

## **Cost Penalties for Failure to File an Affidavit of Records in Time**

**By Tell Stephen and Bottom Line Research & Communications<sup>1</sup>**

Rule 187 of the Alberta *Rules of Court* requires that an Affidavit of Records be filed within 90 days after the filing of the statement of defence, unless the Court grants an order permitting a late filing. Rule 190(1) further provides for a penalty of double costs if the party fails to meet this time requirement “without sufficient cause”, or such larger amount as the Court may determine, irrespective of the final outcome of the proceeding.

In the event that a lawyer misses this time period, in how much jeopardy is the lawyer?

It is clear that the key here is the phrase “without sufficient cause”.

The leading case on this Rule is *Johnston v. Bryant* (2003), 327 A.R. 378; 2003 ABCA 169 per Hunt J.A. for the Alberta Court of Appeal. In this case the defendant Johnston did not provide an Affidavit of Records until seven months after the deadline and offered no excuse for the late filing. The Chambers judge had ordered that the issue of costs be left to the trial judge. This was reversed on appeal with the Alberta Court of Appeal holding that the cost penalty should have been imposed regardless of the outcome of the proceedings. There was no evidence that Johnston had sufficient or any cause for not filing the Affidavit in time and thus the award of double costs was mandatory.

Hunt J.A. further stated:

“. . . The purpose of this new Rule is to ensure that litigation proceeds in an expeditious manner: *Wagner v. Petryga Estate* (2001), 292 A.R. 320 (Q.B.) Its language gives the chambers judge only the discretion to find that sufficient cause for missing the deadline has been established, or to impose a larger amount in costs than that specifically mentioned in the Rule.”

*Wagner v. Petryga Estate* (2001), 292 A.R. 320; 2001 ABQB 690, a decision of Watson J. of the Alberta Court of Queen's Bench, is the leading case on "sufficient cause". In this case the respondent submitted that the other party well knew that he took a customary trip to Arizona from October 15 to mid-April and this was the reason why he had failed to complete his Affidavit of Records. This was rejected as a "sufficient cause".

Watson J. initially affirmed that the onus was on the party claiming the exemption to show sufficient cause. He then stated:

“. . . A key purpose of the Rule change was to make the requirement automatic, and not subject to demands as between counsel.

. . . The stern nature of Rule 190 is not for me to criticize. Absent an obvious miscarriage of justice, I should interpret and apply the Rule on reasoned grounds and in accordance with its terms.

The concept of "without sufficient cause" is not a foreign one to legal discourse. In this context, it would seem to contemplate a form of reasonable excuse which is either beyond the control of the party upon whom the obligation falls or arises from the very complexity and difficulty necessarily associated with the requirement as applied to the particular case. The "cause" must be case specific, not generic. The terms of Rule 188.1 sheds some light on that interpretation since extensions can be granted due to the complexity of the case, or the volume or location of the records or other sufficient reason.

I draw from the decision in *Grybowski* [*Grybowski v. Fleming* [2001] A.J. No. 408; 2001 ABQB 259] that it was not incumbent upon the Respondent to show that the Respondent had been prejudiced by the delay in filing and serving of the affidavit of records . . .

Moreover, a key object of the Rule appears to be the larger benefit to the administration of civil justice by using sharp discipline to ensure that parties do not drag their feet. The terminology of the Rule suggests that the Court does not want to encourage parties to think waiver of that larger public interest can be assumed . . .

. . . It may be that numbers of documents should be part of "sufficient cause" in another case, so I do not wish to foreclose on that possibility . . ."

In *Grybowski v. Fleming* Master Quinn characterized the Rule as “draconian”.

The leading authorities were reviewed by Veit J. of the Alberta Court of Queen’s Bench in *Balogun v. Pandher* (2003), 349 A.R. 390; 2003 ABQB 943 wherein the plaintiff Balogun applied for an extension of time to file an Affidavit of Records. Balogun was involved in a motor vehicle accident and he had a number of medical treatments, assessments and diagnosis. Balogun was a self-represented litigant. Veit J. held that he had established sufficient cause for his failure to file the affidavit in a timely manner because of the complexity of the proceeding relative to Balogun’s ability as a self-represented litigant.

In *Guinhawa v. T.D. Meloche Monex*, [2004] A.J. No. 1262; 2004 ABQB 801, a decision of Master Breitzkreuz of the Alberta Court of Queen’s Bench (In Chambers), the Master stated:

“I would respectfully suggest that Madame Justice Veit [in *Litterst v. Horrey et al.*, 9403 03651 JDE Nov. 3, 1994 (unreported)] would probably conclude that Rule 190 is one of those tools that impede justice and ought to be discarded, to use her language.

