The agenda for each day of the conference contains direct links to the materials for that session.

2011 Provincial Training Conference for Legal Advocates

November 22 – 24, 2011

Legal Services Society

British Columbia
www.legalaid.bc.ca

THE LAW FOUNDATION OF BRITISH COLUMBIA

The agenda for each day of the conference contains direct links to the materials for that session.

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November 22, 23, and 24, 2011

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The agenda for each day of the conference contains direct links to the materials for that session.

AGENDA
Law Foundation of BC and Legal Services Society
Provincial Training Conference

PROVINCIAL TRAINING CONFERENCE 2011 - Radisson Hotel, 8181 Cambie Road, Richmond, BC V6X 3X9 (Aberdeen skytrain)				
TUESDAY, NOVEMBER 22, 2011 - 8:00 am - 5:00 pm & Dinner 6 pm				
8:00 - 9:00	**Registration**			
9:00 - 9:30	**Opening Prayer** **Welcome from the Law Foundation and Legal Services Society** **Announcements**			
9:30 - 11:00	**Welfare Update: current issues** **BALLROOM** An opportunity to discuss issues that advocates and poverty law lawyers have been working on this year. ***Alison Ward, Kendra Milne, lawyers, Community Legal Assistance Society;*** ***Stacey Tyers, advocate, Terrace and District Community Services Society;*** ***Tish Lakes, advocate, Okanagan Advocacy Resource Society (OARS)***		**Welfare for Family Law Advocates** **- RICHMOND ROOM** Consider common welfare issues that advocates working on family law issues encounter such as: the role of MSD in getting child support for women on assistance; getting and declaring the child tax benefit; getting a crisis supplement to exercise access. ***Janet Berry, advocate, First United Church;*** ***Andrea Vollans, advocate, YWCA***	
11:15 - 12:15	**Legal Research Tools: an overview** **(1 HOUR) BALLROOM** A workshop that provides an overview of key resources for advocates researching poverty law issues. ***Meghan Maddigan, Legal Community Liaison, BC Courthouse Libraries;*** ***Alison Ward, lawyer, Community Legal Assistance Society;*** ***Kris Sutherland, advocate, The Kettle Friendship Society***		**Making Good Referrals** **(1 HOUR) RICHMOND ROOM** A presentation that considers best practices for making referrals, current resources and how to keep up-to-date with information and referral resources. ***Allan Parker, lawyer***	
LUNCH 12:15 - 1:45	**LAW FOUNDATION LUNCH (1.5 HOURS)**			
1:45- 3:15	**CPP Applications and Reconsiderations** **BRIDGEPORT ROOM** A session that explains CPP requirements for a "Minimum Qualifying Period (MQP)" and "Severe & Prolonged"; how to get the best medical evidence; and the adjudicative framework for CPP applications and reconsiderations. A workshop for advocates new to CPP, or for those already doing CPP applications who want more information about these issues. ***Peter Beaudin, Ashley Silcock, advocates, BC Coalition of People with Disabilities***	**Show me the Money** **CAMBIE ROOM** How do you collect on an RTB order that awards your client money? This workshop will review how to enforce RTB monetary orders in court, consider important preliminary issues, timelines, issues of service, and potential remedies. ***Alison Ward, lawyer, Community Legal Assistance Society***	**Interpreting Legislation** **RICHMOND ROOM** A review of the principles of statutory interpretation and an opportunity to work on exercises using legislation relevant to welfare, residential tenancy, EI and CPP. ***Kendra Milne, Devyn Cousineau , lawyers, Community Legal Assistance Society***	**Child Protection: Working effectively with MCFD** **BALLROOM** A session will first provide advocates working in the area with an update on MCFD initiatives and guidance and resources to support good advocacy. The second half of the session will provide an opportunity to discuss current issues affecting child protection advocacy work such as: variations in procedure between offices; ensuring that requirements set are realistic; dealing with mental health and immigration issues; establishing clear communication wtih MCFD. ***Kathy Berggren-Clive, Director of Advocacy, Ministry of Children and Family Development (MCFD);*** ***David Peck, Practice Development Consultant, North Fraser - Coast Fraser Region, MCFD;*** ***Lucy Rosman, Collaborative Practice Team Leader, Vancouver Aboriginal Child & Family Services Society;*** ***Wilma Clarke, Representative for Children and Youth;*** ***Amanda Rose, lawyer;*** ***Andrea Vollans, advocate, YWCA***
3:30 - 5:00	**CPP Disability Appeals** **Review Tribunals.** **BRIDGEPORT ROOM** Information about preparing submissions and conducting hearings as well as an update on changes at CPP tribunals. An opportunity to build on information in the previous session and for advocates doing CPP tribunals to discuss current issues. ***Peter Beaudin, Ashley Silcock, advocates, BC Coalition of People with Disabilities***	**Professional Responsibility** **CAMBIE ROOM** Information for advocates about conflicts of interest, confidentiality and difficult situations. ***Mike Seaborn, lawyer, Program Director, Law Foundation of BC***		
	Law Foundation/Legal Services Society sponsored dinner - 5 pm cash bar; 6 pm dinner BALLROOM			

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WEDNESDAY, NOVEMBER 23, 2011 9:00 am - 5:00 pm				
9:00 - 10:00	**Update on residential tenancy issues: Discussion with Suzanne Bell (1 HOUR) - BALLROOM** ***Suzanne Bell, Executive Director, Residential Tenancy Board***		**Working with LSS intake (1 HOUR) - RICHMOND ROOM** An opportunity to discuss with LSS staff the intake issues affecting your clients. There will also be an update from LSS. ***Branka Matijasic , Coordinator of Intake Services, Legal Services Society;*** ***Sherry MacLennan, Director of Public Legal Information and Applications, Legal Services Society***	
10:15 - 12:15	**Effective Advocacy for Mental Health Consumers / Survivors (2 HOURS) - BALLROOM** This workshop will address the behavioural, cognitive and other challenges that come with working with persons with mental health issues. It will provide information, resources and tools on mental health generally, and will address issues such as reducing barriers to service, the gendered and multicultural aspects of mental health, effective case management and improving responses to challenging behaviours. ***Kristi Yuris, Manager of Advocacy Services, The Kettle Friendship Society***		**Alternatives to Going to a Hearing (2 HOURS) - RICHMOND ROOM** A workshop that will give advocates an opportunity to discuss with resource people and other advocates strategies and tips for resolving a case without going to a hearing. ***Sarah Khan, lawyer***	
LUNCH 12:15 - 1:45	**POVNET LUNCH (1.5 HOURS)**			
1:45- 3:15	**Disability Tax Credit: when applying for RDSP and other benefits BRIDGEPORT ROOM** A session that explains a crucial prerequisite to being able to set up a Registered Disability Savings Plan, and to get other benefits - the Disability Tax Credit. Find out about the Credit, who qualifies for it, and what is needed to apply. Bring your questions. ***Jack Styan, RDSP Resource Centre***	**Housing: Getting damages at the RTB - CAMBIE ROOM** A discussion about what damages could be available in different situations, how to quantify damages, the evidence required to make a case and how you get them. ***Kendra Milne, lawyer, Community Legal Assistance Society***	**Aboriginal issues: an update for advocates working with Aboriginal clients - RICHMOND ROOM** A session that will consider issues such as working with band councils, different areas of law that apply on reserve, benefits available, status and membership issues, and rights to land. The session will touch briefly on each issue and identify resources that advocates can access. ***Ardith Walkem, lawyer***	**FMEP: Helping clients who owe money to change orders BALLROOM** Practical steps to help clients owing money under FMEP. This workshop will go through the steps of applying to change an order to reduce what FMEP can attach. ***Adrian McKeown, lawyer, Family Maintenance Enforcement Program (FMEP)***
3:30 - 5:00	**Human rights - practice points - BRIDGEPORT ROOM** A workshop that will give an overview of the human rights process. It will consider issues such as: who gets protection and when they get it; accommodation, and the tribunal process. ***Robyn Durling, BC Human Rights Coalition***	**Applying for Indigent Status CAMBIE ROOM** A session that will go through the steps of applying for indigent status, looking at the forms and the evidence needed. ***Sarah Khan, lawyer ;*** ***Amber Prince, advocate, Atira***	**Housing on reserve - RICHMOND ROOM** An opportunity to discuss issues that arise when helping a client with housing issues on reserve, including an overview of on reserve housing available and recent changes. ***Halie Bruce, lawyer***	**Welfare and assets - BALLROOM** A study of welfare legislation for what MSD may count as an asset. The session will consider arguments and evidence for common issues such as: what qualifies as a "beneficial interest" in an asset; evidence required to show a legal owner does not have a beneficial interest in an asset; what it means to dispose of an asset; and, "inadequate consideration" ***Alison Ward, lawyer, Community Legal Assistance Society***

