend to speak to the matter).
 - (ii) Swearing own affidavit where you may be exposed to cross-examination. This also goes to the weight to be accorded the information.
 - (iii) Deponent making unnecessary, irrelevant statements about the conduct of the other party or lawyer on the progress or substance of the litigation.
 - (iv) Using inflammatory or vexatious statements in the affidavit.
 - (v) Using legalistic language that the deponent could not swear to understand and declare to be true (the affidavit is the deponent's statement, even if the language is yours).
 - (vi) Reference by the deponent to matters arising in the course of settlement discussions, including attaching communications between lawyers as exhibits when some of the contents relate to settlement discussions.
 - (vii) Taking everything the client says at face value without making further inquiries. This leads to further problems for both the lawyer and the client.
 - (viii) Swearing the affidavit without carefully reviewing it with the client to ensure it is accurate; that is, treating accuracy as the client's problem when in fact the lawyer shares the duty.
 - (ix) Paraphrasing the language of the client to twist its meaning into something more favourable to the client.
 - (x) Omitting a crucial piece of information from the affidavit that would put the facts in a different light.
- (d) Substantive Deficiencies (in specific legal field)
 - (i) No evidence provided on key elements of proof required for a successful application.
 - (ii) Failure to include evidence to support urgency in applications without notice.
 - (iii) Inclusion of material that is not relevant to the specific issue on the application before the court.
 - (iv) For applications for non-final orders in family law matters, see the *Practice*

[§3.04] Chambers Advocacy: View From the Bench³

1. Introduction

What follows are the characteristics of good counsel and good presentations in chambers. This list is by no means exhaustive, but it may assist you in being effective in chambers.

(a) The Opening

Counsel should be clear and concise in introducing themselves, and in stating the nature of their application or in stating their position when commencing an address to the court.

(b) Organization and Preparation

Good counsel will have available for the court documents which are carefully prepared, and where the documents are numerous they should be adequately indexed.

(c) Oral Argument

Counsel's oral argument should be relevant and as brief as the subject matter will permit.

(d) Reasonable Position

Counsel should confine their arguments to reasonable propositions if they expect to win the sympathy and attention of the judge.

(e) Candour and Professionalism

Counsel must always be candid with the court and act with a high degree of professionalism.

You may find that all these points are elementary. They should be and, in most instances, counsel adopt them. But some counsel overlook some or all of these points, rendering their presentation ineffective. Each practice point will be discussed in more detail.

2. The Opening

Give a clear and concise introduction of yourself and of your application or your position at the commencement of your address. You should give a proper opening by introducing yourself clearly and succinctly. Say for whom you appear.

You are all aware that you must give the judge your name. You must speak up when you are saying who you are. It is embarrassing to the judge not to know counsel's name, especially after counsel commences the application. If the judge has not been given

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counsel's name or if counsel has not spoken clearly enough for the judge to take a note of it, the judge is put in an unnecessarily embarrassing position. Chambers and court is no place for those who are too nervous or bashful to properly introduce themselves or their application.

If you slur your name so that the judge does not hear who you are and because you are anxious to refer to an affidavit which you have not yet filed you immediately begin by speaking about it by saying "and I wish to refer to the affidavit of Tom Jones—I apologize that I did not file it earlier, etc".

At this point the judge is hopelessly lost and is about to stop you. It may be near the end of a difficult day.

Counsel should avoid a bad opening. In the example given, the judge doesn't get your name; the judge doesn't know if your case is a road accident or a breach of contract; the judge doesn't know who you are speaking for; the judge doesn't know if you are plaintiff or defendant. He or she may assume you are the applicant if you are speaking first, but some defendant applicants stand mute waiting for plaintiff's counsel to identify himself. The judge doesn't know what on earth you want, and is unable to shift into the right gear.

A proper opening goes something like this:

My name is Jane Green, Articled Student. I appear for the applicant. [or the plaintiff or the defendant who is the applicant]

Then you stop for your learned friend to identify herself or himself. You do not speak for your friend.

After that you should say something like this:

This is an action in negligence arising out of a motor vehicle accident. I appear for the defendant. I am seeking an order for the delivery of an affidavit verifying a list of documents under SCCR 26(3) and for the production of documents under SCCR 26(10). The plaintiff has claimed privilege for documents without listing them. My position is that the plaintiff is not entitled to assert privilege for a number of these documents and should be ordered to produce them for our inspection.

