

Subject: **AFFIDAVITS OF ATTESTATION**

BACKGROUND

Most instruments (1) executed by an individual must be witnessed by a person who must sign his name to the instrument as a witness and then make an affidavit of attestation, commonly called an affidavit of execution, in the prescribed form. (2) The requirement for a witness and an affidavit of attestation is a safeguard against forgery and enables the execution of a document to be proved in court by an independent party. A deficiency in meeting the attestation requirements does not invalidate a document which has in fact been signed by the proper person and the Land Titles Act provides that the court may authorize registration of an instrument which has not been properly attested. (3)

REGISTRATION PROCEDURE

1. Documents Not Requiring A Witness And An Affidavit of Attestation

- a) a grant from the Crown
- b) an order in council
- c) a regulation filed under the Regulations Act
- d) a notification referred to in section 32 of the Land Titles Act
- e) an instrument under the seal of a corporation
- f) a caveat
- g) an order of a court or judge
- h) an execution
- i) a certificate of a judicial proceeding attested as such
- j) an instrument executed by a Minister of the Crown in the right of Alberta or by a person authorized by him to execute the instrument
- k) an instrument, including an instrument executed before the coming into force of section 152.1 (i.e., prior to June 6, 1983), that is provided for under another Act or a regulation and that does not under that Act or regulation require a witness to the instrument (e.g., builders' lien) (4)

2. Ineligible Witnesses - Neither a person who is a party to an instrument nor a spouse who consents to the instrument pursuant to the Dower Act may be a witness. (5) A relative, including a spouse, is not disqualified from being a witness provided he or she is neither a party to the instrument nor has a dower interest. The person acting as witness or commissioner for oaths in any of the required affidavits is not a party to the instrument.

3. Affidavit (Form 31) Requirements (6)

- a) A full given name is required for the witness. If only initials are given at the beginning of the affidavit but the signature discloses a legible given name, it is not necessary to reject. Also, the requirement for a full given name can be waived if the witness is sufficiently identified such that he could be located in the future (e.g., the full name of an Alberta lawyer could be ascertained from the Law Society's records).
- b) The names of the parties in paragraph 1 need not be identical to the names in the instrument but must be consistent so that it is apparent that they are the same person.
- c) The jurat must state the date when and the place where the affidavit is taken. If only the month and year are completed for the date, it is not necessary to reject for this reason alone. An affidavit which is affirmed or is sworn to by a person who is illiterate or blind or does not understand the English language must have an appropriately modified jurat, as set out in the "Instructions To Persons Authorized To Administer Oaths, ..." (Schedule A attached).
- d) Any corrections in the body of the affidavit or jurat must be initialled by the person before whom the affidavit is sworn.
- e) **Person Before Whom Affidavit May Be Made**
- Registrar
 - Deputy Registrar or Assistant Deputy Registrar
 - Justice of the Court of Queen's Bench or Court of Appeal
 - provincial judge
 - notary public (the seal is optional if the affidavit is taken within Alberta for use within Alberta) (7)
 - commissioner for taking affidavits
 - justice of the peace in or for Alberta
 - police officer as defined in the Police Act
 - a barrister and solicitor of Alberta
 - a student-at-law under The Legal Profession Act
 - a full-time commissioned officer in the Canadian Forces
 - a member or member elect of the Legislative Assembly of Alberta
 - a member of a municipal council in Alberta
 - a member of a board of trustees of a school district or school division in Alberta
 - a member from Alberta of the House of Commons of Canada
 - a member of the Senate of Canada who at the time of his appointment as a senator is a resident of Alberta
- f) the person is required to legibly print or stamp in legible printing next to his signature his name and, in applicable cases, the date of expiry of his commission. (8) If his name is not printed or stamped but the signature is legible, it is not necessary to reject for this reason alone. If there is no date of expiry, it is to be assumed that the commission does not have a termination date.

4. **Person Before Whom Affidavit May Not Be Made** - The Registrar is not required to register an instrument or a caveat if the person who acted as a commissioner for oaths or notary public in respect of that instrument or caveat is either a party to it or a spouse who consented to it pursuant to the Dower Act. (9)

5. **Defective Attestation** - The court may authorize the registration of an instrument notwithstanding that the proof of the execution may be absent or defective. (10) This will normally be done by a Fiat endorsed on the instrument. If it is by way of separate order, attach the order to the instrument. Fiat re: attestation does not require section 180.1 compliance.