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THURSDAY, NOVEMBER 24, 2011 9:00 am - 3:00 pm				
9:00 - 10:30	**Employment Insurance (EI)** **BRIDGEPORT ROOM** ***Jim Sayre, Kevin Love, lawyers, Community Legal Assistance Society***	**Boundary Setting for Advocates CAMBIE ROOM** Advocates deal with boundary decisions when helping clients. Taking on cases you can't handle, taking on too much work, conflicts with colleagues, staff or clients, feeling overwhelmed, and burn-out are all manifestations of boundary problems. This course will help you identify and create healthy and effective boundaries in your advocacy work. ***Bob Bircher, Lawyers Assistance Program***	**Advocacy Skills for Hearings RICHMOND ROOM** This workshop focuses on the skills you need to do a great job at hearings. Using a residential tenancy fact pattern as an example, you will have a chance to practise identifying issues; gathering evidence; preparing to present your evidence; creating effective written submissions; presenting your evidence and challenging the other side's evidence; and making effective oral submissions. The workshop is suitable for advocates who do all types of hearings, including before the RTB, the EAAT, and the CPP Review Tribunal. ***Jess Hadley, Kendra Milne, lawyers, Community Legal Asssistance Society***	**Family Law: Discussions about current issues with a family law lawyer BALLROOM** Discussion with a family law lawyer (familiar with advocate's work) about current issues and questions submitted beforehand by advocates. ***Linda Thiessen, Coordinator of Civil Law Services & Projects , Legal Services Society***
10:45 - 12:15				**Immigration issues for family law advocates BALLROOM** A survey course on immigration issues that can affect your family law clients. Topics such as: how to declare marital status when applying for temporary or permanent residence (PR); how non-compliant family members may adversely affect a foreign national's application for PR; how spousal sponsorship may be an instrument of abuse in domestic violence; impact of relationship breakdown on a pending family class application for PR; broken sponsorship undertakings; proposed amendments to Canadian immigration law ***Deanna Okun Nachoff, lawyer*** ***Chi Young Lee, lawyer***
LUNCH 12:15- 1:15	**1 HOUR**			
1:15- 2:15	**Housing - Next steps. CAMBIE ROOM** Information about the work being done by different groups to address current issues in housing, and a discussion about possible next steps. ***Amber Prince, advocate, Atira;*** ***Tish Lakes, Okanagan Advocacy Resource Society (OARS)***	**Immigration RICHMOND ROOM** An update about changes to immigration legislation, LSS' response, and how it will affect your clients ***Rochelle Appleby, Legal Services Society***	**Working with MSD: Next steps BALLROOM** A discussion among advocates working on welfare issues about common challenges , potential solutions, and how to follow up with MSD.	
2:15 - 3:00	**Sharing Victories and closing BALLROOM** ***Penny Goldsmith, PovNet, facilitating***			

1. Aboriginal Issues

Legal Services Society
British Columbia
www.legalaid.bc.ca

THE LAW FOUNDATION OF BRITISH COLUMBIA

Aboriginal Issues, an update for advocates

Walkem & Associates
Law Corporation

New issues that advocates should be aware of that will impact upon Aboriginal clients:

- Status
- Matrimonial Property Bill
- Indian Residential School
- Omnibus Crime Bill
- Working with Band Councils
- Estates
- NIHB

Status Registration

- Different identities and legal definitions imposed upon Indigenous Peoples:
  - Status Indian
  - non-Status Indian
  - Metis
  - Inuit
- The *Indian Act* has been used as a tool by the Canada to limit who is and who is not an Indian.
- Status and membership are divisive concepts and contrary to our Indigenous laws, and continue to be a powerful legal and social instrument

McIvor Case and Bill C-3

Who Is Eligible? Someone is eligible for status registration if:

- Their grandmother lost her Indian status as a result of marrying a non-Indian
- One of their parents is registered, or entitled to be registered, under sub-section 6(2) of the *Indian Act; and*
- They, or one of their siblings, was born on or after September 4, 1951?

AUTOMATIC STATUS UPGRADE – If you are the registered Indian parent of a child that fits this criteria…

Bill C – 3: Registration Process

- Entirely by Mail
- No financing to help Bands with the registration or assisting people in applying
- Registration and issuance of an **in-Canada** Secure Certificate of Indian Status (status card)
- Long term all status cards phased out and replaced with the in-Canada secure certificate of Indian status
- The Secure Certificate of Indian Status is an identity document issued by AANDC:
  - Confirms the cardholder is registered as a Status Indian
  - "In Canada" likely to means cannot be used cross-border. [Practical purposes existing status cards are often accepted]

Bill C-3: Impacts

How will Bill C-3 Impact Band Membership?

For those being registered for the first time, there are two possibilities:

1. **Section 11** of the *Indian Act*

1. **Section 10** of the *Indian Act*

Bill C- 3: Impacts

- Finances and Resources Available. (45,000 previously ineligible individuals will now be able to register)

- Canada has made no solid additional funding commitments or efforts to increase reserve land base, housing, health or education funds (likely difficulty when newly added members cannot access resources as there is no funding)

- **Do the amendments address the Subsection 6(2)/Second Generation Cut-Off?** NO

- **Could I lose my Indian status as a result of the amendments?** NO

Bill C- 3: Impacts

- **Who continues to be excluded:**
  - A grandchild born prior to September 4, 1951 who is a descendant of a status woman who married out will be excluded
  - The grandchild of a status woman and a non-status man who were unmarried (common law) will be excluded
  - The grandchild of a status grandmother who married out will not be able to pass status to his or her child born prior to April 17, 1985, while the grandchild of a status grandfather who married out can.

Bill C- 3: Resources

- www.ubcic.bc.ca
- http://www.servicecanada.gc.ca/eng/goc/indian_registration.shtml
- www.nwac.ca
- www.afn.ca
- http://www.aadnc-aandc.gc.ca/eng/1100100032508/1100100032509 (registration process)

Matrimonial property changes:

Bill S-2: *Family Homes on Reserves and Matrimonial Interests or Rights Act*

- Bill S-2 addresses issues relating to family real property on reserves
- The bill distinguishes between categories of property rights:
  - "interest or right"
  - "Matrimonial interest or rights"

Matrimonial property changes:

- Enactment of First Nation Laws (Clauses 7–11)
- Family Home (Clauses 13–27)
- Division of the Value of Matrimonial Interests or Rights (Clauses 28–40)
- Notice to Council [of a First Nation] and Views of Council (Clauses 41 and 42)

Matrimonial property changes:

- Individual rights and protections:
  - Equal right to occupancy of the family home
  - Spousal consent for the sale or disposal of the family home
  - Emergency protection order
  - Exclusive occupation order
  - Equal division of the value of the family home and any other matrimonial interests or rights
  - Order for the transfer of matrimonial real property
  - Entitlement of surviving spouses or common-law partners
  - Enforcement of agreements

Matrimonial property changes:

The federal provisional rules in the bill will apply all First Nations:

- 12 months after the proposed legislation comes into force: applies to all First Nations automatically

- Except:
  - own code
  - First Nations Land Management Act, or
  - Other self government agreements (may opt in)

Matrimonial property changes:

- Legislation does not refer to "matrimonial real property"
- Definition of "spouse"
- No Retroactive application
- Criticisms:
  - Capacity
  - Access to justice (e.g. remote communities)
  - Individual vs. collective rights
  - Wait periods (family violence social supports)

Matrimonial property changes:

Resources:

- http://www.aadnc-aandc.gc.ca/eng/1100100032553/1100100032557
- www.afn.ca
- www.nwac.ca

Child Welfare and Family Law: (amended Family Law Act in process)

Recent legislative changes include:

- Consideration of child's aboriginal heritage
- Involvement of their families/communities/nations
- Parental responsibilities include making decisions about cultural, religious and spiritual upbringing including the child's Aboriginal identity.

Resource: http://www.rcybc.ca/content/home.asp

Omnibus crime bill - Bill C-10: Safe Streets and Communities Act (in process)

- Matters because Aboriginal People are disproportionately arrested and charged, with rates far higher than average
- In response the Criminal Code included certain sentencing provisions and principles meant to address that situation and to divert Aboriginal offenders from jail (interpreted through *Gladue*)
- These provisions will disproportionately target Aboriginal people and eliminate legal options and alternatives currently available to them

Omnibus Bill C-10

- Part 2 of Bill C-10 amends:
  - The *Criminal Code* to impose new mandatory minimum sentences for certain sexual offences committed against young people as well as to increase existing mandatory penalties
  - The *Controlled Drugs and Substances Act* (CDSA) to provide for mandatory minimum sentences of imprisonment for certain drug crimes
  - The *Criminal Code* to restrict the availability of conditional sentences for certain offences

Omnibus Bill C-10

- Part 3 of Bill C-10 amends the *Corrections and Conditional Release Act* to:
  - Increase the accountability of federal offenders
  - Tighten rules governing conditional release
  - Promote the interests and the role of victims in the correctional process
  - Substitutes the term "record suspension" for the term "pardon", and makes it more difficult to get, and impossible in some cases

Omnibus Bill C-10

- Part 4 amends the *Youth Criminal Justice Act*
- *The Safe Streets and Communities Act* proposes amendments to:
  - *Controlled Drugs and Substances Act*
  - *Youth Criminal Justice Act*
  - *Criminal Code* (Ends House Arrest for Property and Other Serious Crimes(former Bill C-16)
  - *Corrections and Conditional Release Act* (Increasing Offender Accountability(former Bill C-39)