An opening such as this tells the judge what the case is about, who the parties are and what the applicant is seeking. The judge has the Rule number that he or she can jot down so that it can be examined if necessary during the argument. The judge is also able to start thinking about the principles that apply to your kind of application without a lot of interruption.

It cannot be overemphasized how important it is to get the judge in context. You are not going to start persuading the judge until he or she has a grasp of the essential matters that you are going to address.

If an application is by consent or is unopposed, you should say so at the very beginning. That information focuses the judge's attention on the aspect of your application that you wish the judge to consider. Obviously a judge who is immediately advised that an application is unopposed will be listening for points which will be different from an application that is contested.

If you do not say that the application is by consent or is unopposed, a judge will probably assume that the application is opposed if there are two counsel appearing. But if the application is unopposed, the judge may stop you from going any further. When only one counsel appears, the judge wants to know right at the start if the application is without notice, consented to, not being opposed, or just a case where the other side hasn't appeared. In the latter situation the judge may want to know more: Where is the other lawyer? Should the application be stood down? Should other counsel be telephoned? Generally what is the situation? Don't keep the judge in the dark about these simple matters and don't assume the judge has read your mind and knows what the situation is.

3. Organization and Preparation

Good counsel will have available for the court well-prepared and well-presented documents. The following points will illustrate why preparation is so important.

The notice of application should state the rule or the statutory enactment relied upon. This is required by Form 32 but is not always followed in practice. Sometimes the notice of application will refer to Rules that are not applicable. This creates confusion for the chambers judge. Precision in the notice of application is the result of precision in thinking about the application before it is spoken to. A precisely drawn notice of application assists counsel to win the support of the chambers judge to counsel's presentation. Moreover, it enables counsel to state at the start of the application what the application is for and under what Rule or statute it is made.

After the clerk calls the case, he or she hands the judge the file. The first document read is the notice of application. Counsel should direct the judge's attention to the nature of the order sought. This cannot be done if the notice of application does not set out precisely what is sought. Counsel's position is assisted by a reference to the rules or to the statute relied on. If the application does not meet this requirement, counsel may take his or her opponent by surprise and this may lead to an application for an

adjournment.

It is important that the notice of application set out the remedy claimed. This will be particularly important if you want to take advantage of SCCR 13-1(4) by having the order made by endorsement of the notice of application.

Further, all of the relief that you seek should be set out. The court may not give any relief which exceeds that which is requested in the notice of application, especially if a respondent is not present at the hearing although he may have been served. In *Bache Halsey v. Charles, Standfield and Dobell* (1982), 40 B.C.L.R. 103 (S.C.), a chambers judge had allowed a application to strike out a defence and then granted default judgment to the plaintiff although the defendant was not present on the application and the notice of application had not specifically sought judgment. The defendant applied later to set aside the default judgment. Spencer J. held that the default judgment was a nullity. Judgment had been given without notice to the defendant that judgment was sought. The notice of application sought only to strike out the defence.

(a) Brief of Documents

If it is necessary to look at a number of affidavits or documents, it is useful to produce a book or brief with these documents collected together so that the judge is not searching through the court file for the crucial document or endeavouring to manage a number of loose documents which are continually burying each other. An Application Record is now required for every contested application. If the documents and exhibits are numerous it is good advocacy to take the time to ensure that they are well presented.

(b) Written Chronology

Sometimes a brief written chronology is helpful. This insures that the judge will have a better chance of getting the facts straight. A judge is not a computer. He or she does not always absorb and collate everything that is said and memory plays tricks in such an intense environment as a busy chambers. Unless you expect a judge to reserve judgment, it is not likely that a narrative summary will be very helpful because the judge will not have a chance to read it. A chronology, on the other hand, may be very helpful. If you have a reputation for accuracy (which should be cultivated), then a chronology may make lengthy references to the affidavits unnecessary. You will not be surprised to learn that a judge's spirit plunges when counsel announces that he or she proposes to go through voluminous affidavits in detail. That should not usually be necessary if you

prepare a chronology which accurately reflects what is in the affidavits. In complicated matters it is useful to make references in the chronology to paragraphs in affidavits which support your important points.

