

AFFIDAVITS

INTRODUCTION

Affidavits consist of written statements, perhaps with documents attached as exhibits. The person signing the affidavit must **swear** (or affirm) to the truth of its contents. If properly sworn, filed and served on opposing parties, a court can accept the contents as evidence. The person swearing the affidavit need not come to court. An opposing party can, however, cross-examine the person on the contents under oath.

The Board does not produce affidavits very often. Legal counsel prepare them in consultation with the Chair. Board affidavits often describe how the Board processed a particular file and what hearings took place. Hearing summaries and correspondence are often attached as exhibits.

The Director or Manager of Settlement usually swear Board affidavits because they have responsibility for case management. In this policy, **Director** refers to both the Director and Manager. This policy does not discuss affidavits that parties use in Board proceedings, only those prepared by the Board for use in the courts. This policy describes:

- when the Board uses an affidavit;
- the Director's responsibilities before swearing an affidavit;
- who administers the oath to the Director;
- how to prepare an affidavit that satisfies the Alberta Rules of Court; and
- filing and serving the affidavit, and the right of cross-examination.

WHEN DOES THE BOARD USE AN AFFIDAVIT?

The Board may produce an affidavit, to respond to an application to **stay** a Board decision. This arises in some judicial review matters. After filing the judicial review application, the party immediately applies by separate motion, for a court-ordered stay. The party does not want the Board's decision to take effect until the court has heard and decided the judicial review. See: [[Preparing the Return & Brief, Chapter 36\(a\)](#)].

To obtain a stay, the party must show the court that the application meets a specific legal test. Because the Board has not yet produced the **record**, evidence by affidavit may be necessary. This is especially true in cases challenging the fairness of Board procedures and decisions about evidence during the Board hearing. The Board may wish to explain and attach certain letters and the hearing summary. These help the court to decide if the party's case on judicial review will be as strong as the party says. The documents often show what the parties knew about procedures and issues the Board intended to address at its hearing.

The Board may also prepare an affidavit, if a witness refuses to comply with the Board's Notice to Attend. The party that applied for the Notice must prove to the Board that it properly served the witness and that its case is hurt without the evidence. See: [[Notices To Attend and Produce, Chapter 32](#)]. If the Board agrees, it can apply for a Court order directing the person to attend. The affidavit would explain and attach documents such as the Notice to Attend, the party's proof of proper service, and the Board's hearing summary.

DIRECTOR'S RESPONSIBILITY BEFORE SWEARING AFFIDAVIT

Statements in an affidavit must be true. If an affidavit is untrue, the Director may be subject to sanction for giving false evidence. Board affidavits tend to show how the Board processed a file, and do not include contentious statements or statements of opinion. The draft affidavit is unlikely to contain any false statements. Even so, the Director must carefully review and revise any inaccuracies before swearing the affidavit.

As a general rule, the Court requires that statements in an affidavit be within the **personal knowledge** of the person swearing the affidavit. See: [*Alberta Rules of Court, Rule 305*]. This suggests that the Director and Manager can only make statements about events they saw, things they said, and letters they sent or received.

Most Board affidavits are, however, used in **interlocutory applications**. These are procedural applications leading up to the hearing or trial of a case. Because the application does not make any final determination of the rights between the parties, affidavits may contain statements based on **belief**. An application for a stay of the Board's decision pending judicial review is an example.

If the Director bases a particular statement on **belief** rather than **personal knowledge**, the Director must state the source and grounds of the belief. For example:

"Mr. X told me" [*which identifies the source*] "that it was he, and not Mr. Y that spoke with the Board's officer on Tuesday, March 1st. I believe this is true because [*and then set out the grounds*], I attended a full-day labour arbitration conference in Calgary on March 1st. Mr. Y was present both morning and afternoon."

WHO MAY ADMINISTER THE OATH

Section 13(1) of the [Code](#) allows Board officers and members to administer oaths for purposes of the Code. For example, they can administer an oath to a witness before the witness gives evidence at a Board hearing. They can also do so for persons wishing to swear affidavits of service for use in Board proceedings. See: [[Oaths, Chapter 34\(b\)\(iii\)](#)].

Section 13(1) does not authorize a Board officer or member to administer oaths for affidavits used in judicial review proceedings. A Commissioner for Oaths must swear documents for use in court. See: [*Alberta Rules of Court, Rule 309*].

All Board officers should be Commissioners for Oaths. Apply under the *Commissioner For Oaths Act, R.S.A. 1980, c. C-19*, to the Official Documents & Appointments branch of the Attorney General's department. This is usually done through the department's Human Resources Branch. They publish a booklet: "Information and Instructions Pertaining to Appointments of Commissioners for Oaths".

FORM OF AFFIDAVIT—RULES OF COURT

Rules 298 – 314 of the Alberta Rules of Court set out certain requirements for an affidavit. In preparing an affidavit:

- Copy the **style of cause** as it appears in the Originating Notice. The style of cause names the level of court and parties to the action. Include the action number.
- State the person's name in the affidavit title. This helps the Court if there is more than one affidavit.
- State the Director's full name, city or town of residence and occupation in the opening sentence.
- Number paragraphs that follow the opening sentence. Deal with only one subject per paragraph.
- Identify the Director of Settlement's responsibility in the first paragraph. This allows the Director to claim knowledge of the matters discussed in the affidavit.
- Double-space the affidavit.
- Write the Director's statements in the first person—"I stated x", "I saw y". Write in clear, unambiguous English.
- Express dates and figures in numbers or words.
- State the purpose for making the affidavit in the final paragraph. For example: "I make this affidavit to oppose the union's application to stay the Board's order of September 21, 1992 pending judicial review."
- Assign letters of the alphabet to documents marked as exhibits: Exhibit A, Exhibit B, etc. Mark the first page of an exhibit with the Board's exhibit stamp.

Before administering the oath, the Commissioner for Oaths initials any hand-written changes, deletions or additions before administering the oath to the Director. These changes could appear in the body of the affidavit, jurat or exhibits. See: [Rule 308 of Rules of Court]. The Court can reject an affidavit that is not properly initialled.

After administering the oath, the Commissioner for Oaths:

- Completes the **jurat** at the end of the affidavit. The jurat certifies when, where and before whom the Director swore and signed the affidavit.
- Fills in the information required by the Exhibit stamp. This verifies each exhibit in a manner similar to the jurat.

AFFIDAVIT FILING AND SERVICE, AND CROSS-EXAMINATION

A Board staff member files the originally signed affidavit with the clerk of the court. Take copies for date-stamping by the clerk and service on the parties.

Opposing parties have the right to cross-examine the Director on statements in the affidavit. If this happens, the parties decide upon a convenient location. A Court reporter attends and produces a transcript of the cross-examination for use in Court. The Court will adjourn its hearing if necessary, to allow an opportunity for cross-examination.

A party can only cross-examine the Director on topics raised in the affidavit. In most cases, Section 3(1) of the Code allows the Director to refuse to testify or produce documents concerning work matters. If the Board chooses to provide evidence by affidavit, however, the Director gives up the Section 3(1) protection for matters discussed in the affidavit. Cross-examination on a topic raised in the affidavit can be wide-ranging. The Chair should review an affidavit before the Director swears it.

For some topics, the Director need not give any information under cross-examination, even if the affidavit mentions them. Section 14(6) allows the Director to refuse to give information about what persons are, wish to be, or do not wish to be, members of a trade union.