Omnibus Bill C-10

Resources:

- www.justice.gc.ca/eng/news-nouv/nr-cp/2011/doc_32633.html
- www.cba.org
- www.nccabc.ca
- www.indigenousbar.ca

Indian Residential Schools

Independent Assessment Process (IAP)

- Eligibility
- Financial help with legal costs
- Application deadline: September 19, 2012

Resources:

- http://www.servicecanada.gc.ca/eng/goc/cep/index.shtml
- http://www.residentialschoolsettlement.ca/english_index.html - contains more detailed information about the Independent Assessment Process
- www.trc.ca - truth and reconciliation commission process
- http://lss.bc.ca/assets/pubs/guideToIndianResidentialSchoolsSettlement.pdf
- http://www.nccabc.ca/index.php/

Indian Residential Schools

Common Experience Payment

- Eligibility
- Application deadline: September 19, 2012
- Extensions: One year after the deadline only in cases where the applicant could not apply within the designated timeframe due to
  - disability,
  - undue hardship or
  - other exceptional circumstances

  Need to provide a written reason for late application

Indian Day School Case

Estates (for status Indians)

AANDC has authority to deal with the wills and estates of status Indians who are "ordinarily resident"

- *Indian Act* has sets out rules for property transfers on-reserve
- BC Supreme Court has authority to deal with wills and estates of off-reserve status Indians

Resources:

- Aboriginal Practice Points CLE : http://www.cle.bc.ca/PracticePoints/ABOR/Aboriginallaw.html
- Legal Services Societyhttp://www.lss.bc.ca/aboriginal/willsAndEstates.asp

Decisions of Band Councils

Who are band councils? Where do they get their authority?

- Appeals:
  - Band by-law/policies/codes, etc. may set out a process of appeal
  - Federal Court (of some decisions)
  - Canadian Human Rights Tribunal (if the allegation is band decision reflects discrimination based on sex, race, or marital status)

Decisions of Band Councils

- Understand why and how the decision was made; was there any discretion in making the decision?
- There may be an **informal process** available (often the most effective)
- May be able to work with communities to see about what informal or formal processes are available to investigate a decision
- **Resources:**
- The Band (policies or bylaws)
- AANDC (If the decision one that AANDC can review)
- See: http://www.lss.bc.ca/aboriginal/pubs.asp

Aboriginal Housing On-Reserve

Prepared by
Walkem & Associates
Law Corporation

Introduction and Check List of Issues

- Reserve lands are held in trust for Aboriginal Peoples by the federal government.

- Under s. 91(24) of the *Constitution Act, 1867* the federal government has responsibility for **Indians and Indian lands**.

- Land "ownership" on reserve is different than off-reserve:

  Individual interests in reserve lands, (e.g. Certificates of Possession (CP) or Certificates of Occupation) give individual the right to occupy land, but not "ownership"

Laws

- **Federal law, and not provincial law, applies to the use/possession of reserve lands.**

- S. 81 of the *Indian Act* grants Bands the authority to enact by-laws over reserve lands, including residency requirements for its members

- Band bylaws cannot violate provisions set out in the *Indian Act*, but, not all Registered Status Indians are **members** of a Band. Individuals have to apply to their Band for membership.

On-Reserve Housing Overview

- Reserve lands are held in trust for the benefit of the entire community and the uses that individual members can make of their lands is limited by the interests of the entire community
- The *Indian Act* requires the Minister or Band to approve a lease or transfer of land within a reserve to be valid
- There is no automatic right for someone to live on a reserve.

Preliminary Questions:

- Which Band/First Nation is involved?
- Is the client (or their spouse/children) a member of that reserve?
- **Who has <u>legal authority</u> for housing and land decisions on the reserve?**
    - *INAC*
    - *T*he Band under:
        - s. 60 of the *Indian Act;*
        - the *First Nation Land Management Act;* or
        - under a self-government agreement (e.g., Nisga'a and Sechelt Agreements)

Find out if the Band has delegated powers over reserve lands or if the Minister (INAC) maintains authority for the Band's reserve lands

Band Bylaws or Housing Policies

- Does the Band have a Housing Bylaw or policy in place? (Obtain a copy)

- **Determine how housing/reserve land decisions are made at the Band level, including the chain of command in decision-making**:
  - Chief and Council
  - Housing Committee
  - General Band Meeting
  - Housing Coordinator/Manager

- Federal *Access to Information Act*
- AANDC Has the Band Bylaw been approved by the Minister?
- What Alternative Dispute Resolution or Appeal options are available?

Social Housing (CMHC Housing)

- CMHC provides mortgage financing to the Band to build affordable houses for low-income families and individuals
- The Band administers the housing program, including:
  - **Assigning homes,**
  - **Deciding who can live in them**
  - **Setting residency conditions**
- If there is a written agreement:
  - Is there a rental/tenancy agreement in place with the renter?
  - What are its conditions?
  - Does it set out the process that must be followed?

Private Rental/Lease Agreement

- Is there a written rental agreement in place?
- Month to month, or at will tenancy? (Different notice requirements)
- Does the lease or rental agreement set out the process to be followed in the case of disputes?
- Leases or long term rental agreements may require the approval of the Minister (or designated authority) to be valid under the *Indian Act*.
- A lease that does not have Ministerial approval and registration (sometimes known as a "buckshee lease") may not be legally enforceable.

Fairness in Housing Decisions

- Common Law, including duties of **administrative fairness** apply on reserve. To determine whether or not a decision has been made fairly, ask:
  - Was the person notified of the decision to be made/problem?
  - Were they provided with enough information and time to respond?
  - Were they provided with all relevant information?
  - Were they given an opportunity to be heard?
  - Were they notified of the reasons for the decision?
  - Is there an opportunity to appeal the decision (if applicable)?

Appeals:

It may be possible to appeal or challenge a decision of a band council in a number of ways:

- Band by-law or housing code may provide an appeal process
- Federal Court challenge (within thirty days)
- The Canadian Human Rights Tribunal (e.g., if can show decision was based on discriminatory grounds such as sex, race, or marital status)
- **Informal process** (can often be the most effective).
  - E.g. An eviction for non-payment of rent upon an agreement to put in place a repayment plan.

  It is important to suggest options to resolve the dispute, and most Bands are willing to seek alternatives.

Repairs:

Programs available to fund emergency or health related repairs:

- Does the Band have a process in place to address repairs or renovations?
- How does the Band determine priority for repairs. E.g. if the matter is a serious health risk:
- If CMHC social housing, the Band has a contractual obligation to keep the housing in a certain state of repair.
- Are there emergency funds (or loans, if the client can afford it) available through the Band, CMHC, or INAC?
- Letters from physicians/other community support?

Additional Issues

Indian Act provisions for issues relating to:

- Wills/Estates
- Matrimonial Property

See: *Aboriginal Issues Update: Emerging issues* Workshop

General Helpful links:

- **Indian and Northern Affairs** – general information about housing programs on reserve (subject area housing): http://www.aadnc-aandc.gc.ca/
- **Canada Mortgage and Housing Corporation (CMHC)** – general information about social housing program, as well as home loans and renovation loans on reserve: www.cmhc-schl.gc.ca/en/index.cfm
- General information about reserve lands: **Continuing Legal Education Society** website maintains a database of "Practice Points" on Aboriginal Issues: www.cle.bc.ca
- **Legal Services Society (Aboriginal Poverty Law Manual),** includes a chapter on housing: www.lss.bc.ca

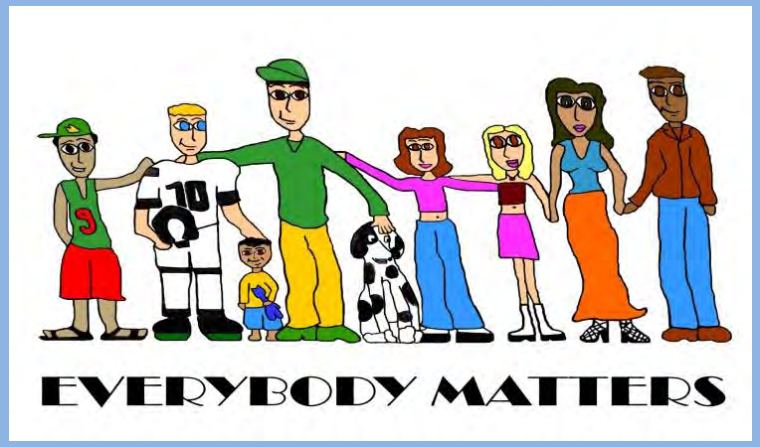
General Helpful links:

- **First Nation Land Management Act** information: www.fafnlm.com
- **Individual First Nation Websites.** Some Bands maintain websites, which have links to their organizational structure and policies. A good common source is www.ubcic.bc.ca (their "Links" page connects to many of the First Nation communities in the province).
- **BCAFN** This website contains information about the *Corbiere* decision www.bcafn.ca about the rights of off-reserve band members

2. Child Protection Materials

Legal
Services
Society

British Columbia
www.legalaid.bc.ca



Family Engagement

Collaborative Planning and Decision Making


HELLO
my name is

The Family Engagement Umbrella: Many Programs


Mediation
Family Development Response
Integrated Case Management
Court Conferences
Family Meeting
"4 Way Meetings"
Family Group Conferencing
Traditional Decision Making
Family Case Planning Conference
Restorative Justice Conferencing
Youth Transition Conferencing

WHAT IS Family Engagement?