Note that the above text predates SCCR 8-16, which provides that unless an application is estimated to take more than 2 hours, a party is not permitted to submit a written argument other than what already appeared in the notice of application or application response. Whether a judge or master might consider a chronology to be something other than a written argument remains to be seen.

(c) Calculations

It is very useful to produce calculations in written form. Examples include summaries of different kinds of claims or damages, mortgage calculations, spousal income and expense calculations, etc. There is nothing worse than counsel reciting a lot of numbers, even when they are extracted from various affidavits, and expecting the judge to remember them or to write them all down. That wastes time and calls your professionalism into question. It is not necessary that these kinds of calculations be served in advance, although early service will usually be helpful. If calculations are not served in advance they should at least be given to your learned friend as soon as you see each other in chambers so that your friend will have a chance to look at them before the application is called. Documents should rarely be exchanged after the application has been called.

The same caveat with respect to SCCR 8-16 and the limitation on written argument applies.

(d) Written Submission

As noted above, both the notice of application and the application response contain summaries of the facts and law. As well, for an application estimated to take more than 2 hours, a party may prepare a more detailed written submission.

A written submission (sometimes referred to as a "Chambers Brief") helps you collect your thoughts, marshal the evidence appropriately, and assemble the key case references in a coherent and logical fashion.

Do not read a written submission that you have not provided to the court. Frequently counsel who have gone to great pains to prepare in writing what they intend to say orally ruin the effectiveness of their argument by reading rapidly from their written material which the judge does not have. This puts the judge in the

difficult position of having to take notes when he or she would prefer to listen to what you have to say while following your written argument.

(e) Briefs of Law

The management of authorities in chambers is again a matter that you should consider before you make your application. You should always know, and have with you, the leading case on whatever point you are arguing, even if it is just a volume from the library. Expensive books of photocopied cases are not always necessary but, for most applications, at least some photocopies are useful.

It is sometimes acceptable to include only a headnote and a page or two where the relevant point is made. It is not usually necessary to include the full text of cases such as *Donoghue v. Stevenson*.

4. Oral Argument, Relevance, and Brevity

State the facts briefly. Avoid reading affidavits verbatim.

Chambers really operates on the “statement of counsel” principle. You should remember that anyone can read affidavits to the court, but only counsel can make a proper submission. The details, of course, must be in the affidavits, but in a few short sentences you should be able to paint a picture for the judge which permits you to make your point. You may refer to a passage or two from the affidavits, or to a document, or an authority, but do not get bogged down in the affidavits. Leave that to the loser.

(a) Relevance

If you are acting for the plaintiff in an action for wrongful dismissal and your application is for the production of documents under SCCR 7-1(17), you can probably give a very brief and useful history of the action and concentrate on the circumstances under which the documents have been withheld in order to obtain an order for production. If your application is in the same action but is for judgment under SCCR 9-7, you would have to give much more detail of the history and nature of the action and state fully the facts which should be decided in your favour when arguing that type of application.

Chief Justice McEachern during a 1985 chambers practice workshop, said:

. . . there is in my view, something very pleasant and attractive about a short, logical, rational submission. A lawyer who confidently makes his point this way almost implies,

subconsciously, that he must be right or he could not make his point so easily and what he says and the way he says it seems to warrant that it was not necessary for him to go on and on with endless recitations of facts and law ...

Judge van der Hoop, at a CLE seminar held in February 1982, stated:

The first question you want to ask yourselves is, “Is the application necessary?” There have been a number of comments from the judges about the frequency of applications which do not appear to the judges to be really necessary. Sometimes these are contested. They are an unnecessary consumption of time. A number of these problems can be cleared up by co-operation between counsel. It is not a happy occasion to realize that an application is being brought and contested simply because there is ill-feeling between counsel. That should never be the basis for an application. Counsel should strive to co-operate with one another. I always felt, when I was practising, that the practice of law was tough enough without counsel making it more difficult than necessary.

Judge van der Hoop added that counsel should ask themselves, “Do I have a proper basis for the order I am seeking?” The Judge mentioned that counsel sometimes view chambers as some sort of cure-all. He referred to the case of an application by a mortgagee's lawyer for an order that the mortgagor produce proof of fire insurance. As Judge van der Hoop pointed out, if there was no fire insurance, the proper remedy was for the mortgagee to take out its own fire insurance. No court order was needed.