6. **Marksman Affidavit** - If the person making the affidavit or statutory declaration is blind or illiterate, you must read the document, or cause it to be read, to the person and then ask the person if he understood what was read to him. You may only administer the oath, affirmation or solemn declaration if you are satisfied that the person has in fact understood what was read to him. In those cases, the ordinary form of jurat must be amended by inserting the following before your signature:

"As (name of person) is blind (or illiterate)

- a) this affidavit (or statutory declaration) was read to him in my presence,
- b) he seemed perfectly to understand it, and
- c) he made his signature (or mark) in my presence." (11)

STATUTE AND CASE REFERENCES

Statute references are to the Land Titles Act, R.S.A. 1980, c. L-5, unless otherwise indicated.

1. "Instrument" is defined in s. 1(l) to mean:
 - (i) a grant, certificate of title, conveyance, assurance, deed, map, plan, will, probate or exemplification of will, letters of administration or an exemplification thereof, mortgage or encumbrance,
 - (ii) a judgment or order of a court,
 - (iii) an application under section 76, or
 - (iv) any other document in writing relating to or affecting the transfer of or dealing with land or evidencing title thereto.
2. s. 151 and Form 31, Alberta Regulation 480/81
3. s. 152.2 and 152.4
4. s. 152.1
5. s. 152.01; This section codifies the law as established in such a case as *Hebb v. Registrar of Titles*, [1983] 3 W.W.R. 48 (N.W.T.S.C.).
6. s. 201(3); Rules 298 - 314 of the Alberta Rules of Court outline the requirements for affidavits
7. s. 5(3), Notaries Public Act, R.S.A. 1980, c. N-11

8. s. 9(1), Commissioners For Oaths Act, R.S.A. 1980, c. C-19; s. 7(1), Notaries Public Act
9. s. 152.02
10. s. 152.4 and *Barty v. Kerr and the Registrar N.A.L.R.D.* (1975), 8 Alta., L.R. 275 (Alta. D.C.)
11. see Schedule A

INSTRUCTIONS

TO PERSONS AUTHORIZED TO ADMINISTER OATHS, AFFIRMATIONS AND SOLEMN DECLARATIONS WITHIN THE PROVINCE OF ALBERTA

A. GENERAL

Affidavits are documents containing statements that are verified by the oath or affirmation of the person making those statements. An affidavit must be authorized by legislation (a statute or a regulation) which permits or requires the proof of certain facts by way of an affidavit.

Statutory declarations are documents containing statements that are verified by the solemn declaration of the person making those statements. A statutory declaration is made pursuant to the Canada Evidence Act or the Alberta Evidence Act and is used in situations where there is no legislative authority for an affidavit. Both acts prescribe the following form for a statutory declaration:

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

*Declared before me
at _____ this _____ day of
_____, 19 ____"*

Affidavits and statutory declarations are used for the purpose of establishing legal rights and, if they are not properly made, the legal rights sought to be established may be impaired or destroyed. The importance of affidavits and statutory declarations is reflected in the Criminal Code which provides a maximum penalty of 14 years imprisonment for any person making a false affidavit or statutory declaration.

In order for an affidavit or statutory declaration to be legally valid, it is essential that the oath, affirmation or solemn declaration be administered properly. A person administering an oath or affirmation may be called into court to establish that an oath, affirmation or solemn declaration was administered properly by him. It is therefore imperative that the proper procedure be followed on all occasions. The legal validity of an affidavit or statutory declaration will then not be jeopardized, nor will the person who administered the oath or affirmation be embarrassed by failure to recall the procedure used on a particular occasion. As earlier mentioned, the Criminal Code places a high degree of responsibility on that person under section 138 which provides, in part:

"Every one who –

(a) signs a writing that purports to be an affidavit or statutory declaration and to have been sworn or declared before him when the writing was not so sworn or declared or when he knows that he has no authority to administer the oath or declaration, ...

is guilty of an indictable offense and liable to imprisonment for a term not exceeding two years."

It is also considered poor practice for a Commissioner for Oaths to take their spouses oath, affirmation or declaration. The reasoning for this is that sections of the Canada Evidence Act and the Alberta Evidence Act protect spouses from giving evidence against one another and this results in possible problems respecting the proof of affidavits in court and prosecution relating to Criminal Code offences involving perjury and the swearing of false affidavits.

B. HOW TO ADMINISTER AN OATH TO A PERSON MAKING AN AFFIDAVIT

When a person of the Christian or Jewish faith appears before you to make an affidavit, usually an oath is given. The oath should be administered in the following manner:

1. Ask the person appearing before you whether he is the individual named in the affidavit as the person making the affidavit. If you know the person, it is not necessary to confirm his identity.
2. Ask the person to sign the affidavit. If the affidavit has already been signed, ask the person if the signature on the affidavit is his.
3. Hand the person a Bible or New Testament, or, if the person is of the Jewish faith, an Old Testament. Alternatively, you may ask the person if he desires to swear with uplifted hand, in which case the use of the Bible or Testament may be omitted.