Family Engagement gathers family members, children and youth, child welfare and community professionals, and others closely involved in children's lives to identify family strengths, concerns and resources to develop sustainable solutions

Definition of "Family"

Anyone who cares about the child;

everyone who is important to the child.

This may include parents, close relatives, extended family, and other friends who feel like a part of the family

The Intention

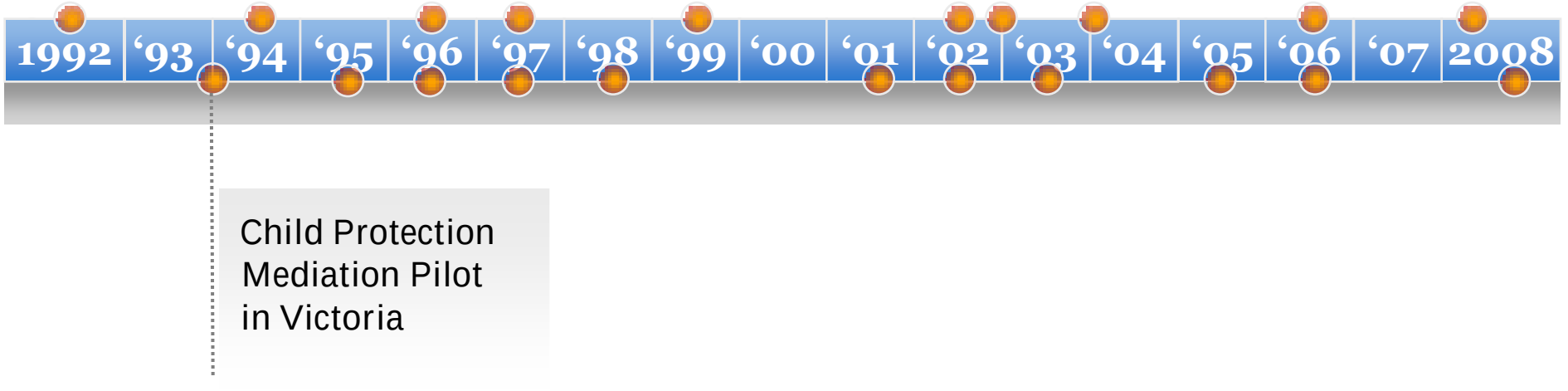
- To move from adversarial to collaborative relationships between child welfare agencies and families
- Encourage family involvement in decision-making
- Draw upon community supports
- Respect cultural heritage of families
- Advance children's safety, permanency and well-being

EVOLUTION OF COLLABORATE PRACTICE IN BC

Evolution of Collaborate Practice in BC

Community Panels recommend FGC

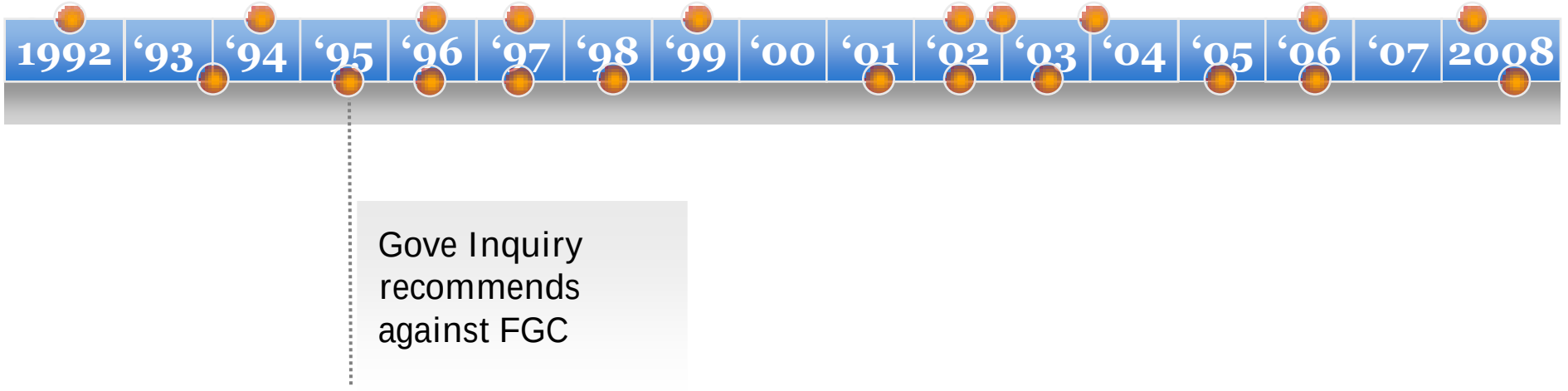
Evolution of Collaborate Practice in BC



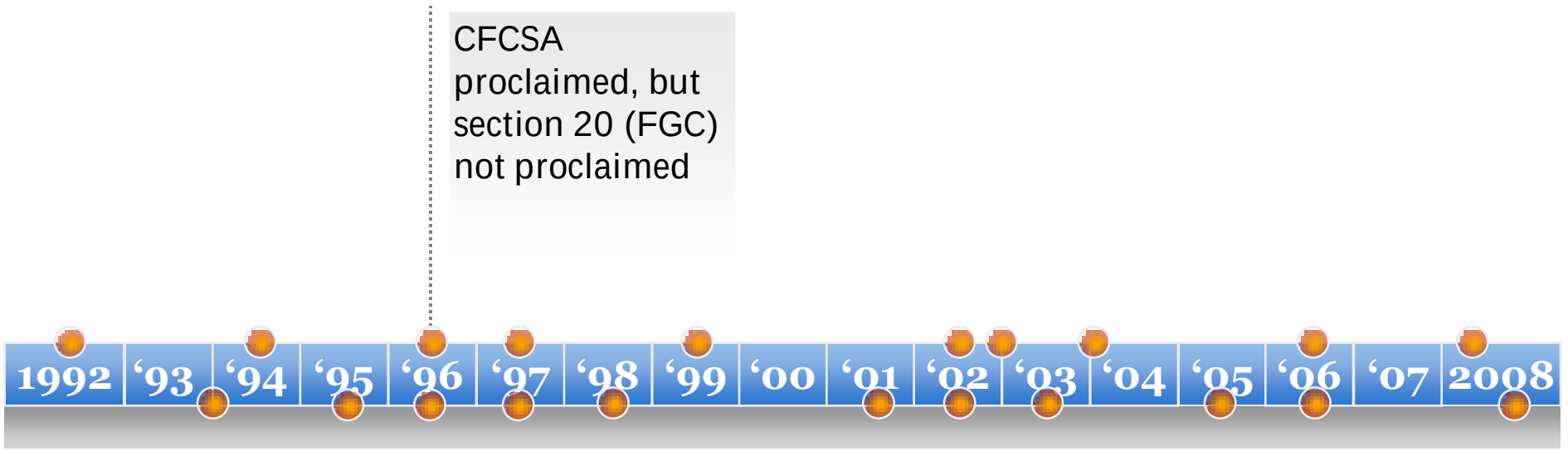
Evolution of Collaborate Practice in BC

Child, Family, and Community Service Act (CFCSA) written with Cooperative Planning and Dispute Resolution Section 20-24 & 60