Finally, if you have a number of authorities on the same point and have a brief of law containing those authorities, an effective presentation is to indicate to the chambers judge that although you are relying on all of the authorities, you intend to quote from only the leading case on the point. Quote only from that case.

(b) Over-Running Time

With the pressure in contested chambers, the length of time which is estimated for an application is a matter of great significance to the chambers judge. Do not take more time than your estimate.

5. Reasonable Position

Counsel who confine their argument to reasonable propositions will find most judges sympathetic to their application.

The worst thing you can do is to appear to be unreasonable, even if you are legally correct. For example, there should be a good reason why you are in court. Why are you opposing an application for an adjournment that is bound to succeed? You should not be in court trying to vary a maintenance order when a trial is two weeks away. You should not be in court arguing where and when an examination for discovery should be held. In other words, there should be a real point in your case or in your opposition that warrants your being in court. One example which comes to mind is the making of a summary trial (SCCR 9-7) application within a week or two of the date set for trial, or on the opening day of the trial (*Belden Farms Ltd. v. Milk Board and Canadian Dairy Commission* (1989), 14 B.C.L.R. (2d) 60 (S.C.)). [Editor's Note: this comment predates SCCR 9-7(3), pursuant to which a SCCR 9-7 application can no longer be heard less than 42 days before trial.]

Your standing at the bar is judged every time you are there. Counsel usually deserve whatever reputation they acquire in chambers.

6. Counsel Must Always Be Candid With the Court and Act With a High Degree of Professionalism

(a) Without Notice Applications

When drawing an affidavit in support of an application to be made without notice, you should remember the requirement that you must lay all material facts before the court. Suppress nothing; see Chapter 8, Rule 21 in the *Professional Conduct Handbook*. If you fail to do this, you run the risk that the order will be set aside *ex debito justitiae* without regard to the merits; beyond this, you will lose your credibility. The general rule is that when you are applying without notice you must demonstrate the utmost good faith. If there are circumstances of which you are aware which should be brought to the attention of the chambers judge, you are under an obligation to do this, even though the circumstances may not be in your client's favour.

(b) Other Ethical Considerations

Chambers applications must frequently be prepared with a great deal of haste and under a great deal of pressure. Counsel will sometimes dash off an affidavit to meet a sudden problem without sufficient precision. Avoid this practice by drafting an affidavit and by checking it over with the deponent before it is typed in final

form. When the deponent swears it, be sure that the deponent has been given sufficient opportunity to read it through and correct any errors and differences in wording that he or she notes. If possible, use the words of the deponent rather than your own. You should remember that clients and deponents will usually swear almost any affidavit prepared by a lawyer because they assume that the lawyer is putting it in correct form. You should always explain to a deponent the need for accuracy and precision. You should advise a deponent not to hesitate to change anything that you have had typed up if it requires correction.

Also remember that before you draft an affidavit you should have a complete understanding of the facts and the law relating to the case. Remember that deponents may be cross-examined either before the hearing in which the affidavit is to be read, or at discovery, or at trial. You should remember not to allow your client or a witness, who is supporting your client, to make an incorrect or incomplete statement of facts or state an inaccurate or false position. Even very sophisticated persons will swear an affidavit on which they are subsequently cross-examined and obliged to admit to gross errors or exaggeration. Is their lawyer to blame for allowing that to occur?

You should avoid the practice of preparing an affidavit for your secretary to swear upon information and belief supplied by you, the lawyer. This is bad practice except in purely formal matters such as the mailing or receipt of a letter. Whenever possible the person chosen to swear the affidavit should be the client; see Canon 3(11) of the Canons of Legal Ethics.

Counsel should not attempt to speak to their own affidavits on matters that are controversial; see Chapter 8, Rule 9 of the *Professional Conduct Handbook*. Even on matters that are not controversial, counsel should only speak to their own affidavit after discussing the matter with opposing counsel.

You should be reluctant to include something controversial in an affidavit that involves you personally. You should only do this if it is necessary and proper and no other course is open to you and you should be prepared thereafter to step out of the litigation if necessary (*Rottacker Farms Limited v. C. & M. Farms Limited* (1976), 2 W.W.R. 634 at 655; *Phoenix v. Metcalfe* (1975), 48 D.L.R. (3d) 631 (B.C.C.A.)).