4. Address the person as follows:

"You swear that the contents of this your affidavit are true. So help you God."

5. The person responds by saying "I do" while holding the Bible or the appropriate Testament in his uplifted hand or while holding his hand uplifted.

6. You must then complete the jurat (see sections E-2 and E-3).

Section 15 of the Alberta Evidence Act provides that a person is bound by an oath if it has been administered in such form and with such ceremonies as he may declare to be binding. This allows persons who are not of the Christian or Jewish faiths to be sworn in a manner sanctioned by their religion.

C. WHEN AND HOW TO ADMINISTER AN AFFIRMATION TO A PERSON MAKING AN AFFIDAVIT

When a person appears before you to make an affidavit but objects to giving an oath (being sworn)

- (a) from conscientious scruples, or
- (b) on the ground of his religious belief, or
- (c) on the ground that the taking of an oath would have no binding effect on his conscience,

the person may give an affirmation, instead of an oath, and the affirmation has the same force and effect as if the person had taken an oath.

The affirmation should be administered in the following manner:

1. Before administering the affirmation, you must amend the words *"make oath and say"* in the introduction to the affidavit to read *"solemnly affirm and declare"*.

2. Ask the person appearing before you whether he is the individual named in the affidavit as the person making the affidavit. If you know the person, it is not necessary to confirm his identity.

3. Ask the person to sign the affidavit. If the affidavit has already been signed, ask the person if the signature on the affidavit is his.

4. Address the person as follows:

"Do you solemnly affirm and declare that the contents of this your affidavit are true?"

5. The person responds by saying "I do".

6. You must then certify that the person satisfied you that he was entitled to affirm, which may be done by inserting the following before your signature on the jurat:

"I certify that (name of person) satisfied me that he was a person entitled to affirm."

In so satisfying yourself, you need not enquire beyond the person's verbal statement that he objects to being sworn on one of the grounds listed above.

7. You must then complete the jurat (see sections E-2 and E-3).

D. HOW TO ADMINISTER A SOLEMN DECLARATION TO A PERSON MAKING A STATUTORY DECLARATION

When a person appears before you to make a statutory declaration, the solemn declaration should be administered in the following manner:

1. Ask the person appearing before you whether he is the individual named in the statutory declaration as the person making the statutory declaration. If you know the person, it is not necessary to confirm his identity.

2. Ask the person to sign the statutory declaration. If the statutory declaration has already been signed, ask the person if the signature on the statutory declaration is his.

3. Address the person as follows:

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

4. The person responds by saying "I do".

5. You must then complete the jurat (see sections E-2 and E-3).

E. YOUR DUTIES IN COMPLETING THE AFFIDAVIT OR STATUTORY DECLARATION

1. Alterations

If there are any interlineations, alterations or erasures on an affidavit or statutory declaration (including the jurat), you should place a check mark at the beginning and end of each of the changes and then write your initials beside each change. UNLESS CHANGES ARE AUTHENTICATED BY YOUR INITIALS, THE AFFIDAVIT OR STATUTORY DECLARATION MAY NOT BE ACCEPTED IN COURT PROCEEDINGS. The following is an example of this procedure.

A.B. ✓ fifth ✓ ✓ February ✓ A.B.
I did on the fourth day of January, 1976.

2. Jurat - Ordinary Form:

The jurat is the part of the document which must be completed by you. The ordinary form of jurat for an affidavit is:

Sworn (or Affirmed) before me at _____
_____ Province of Alberta, this
_____ day of _____, 19 ____

A Commissioner for Oaths in and for the
Province of Alberta

3. Commissioner's Name and Expiry Date:

As a Commissioner for Oaths, you must legibly print or stamp in legible printing your name and if you are appointed under section 3 or 4, the date on which your appointment expires, next to your signature on each affidavit, declaration, affirmation or other document that you sign in your capacity as a Commissioner. Failure to comply with this requirements makes you guilty of an offence and liable to a fine of up to \$100.