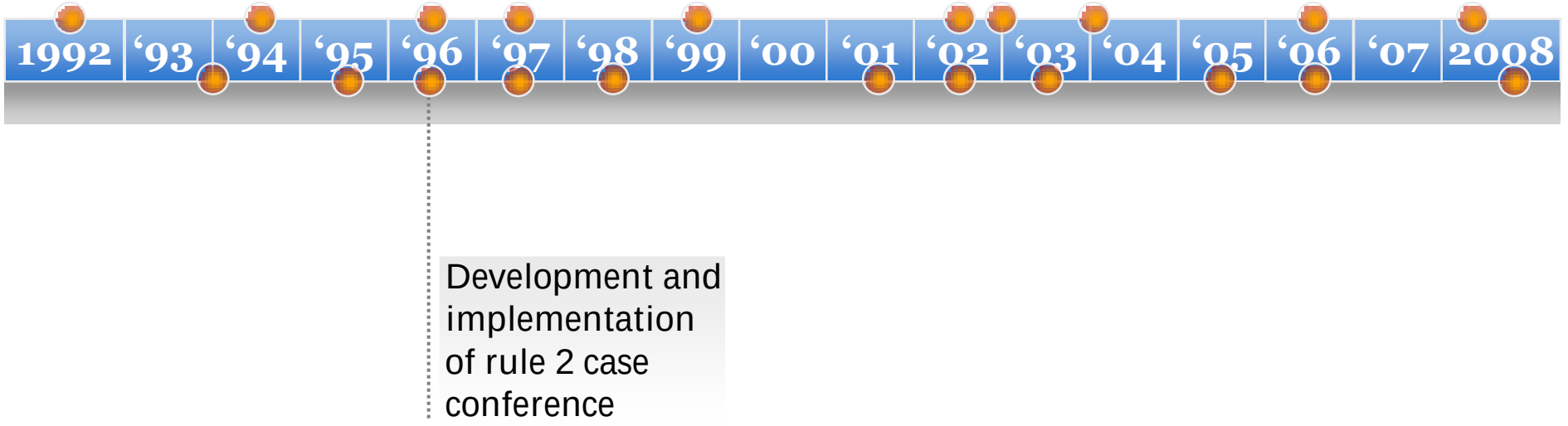
EVOLUTION OF COLLABORATE PRACTICE IN BC



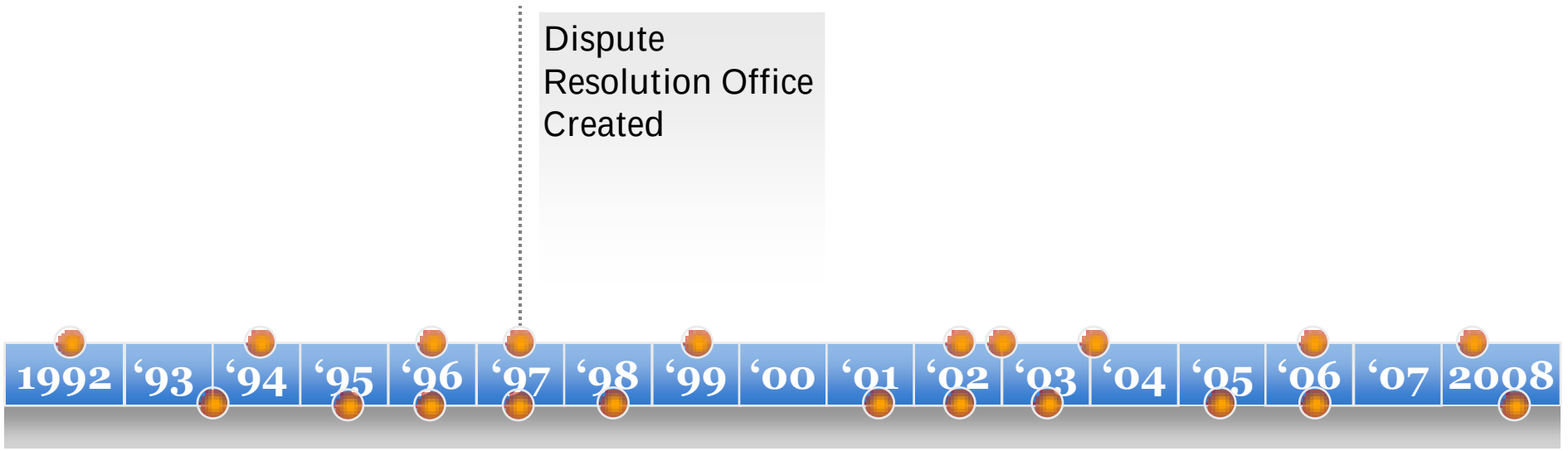
EVOLUTION OF COLLABORATE PRACTICE IN BC



Evolution of Collaborate Practice in BC



Evolution of Collaborate Practice in BC



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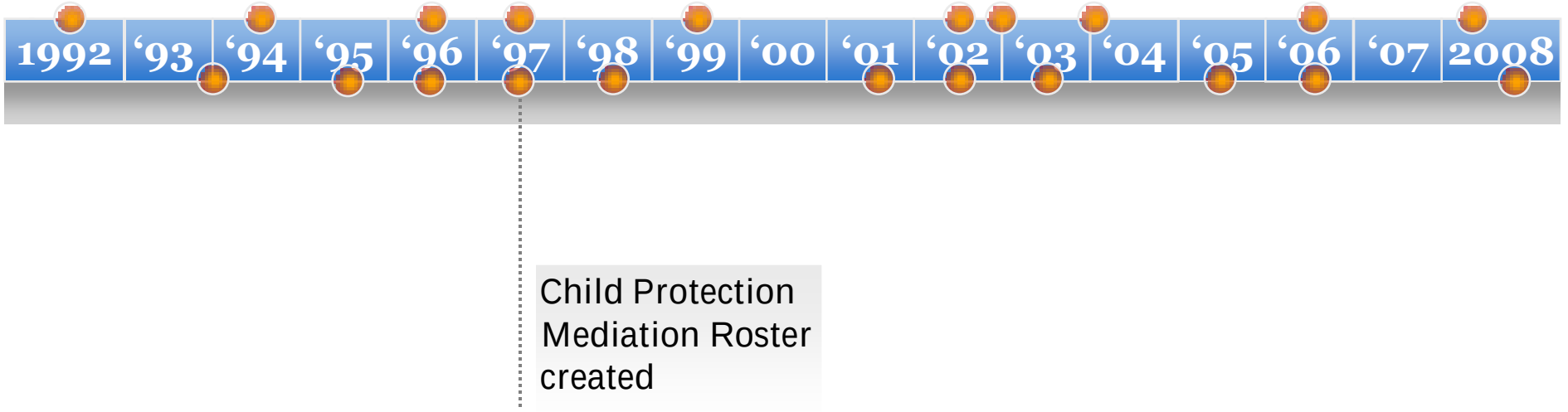

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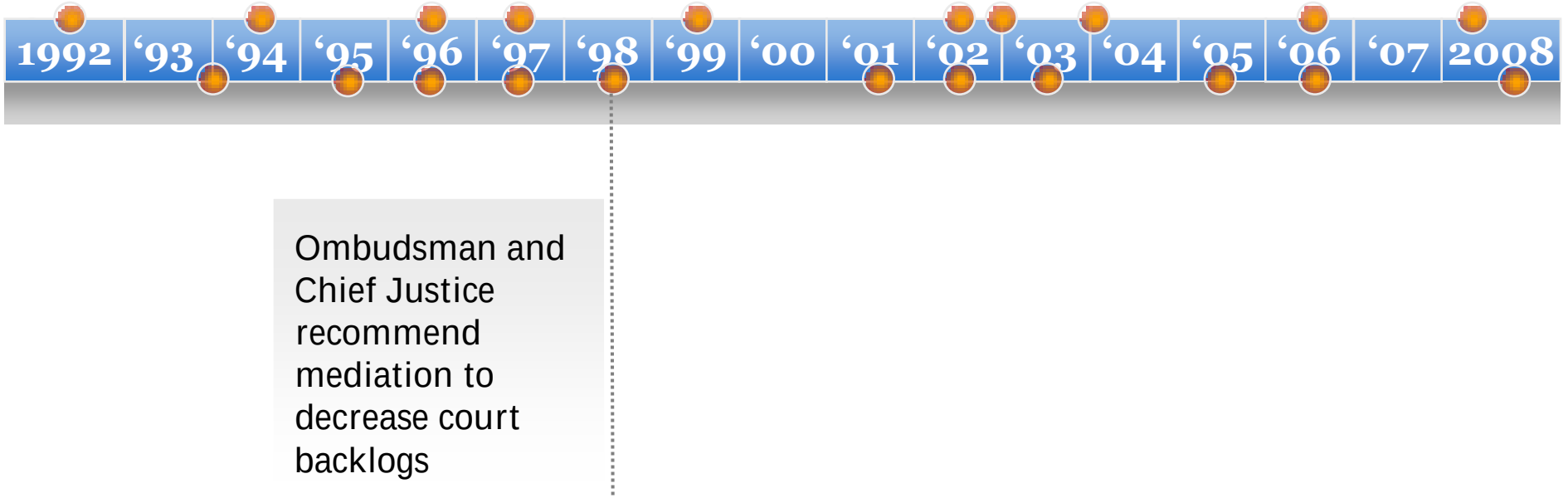