You should think very hard and if possible obtain independent advice before you depose to anything said by another lawyer if he or she

does not expect to be recorded. What happens in the barrister's room or in a judge's chambers should never appear in an affidavit unless the circumstances indicate that what was said was "on the record".

Personal criticism of a judge, registrar, trial coordinators or court reporters are matters that require much thought. It is probably a contempt to attribute unfairly corruption, or conscious or unconscious bias to a judge. If criticism is not made in good faith or exceeds the limits of good courtesy, it amounts, to scurrilous abuse. That also may be contempt.

[§3.05] Drafting and Entering Orders

1. Introduction

Following an interlocutory application, counsel must draw the resulting order. Under SCCR 13-1(3), the order must be in Form 34, 35, or 48 and must be approved by all parties in attendance. If a party has appeared in person, the court may dispense with the necessity for approval of the form of the order (SCCR 13-1(1)(b)). A lawyer must, however, ask the court for this direction, it will not be presumed.

When an oral order or judgment is granted, it is imperative for counsel to make careful notes of the terms. If you are unsure of a term, or if the order sounds ambiguous to you in any way, you should immediately ask the judge or master to clarify the point. If the judge or master has not in your opinion covered all of the relief asked either in your pleading or in your notice of application, you should draw that to his or her attention so that the notes you have will be unambiguous.

2. Drafting the Order

Orders and judgments must be drafted in accordance with the SCCR and Forms. You should review those forms before drafting your order or judgment, to lessen the possibility that your drafting will not be accepted at the registry.

Where do you obtain the information that forms the heart of these documents? You will consider the contents of your originating materials (notice of civil claim, petition or notice of application) filed with the court registry. Next, your notes or the transcript of the reasons for judgment should reveal what was granted in full, in part, varied, etc. These notes will be the starting point for your drafting.

It might be worthwhile to devise a checklist of the relief sought, especially in complex cases, to minimize the amount of note taking, especially since you will rely heavily on your notes during the drafting process.

If you are uncertain of the terms of the order that was made, you should go to the registry and obtain a copy of the clerk's notes or a transcript of the order or judgment. It may also be possible to arrange with the court registry to listen to a recording of the comments of the judge or master when granting the order—this will be less expensive and time-consuming than ordering a transcript (which must be prepared by a court reporter and then approved by the judge or master before being released).

To the personnel who check civil orders and judgments, the clerk's notes are a most important factor in the entry of an order because they are part of the official record of court proceedings. One of the clerk's mandates is to provide complete, accurate and legible notes so that the record be clear and to make the task of checking large volumes of orders and judgments much easier.

After you have reviewed the clerk's notes, if you are still unclear as to any point in a decision of the court or if matters have not been dealt with that should have been dealt with, you should arrange with the other counsel to bring the matter on before that judge again to have matters clarified or completed.

3. Forms and Precedents

Some of the most important sources influencing the form and style of orders and judgments are as follows:

- (a) Supreme Court Civil Rules generally;
- (b) Forms 34, 35 and 48 of the Supreme Court Civil Rules;
- (c) case law (Supreme Court, Court of Appeal);
- (d) published, court-approved precedents;
- (e) other established, profession-wide, court-approved precedents;
- (f) unpublished precedents, provided by the court registry; and
- (g) preferences of groups and/or of individual judges.

Specific publications that are available to help you include:

- (a) *Supreme Court Chambers Orders—Annotated*, published by CLE (The orders were drafted by Mr. Justice P. van der Hoop and reviewed by the Judges' Practice Committee); and
- (b) McLachlin & Taylor, *British Columbia Court Forms*, (Markham: Butterworths).

4. Format

An order or judgment should look good and tell all. To do that, it should observe the guidelines in the Supreme Court Civil Rules and the Forms, and be governed by two basic principles:

- (a) it must accurately reflect the court’s decision (see the Practice Direction dated October 17, 1990); and
- (b) it should speak for itself, so that any reader (party, counsel, judge, police, interested public, etc.) can understand its meaning, without referring to other materials.