4. Exhibits:

If the affidavit or statutory declaration refers to other documents that are annexed as exhibits, each exhibit should be marked as follows:

This is Exhibit _____ referred to in the
affidavit (or statutory declaration) of (name of person) sworn (or affirmed or declared)
before me this _____ day of _____, 19 ____

A Commissioner for Oaths in and for the
Province of Alberta

5. Jurat - Where person is blind or illiterate:

If the person making the affidavit or statutory declaration is blind or illiterate, you must read the document, or cause it to be read, to the person and then ask the person if he understood what was read to him. You may only administer the oath, affirmation or solemn declaration if you are satisfied that the person has in fact understood what was read to him. In those cases, the ordinary form of jurat must be amended by inserting the following before your signature:

"As (name of person) is blind (or illiterate),
(a) this affidavit (or statutory declaration) was read to him in my presence,
(b) he seemed perfectly to understand it, and
(c) he made his signature (or mark) in my presence."

6. Jurat - Person who does not understand the English language:

If the person making the affidavit or statutory declaration does not understand the English language, a person competent to interpret the contents of the affidavit or statutory declaration must first be sworn using the following oath, or if the interpreter objects to being sworn, an affirmation in similar form may be administered:

"You swear that you well understand (the language of the person), that you will well and truly interpret the contents of this affidavit (or statutory declaration) to (name of person) and that you will well and truly interpret to him the oath (or affirmation or solemn declaration) about to be administered to him. So help you God."

After the interpreter has interpreted the contents of the document, you must administer the oath, affirmation or solemn declaration to the person through the interpreter and the person should respond by saying "I do" through the interpreter. In those cases the ordinary form of jurat must be amended by inserting the following before your signature:

"As (name of person) does not understand the English language, this affidavit (or statutory declaration) was, in my belief, interpreted to him by (name of interpreter) who first swore (or affirmed) that he well understands (the language of the person), that he would well and truly interpret the contents of this affidavit (or statutory declaration) and that he would well and truly interpret the oath (or affirmation or solemn declaration) about to be administered."

F. PERSONS WHO ARE COMMISSIONERS EX OFFICIO

By virtue of the Commissioners for Oaths Act, and the Justices of the Peace Act, the following persons are commissioners without having to be so appointed by the Inspector of Legal Offices:

- (a) a barrister and solicitor of Alberta;
- (b) a student-at-law under the Legal Profession Act;
- (c) a full-time commissioned officer in the Canadian Forces;
- (d) a member of the Legislative Assembly of Alberta;
- (e) a member from Alberta House of Commons of Canada;
- (f) a member of the Senate of Canada who at the time of his appointment as a senator is a resident of Alberta;
- (g) a member of a municipal council in Alberta;
- (h) a member of a board of trustees of a school district or school divisions in Alberta;
- (i) a justice of the peace;
- (j) a police officer as defined in the Police Act;
- (k) every provincial judge, judge of the Surrogate Court, master in chambers, judge of the Court of Queen's Bench and judge of the Court of Appeal.

G. DOCUMENTS TO BE USED OUTSIDE OF THE PROVINCE OF ALBERTA

When an affidavit or statutory declaration is intended to be used in another jurisdiction, the law of that jurisdiction must be determined to ensure the use of formalities that are necessary in that jurisdiction to have the document accepted for use within that jurisdiction. Very often other jurisdictions require that the document be completed by a notary public rather than a commissioner.

H. POWERS

Commissioner for Oaths must ensure that they restrict their use of the appointment to those powers set out in the Act i.e. administering oaths, taking and receiving affidavits, declarations and affirmations. They may not, as a Commissioner for Oaths perform other actions such a certifying true copies, completion of documents etc.

REAPPOINTMENT

Before an appointment as a Commissioner for Oaths expires, an application form will be completed showing information on file in the Department and forwarded to the appointee by the Department of Justice. This is a departmental notification that the appointment will expire on the date printed on the application. If you wish your appointment to be renewed as of the expiry date, you should make any necessary corrections in ink, to bring information up-to-date, and sign and return the corrected application, together with the proper fee, to reach the Department of Justice NOT LATER THAN THREE WEEKS PRIOR TO EXPIRY DATE.

EVERY COMMISSIONER MUST ENSURE THAT HE DOES NOT ACT ON OR AFTER THE EXPIRY DATE OF HIS APPOINTMENT.

CHANGE OF EMPLOYMENT OR CHANGE OF ADDRESS DURING THE PERIOD FOR WHICH THE COMMISSIONER FOR OATHS APPOINTMENT IS HELD MUST BE REPORTED IN WRITING TO THE DEPARTMENT OF JUSTICE AT THE FOLLOWING ADDRESS:

Official Documents & Appointments
9833 - 109 Street,
Edmonton, Alberta T5K 2E8

INQUIRIES with reference to all matters concerning the appointment of Commissioners for Oaths may be made to the address shown above, or by telephone at 427-5981.