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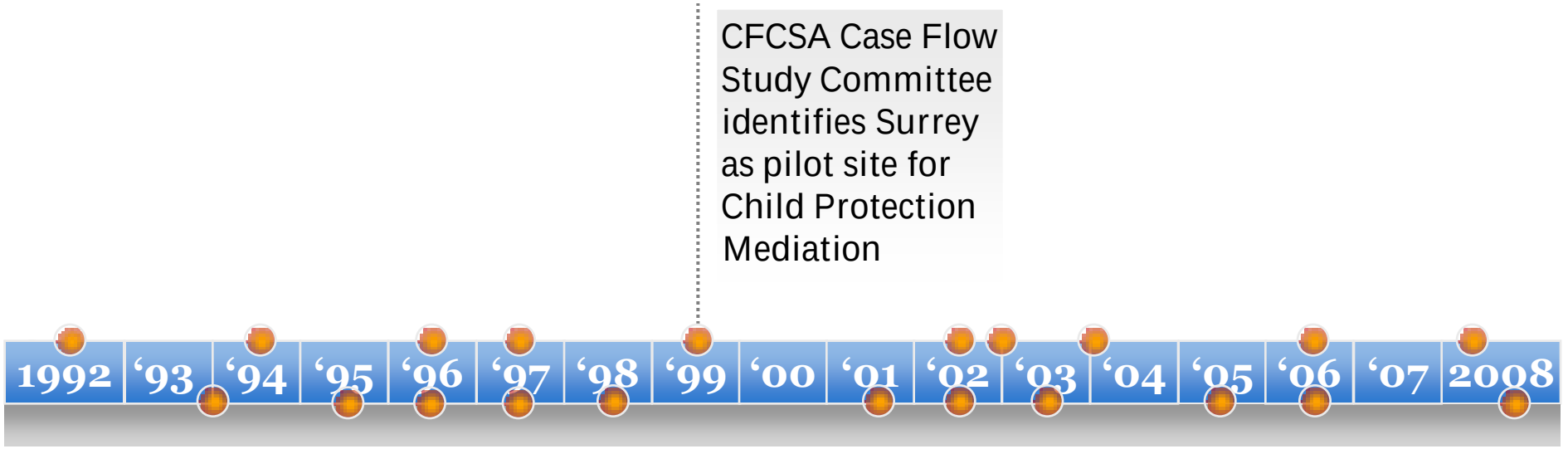

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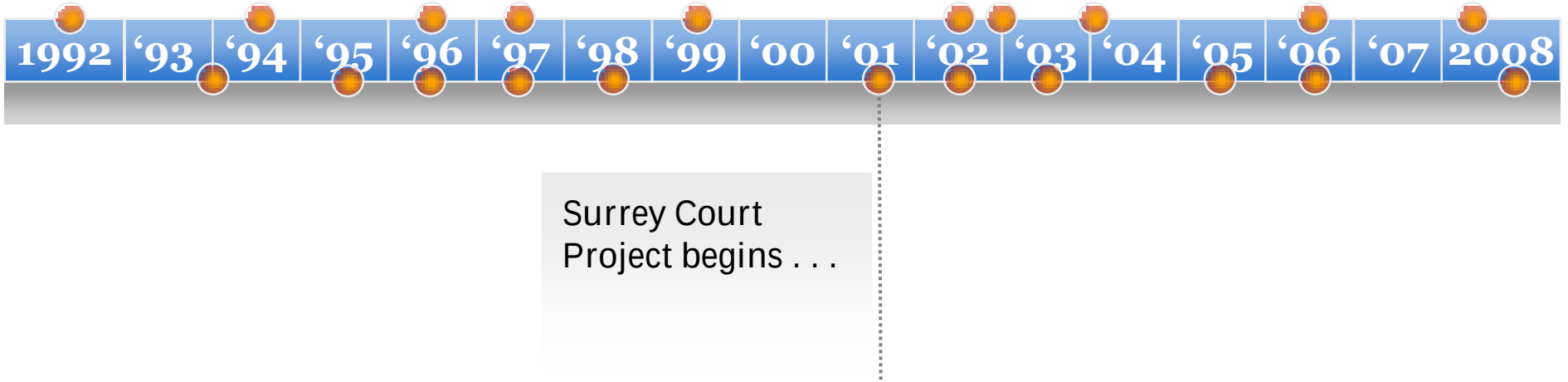

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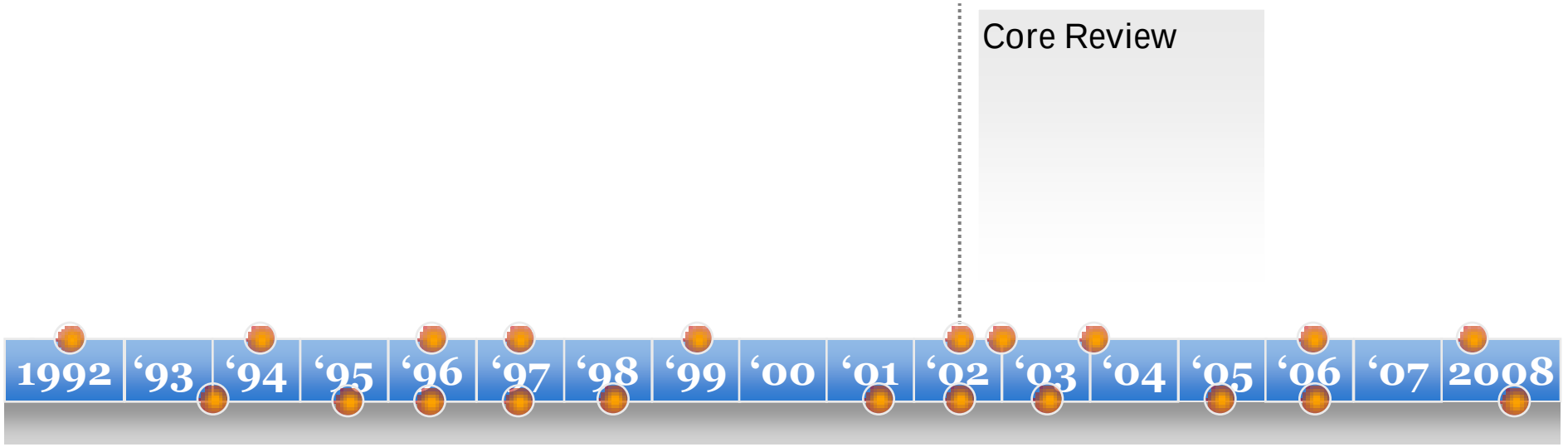
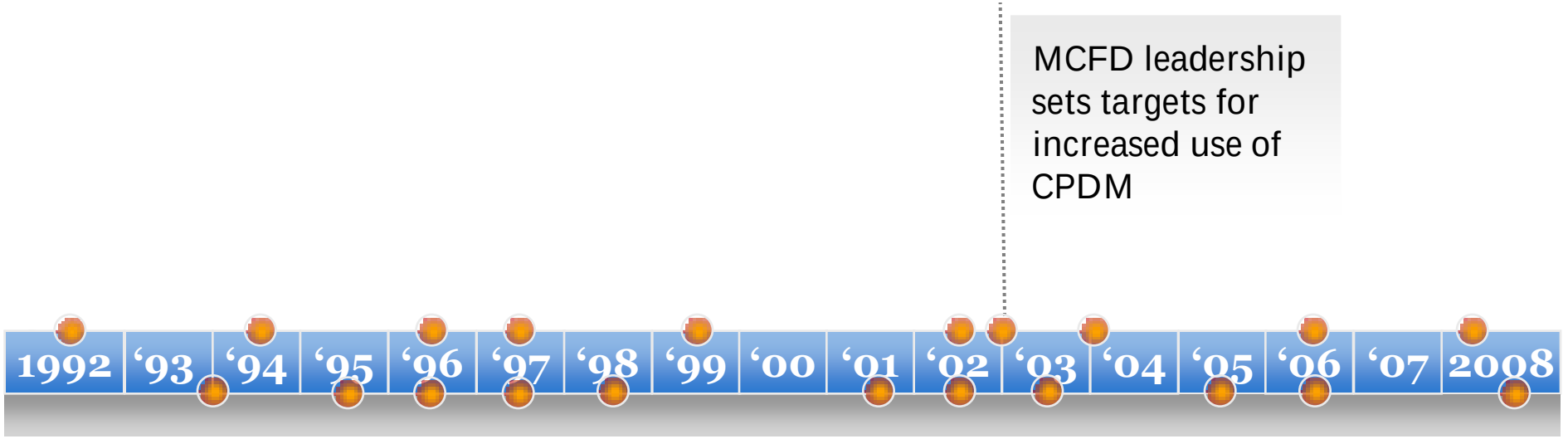