The construction of orders follows a fairly standard format, incorporating the following components.

(a) File Number and Style of Proceeding

The top right-hand corner reveals the file number and location of the registry. This is followed by the identity of the court; the appropriate enactment or Rule (for example, “In the matter of the *Family Relations Act . . .*”); and the names of the parties. The names must be in full (SCCR 22-3(5)). “And others” after the first name, while acceptable for some documents, is improper in an order. Ensure your use of the class of party (plaintiff/petitioner, etc.) is correct by comparing it to your copy of the originating document.

(b) Judge and Date

Supreme Court judges are shown as “Before The Honourable Mr./Madam Justice (name)”. Masters are shown as “Before Master (name)”.

Lists of Supreme Court judges are shown in the front pages of the CBA’s *B.C. Lawyers’ Telephone, Fax and Services Directory* and are also available on the website of the Supreme Court (www.courts.gov.bc.ca).

By contrast to pleadings in Provincial Courts, first names and initials are not used (unless there are two judges with the same last name). The date of the order or judgment must be the date on which the decision was pronounced (SCCR 13-1(8)). If judgment was reserved, both the date and the preamble will reflect this.

(c) The Preamble

This is the introduction to the order or judgment and includes the following information:

- (i) that the application or trial of the action came on for hearing on the date shown (or others if judgment was given later);
- (ii) name(s) of counsel or other representative and who they represented;

- (iii) appearances by other parties, such as those acting on their own behalf;
- (iv) who was served, or if the matter proceeded without notice;
- (v) if the matter was brought by consent of the parties; and
- (vi) if judgment was reserved until the date shown above.

(d) The Body of the Order or Judgment

Following the preamble is the body of the order or judgment, which sets out in detail the relief granted by the court. Using available and appropriate resources (counsel’s notes, precedents, stylistic preferences), you will be able to prepare this portion with little difficulty.

Don’t forget to deal with costs, if appropriate.

(e) Endorsements

An endorsement is the signature of a party or counsel. Usually an endorsement will indicate that the order has been “Approved as to Form”. If a party has consented to all of the order, the endorsement will usually indicate that it has been “Approved and Consented to”. SCCR 13-1(1)(b) governs approval; SCCR 13-1(10) governs consent.

Generally, endorsements are required by all parties who attended an application unless

- (i) the court waives approval by one or more of the parties pursuant to SCCR 13-1(1)(b);
- (ii) the order is signed or initialed by the presiding judge or master pursuant to SCCR 13-1(2);
- (ii) a party did not attend and was not said to have consent to the order (SCCR 13-1(1)(c); or
- (iii) an unrepresented party who has attended before the judge or master and orally consented to a consent order, or gave a written consent (SCCR 13-1(10)(b)).

It is important to understand the difference between consenting to an order and taking no position. If opposing counsel tells you that they consent to an order, then the order should not be entered without first being signed by counsel for that party – whether or not they attended the hearing. If opposing counsel tells you that they are taking no position with respect to your application, and does not attend the hearing, then there is no need for their endorsement on the order. Be clear on the position that any non-attending party is taking and advise the court

accordingly.

(f) Points to Observe

Supreme Court Civil Rule 13-1(1) directs that approval shall be in writing. This is generally understood to mean a complete and legible signature, on the line above the identity of the person signing (for example, counsel for the petitioner). Initials, or a name in quotation marks, are not acceptable. One lawyer signing on behalf of counsel for the party is acceptable. Approval in the name of a firm of solicitors is not acceptable (Practice Direction dated October 17, 1990). There is no objection to pleadings being signed, filed and issued in the name of a firm of solicitors. The Practice Direction states that the practice requiring “Approved as to Form” or “Approved and Consented to” shall be continued, but it will be assumed that an endorsement “Approved as to Form” includes consent to any provision described in the order as being made by consent.

5. Entering the Order

When the order has been approved by all counsel who attended the hearing, it is then submitted to the registry for entry. If counsel cannot agree on the form or content of the order or judgment, then they should obtain the notes of the clerk immediately to see if the matter can be resolved without resorting to further court appearances.