It is obviously not my role to decide whether a rule ought to be applied or discarded. If that was within my jurisdiction, I would discard Rule 190. This rule is a clear case of a rule that has been elevated to the role of a master, and the court’s role has been diminished to the status of its slave.

In *Anderson v. Airsprint Aircraft Management Inc.* (2004), 352 A.R. 59; 2004 ABQB 12, a decision of Phillips J. of the Alberta Court of Queen’s Bench, the defendants applied for a hearing *de novo* on appeal from an Order of Master Laycock in which they were ordered to pay double costs for failure to file their Affidavit of Records on time. The defendant argued that there was an agreement to postpone the filing requirement, that the order of Kent J. was still not resolved, and thus they could not file the Affidavit of Records, and that it would be “harsh and inappropriate”. Phillips J. found that there was “sufficient cause” under Rule 190 as there appeared to be an acquiescence to the extension of the date for filing; the order of Kent J. was unsettled, and that it would be “harsh and inappropriate” as per *Govenlock* [*Govenlock v. Govenlock* (2001), 284 A.R. 399; 2001 ABQB 319]. She concluded:

“4. To award punitive costs in the situation would be harsh and inappropriate in relation to the breach. The purpose of these rules of production is the promotion of efficiency in litigation, and the defendants are not guilty of creating inefficiencies in this lawsuit. The defendants have attempted to deal with the issues in this litigation promptly and reasonably. To provide punitive costs measures, given the above circumstances of this case, would be harsh and inappropriate.”

In *Dene Estate v. Baker*, [2004] A.J. No. 1289; 2004 ABQB 811, a decision of Sanderman J. of the Alberta Court of Queen’s Bench, the costs penalty was not awarded because the defendant’s conduct was not intended to frustrate the orderly and expeditious advancement of the litigation. Sanderman J. stated:

“The Rules of Court provide the structure for litigation to proceed in an orderly and expeditious fashion. They ensure fairness in the process and assist in the quest for adjudicative fairness. They were intended to be applied with some flexibility when warranted in order to prevent extreme gamesmanship. Litigation is not to be without gentlemanly behaviour. Consideration should be extended to adversaries when deserved.”

See also *Zukiwsky v. Prime*, [2002] A.J. No. 267, a decision of Master Quinn of the Alberta Court of Queen’s Bench, wherein a holiday scheduled by counsel was held not to be “sufficient cause”.

## **Conclusion**

Thus, in the event that a lawyer misses the time period within which to file an Affidavit of Records, it is clear that the extent of the jeopardy of the lawyer is dependent on whether the lawyer can establish “sufficient cause”.

Although *Johnston v. Bryant* (2003), 327 A.R. 378, a decision of the Alberta Court of Appeal per Hunt J.A., is the leading decision regarding this Rule, the leading case that establishes when there will be “sufficient cause” is *Wagner v. Petryga Estate* (2001), 292 A.R. 320. In an oft-applied passage Watson J. stated:

“The concept of “without sufficient cause” is not a foreign one to legal discourse. In this context, it would seem to contemplate a form of reasonable excuse which is either beyond the control of the party upon whom the obligation falls or arises from the very complexity and difficulty necessarily associated with the requirement as applied to the particular case. The “cause” must be case specific, not generic. The terms of Rule 188.1 sheds some light on that interpretation since extensions can be granted due to the complexity of the case, or the volume or location of the records or other sufficient reason.”

Other helpful *dicta* is found in *Anderson v. Airsprint Aircraft Management Inc.* (2004), 352 A.R. 59 per Phillips J., applying *Govenlock v. Govenlock* (2001), 284 A.R. 399, to find that imposition of the cost penalty would be “harsh and inappropriate”.

Further, it can be argued that failure to file the Affidavit of Records was not intended to “frustrate the orderly and expeditious advancement of the litigation” per *Dene Estate v. Baker*, [2004] A.J. No. 1289; 2004 ABQB 811 wherein Sanderman J. stated the following helpful *dicta*:

“The Rules of Court provide the structure for litigation to proceed in an orderly and expeditious fashion. They ensure fairness in the process and assist in the quest for adjudicative fairness. They were intended to be applied with some flexibility when warranted in order to prevent extreme gamesmanship. Litigation is not to be without gentlemanly behavior. Consideration should be extended to adversaries when deserved.”

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