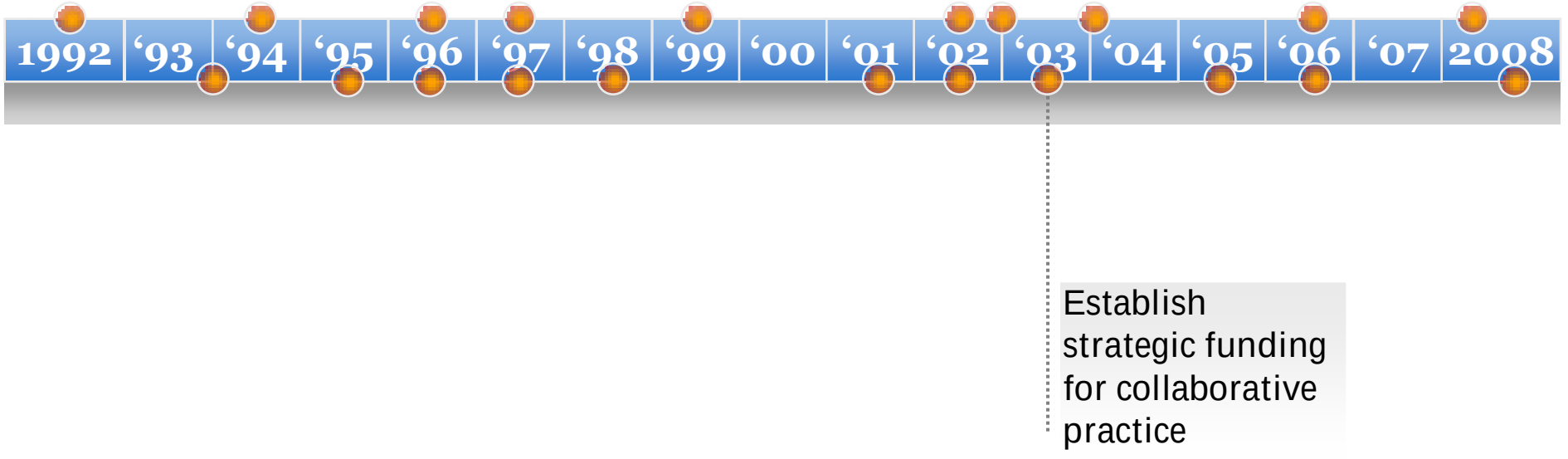
EVOLUTION OF COLLABORATE PRACTICE IN BC

CFCSA – Section 20 (FGC) proclaimed

EVOLUTION OF COLLABORATE PRACTICE IN BC



Evolution of Collaborate Practice in BC



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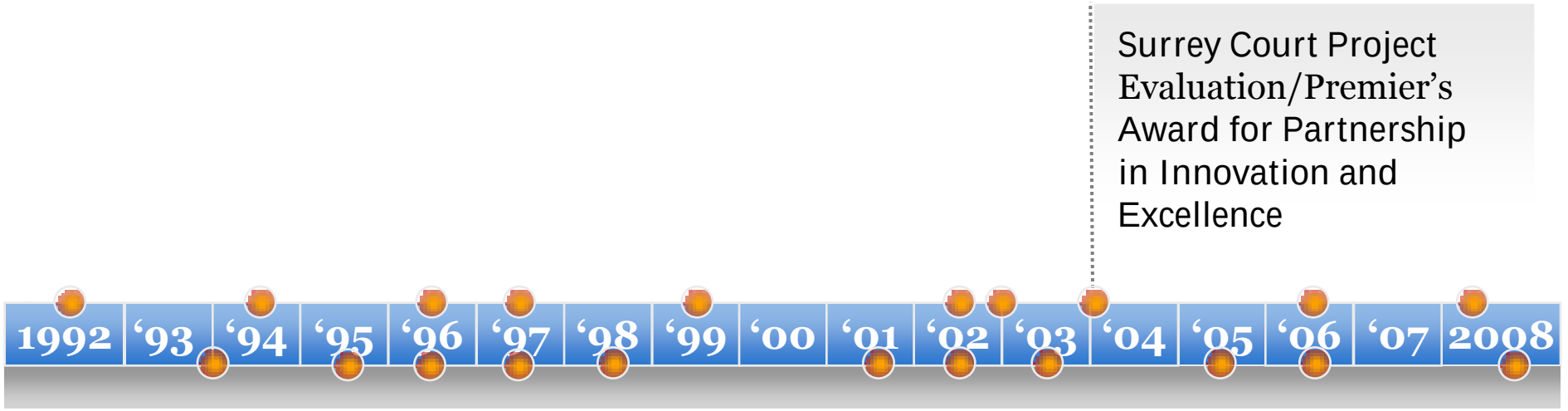

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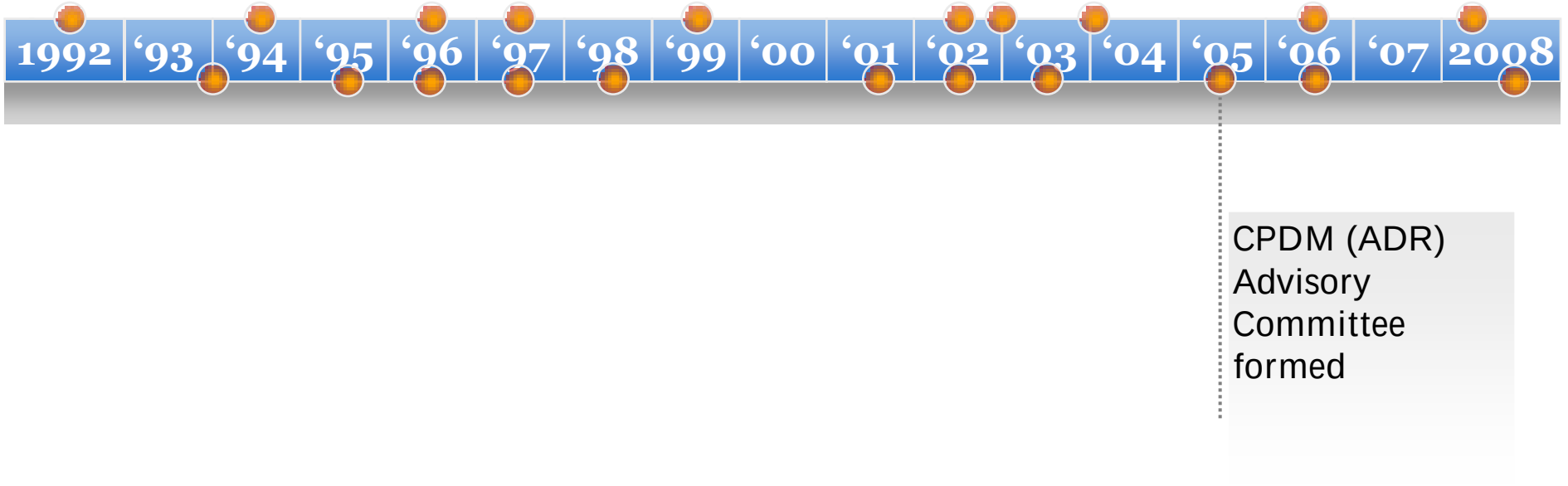
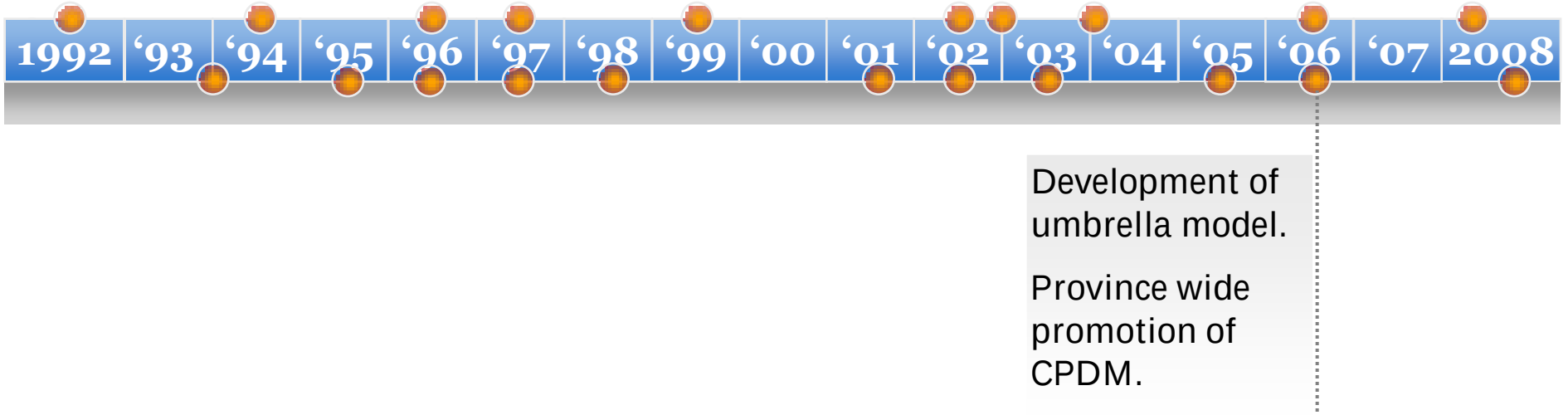