If counsel cannot agree on the form of the order, the procedure is to take out an appointment to settle in accordance with SCCR 13-1(12), as described below. Notice of the appointment must be served on all other parties whose approval is required. The order will then be settled at a hearing before the registrar, based on reasons for judgment if available or, if not, based on notes taken by the courtroom clerk and material in the court file. Virtually all proceedings in chambers are taped, so a transcript may be ordered of oral reasons if any counsel deems it necessary. Note that this normally takes some time, as the reasons are transcribed by a court reporter then forwarded to the judge or master for review before being issued to the parties.

In most cases, orders made in chambers need not be inspected or initialed by the judge or master. The Practice Direction on “Counsel Signatures—Orders” dated October 17, 1990 spells out situations where orders must be initialed. For example:

- (a) when the orders do not correspond with the clerk’s notes;
- (b) desk orders other than consent orders; and
- (c) judgments after trial.

When counsel agree on the form and content of the order, but the registrar, after reviewing the clerk’s notes or reasons for judgment, does not agree, you should arrange with the registry to attend before that judge to settle the terms of the order. Normally this can be done by contacting the trial division, asking for a 15-minute appearance before the specific judge and then filing a requisition bringing the matter back before him or her.

As well, if the disagreement between counsel on the terms of the order is substantial and the matter somewhat complex, the registrar may decline to settle the order and suggest it be referred to the original judge.

As a practical matter, if you are in a hurry to have the order entered or if you feel the matter is too complex to be dealt with by the registrar based on the written reasons for judgment (or the clerk’s notes or a transcript if the decision has been orally granted), you should proceed immediately to have the matter brought before the judge in question by arranging an appointment before him or her with the registry and serving your requisition.

It is also permissible in urgent cases to have a draft order available at the hearing of an application and to ask the judge or master to sign the order at the conclusion of the hearing. Be prepared to explain to the judge or master why the order cannot be entered in the ordinary course. Many judges or masters will ask you to have the form of order approved by registry staff before they sign. If you anticipate asking the judge or master to sign the order at the conclusion of the hearing, you should consider having the order checked by the registry before the hearing. If the judge or master has signed the order the registry staff will generally enter it without further review (SCCR 13-1(2)).

The time required to process and enter an order in the ordinary course varies greatly from registry to registry. You can expect most registries will take a week or two to enter an order, but some take much longer than that. You can normally find out from the registry or from a registry agent what the typical timeline is.

You may ask the registry to enter it on an expedited basis by submitting the order with a covering letter or requisition explaining why expedited entry is necessary. Orders on an expedited basis are entered within a day or two. In the case of an order that must be entered more quickly (such as, an urgent injunction), it is advisable to have a draft order signed by the judge, then take it to the registry yourself and explain to the registry staff why it is urgent.

6. Amending an Entered Order

In general, once an order has been entered, the presiding judge is *functus* and unable to deal further with any problems that should have been dealt with during the application or the trial unless the order itself allows for his or her further involvement. However, SCCR 13-1(17) does allow for correction of clerical errors and for amendment of an order to provide for relief that should have been adjudicated upon but was not. There is also an inherent jurisdiction to amend an order that reflects an error in expressing the manifest intention of the Court: *Buschau v. Rogers Communications Inc.*, 2004 BCCA 142.

Amendments to entered court orders and judgments cannot be made without permission of the court. The current practice is for an application to be made either in chambers, or to the trial judge, to deal with this issue.

The original entered document cannot be amended. In addition, it is improper to tender a revised, backdated order or judgment for entry. A new order, setting out the amendment particulars, must be prepared. The two documents are then used together as the complete order or judgment.

7. Alternatives to Formal Orders

Supreme Court Civil Rule 13-1(4) permits other material to be endorsed (for example, notice of application, petition) in place of a formal order.

This has not been a common practice in recent years. It has typically been used only when there is insufficient time or opportunity to draft an order. However, the Form 32 notice of application adopted in 2010 contains a specific section for endorsement of the notice of application, so it may become more common. The document must contain substantially all the relief granted by the court.

In the case of a restraining order application, it is doubtful that a notice of application would serve as a suitable substitute for a formal order. The police would almost certainly not accept the endorsed notice of application for enforcement purposes.

8. Identifying the Sender

In order to ensure that a copy of your entered order or judgment is returned to you, you must attach a backing sheet (or at least the name and address of the lawyer at the end of the document) to the order when it is provided to the registry.