EVOLUTION OF COLLABORATE PRACTICE IN BC

Work started on mandating CPDM

EVOLUTION OF COLLABORATE PRACTICE IN BC



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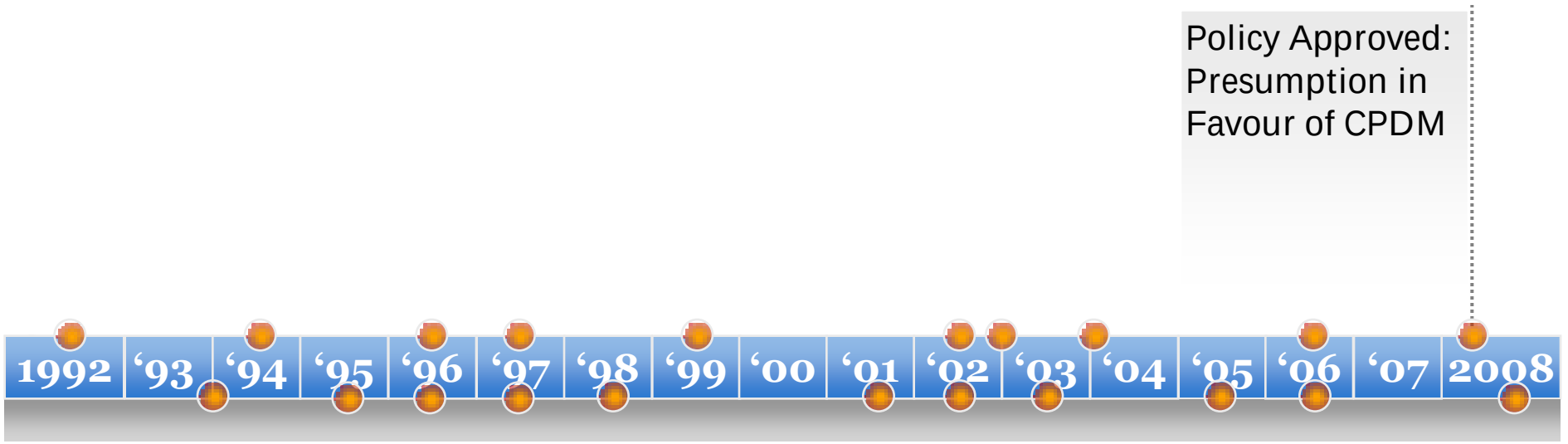

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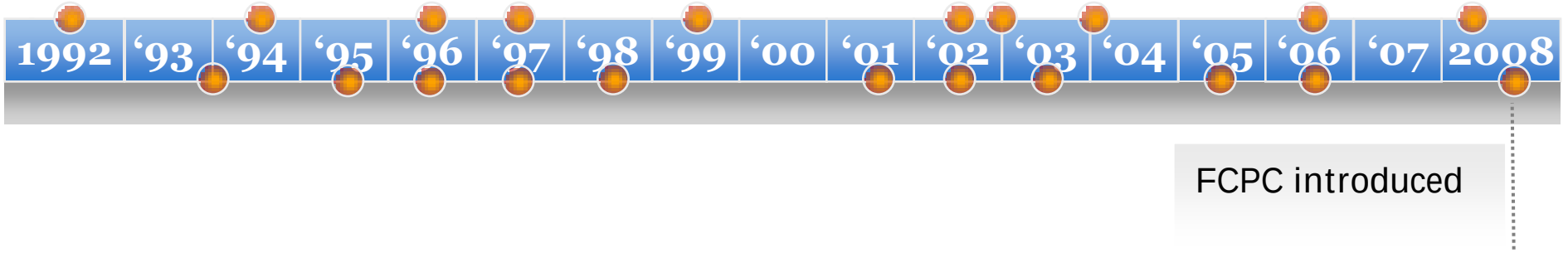


Presumption in Favour of

COLLABORATIVE PLANNING AND DECISION MAKING

POLICY & PROCEDURES

Presumption in favour of Collaborative Planning and Decision Making means that family group conferencing, mediation, and traditional decision making are the **first choice** for child welfare decision making and for resolving child welfare disagreements; court is the alternative.

Formal decision making and/or dispute settling processes (court) occur only after CPDM has been offered (whether accepted or refused) or deemed inappropriate due to safety concerns.

BRITISH COLUMBIA | Ministry of Children and Family Development

MCFD has established policy regarding a presumption in favour of CPDM early in the case management continuum that is consistent with best practice research, ministry goals, and guiding principles of the *CFCSA.*

Child and Family Service Standard #4→ Promotes planning and working cooperatively with others to enhance a family's commitment to keeping a child safe.

FACTS

- Participant information shared during the CPDM process is kept confidential
- CPDM occurs early in and throughout the child welfare service continuum
- Agreements/plans are made in good faith and involved parties have an obligation to live up to the terms of the plans and agreements.
- If a change in circumstances means the plan no longer assures a child's safety, delegated workers will act to protect the child. They may revert to an alternate process in the agreement for a change in circumstances. If the child’s safety is an immediate issue, the delegated worker can take action without waiting for a subsequent CPDM process.

Objective: To ensure that children, youth, and their families are encouraged and assisted to participate in collaborative case planning and decision-making and through these processes to:

- Increase meaningful participation of children, youth, and families in decision making;
- To enter into collaborative planning and decision making that is respectful of the culture and traditions of children/youth and families;
- Achieve timely planning decisions and permanency for children; and,
- Reduce the amount of time spent on court and court related activities.

Presumption in favour of Collaborative Planning and Decision Making

Family group conferencing, mediation, and traditional decision making are the **first choice** for child welfare decision making and for resolving child welfare disagreements; **court is the alternative**.

Child and Youth Participation

What is Meaningful Child and Youth Participation?

- It is a process not a one time event
- Child-centered
- Express views freely, according to ability and assisted in doing so
- Views are considered
- Reasons for decision are explained

Why Include Children and Youth?

- Legislation (UNCRC, CF&CS Act, etc)
- Standards and Policy
- Research – protection, builds relationship, better decisions made, commitment to decisions, positive development
- Practical Reasons – stakeholders, good ideas, ready to talk, capable and competent, resilient and not fragile.

Collaborative Planning and Decision Making with Aboriginal Families

Ministry CPDM policy acknowledges Aboriginal and other cultural models and practices to resolve disagreements and make decisions through Traditional Decision Making (TDM).

- TDM allows Aboriginal families to exercise their right to self-determination within their communities.
- The traditional practice is the presumed process used in planning and decision making whenever the participants are informed about their options and are in agreement with it.

To reflect their specific culture, the delegated worker will: Find out which culture the child belongs to and learn about it from involved family and community members; find out who is to be included in the process and ask what specific roles the family, clan, nation, or band have; reflect the local Aboriginal culture process as much as possible including using the specific terms cultural communities may have and recognizing that a member of the participating nation leads the process; and identify a contact in each community or band.

Cultural and/or Traditional Decision Making

Planning and/or resolving disagreements by following community or cultural models and practices.

- There are some common elements in culturally-based decision making tradition, but structure and approach of the process will differ from nation to nation, and community to community.
- Some common elements include: Inclusion of extended family and wider community; clear explanation of roles; process orientated; voluntary participation; children included whenever possible; non-interference (participants input is not judged or interrupted); family/community as witness to agreement; and focus on restoring relationships, balance, and harmony rather than affixing blame.

When to Use Collaborative Planning and Decision Making Processes:

The following are **The Defined Presumption Points**:

- **Must** be offered where a determination is made, or is likely to be made to seek removal under section 30(1)(b)
- **Must** be offered after a presentation hearing but before a contested presentation hearing
- **Must** be offered when a protection hearing is contested

When to Use Collaborative Planning and Decision Making Processes:

- May be offered at specific points throughout the case management continuum as a way to plan for children and youth, including children and youth who are in the ministry's care
- May be offered if a disagreement arises between a director and the parent(s) at any time during the case management continuum as a way to resolve issues as a preferred alternative to court
- May be offered for families who have been previously referred to CPDM, whenever further significant or contested case planning decisions are required.

When to Offer Collaborative Planning and Decision Making Processes:

- When seeking removal under section 30(1)(b): *No other less disruptive measure that is available is adequate to protect the child*
- After a presentation hearing, but before a subsequent contested presentation hearing
- When a protection hearing is contested
- At specific points throughout the case management continuum as a way to plan for children and youth
- Disagreement between director and the parent(s)
- For families who have been previously referred to CPDM

Declined CPDM

Ensure that the family is aware:

- Of the processes;
- CPDM will be available should they change their mind; and
- Some decisions will be made in court without the same opportunities for the family's involvement

<u>The delegated worker will offer a referral to CPDM process at another point in the service continuum</u>

Note: Parental consent is not required if child/youth is in Continuing care of director under CFSA or director is guardian or has care/custody of child under the A.A.

Issues not Appropriate for Collaborative Planning and Decision Making:

- The decision to conduct a child protection investigation;
- The decision about whether a child needs protection and why; and,
- A decision about resources or services that are not available.

Referrals to CDPM may not be appropriate if there is a significant power imbalance, or safety is threatened.

Family Group Conferencing

Principles Inherent in FGC

- **Autonomy** – respect for the family responsibility
- **Harm reduction** – reduce harm that comes from a lack of autonomy, a lack of participation and a lack of respect in decision making
- **Child safety/ well-being** – harm maybe reduced by enlisting a wider circle of informed extended family protectors, gaining meaningful parental engagement in planning resulting in family safety
- **Best interests** – accurate information about the family's strengths, needs and resources
- **Justice** – the family has the opportunity to tell its story and shape it's plan to ensure the safety and well being of the child

FGC – Model of Empowerment

- Family members are the experts on their specific family
- Family has the knowledge to protect children when they are charged and empowered to do so
- Family in the widest sense is more motivated than any other social institution to care for to protect its own children
- The task is to ensure that children/ youth have a “voice”

What makes FGC Unique?

- Voluntary
- Neutral co-ordinator/facilitator
- Model of family empowerment
- Preparation
- Private family time
- Family creates the plan and presents it to the professionals

FGC FACILITATOR'S GUIDING PRINCIPLES

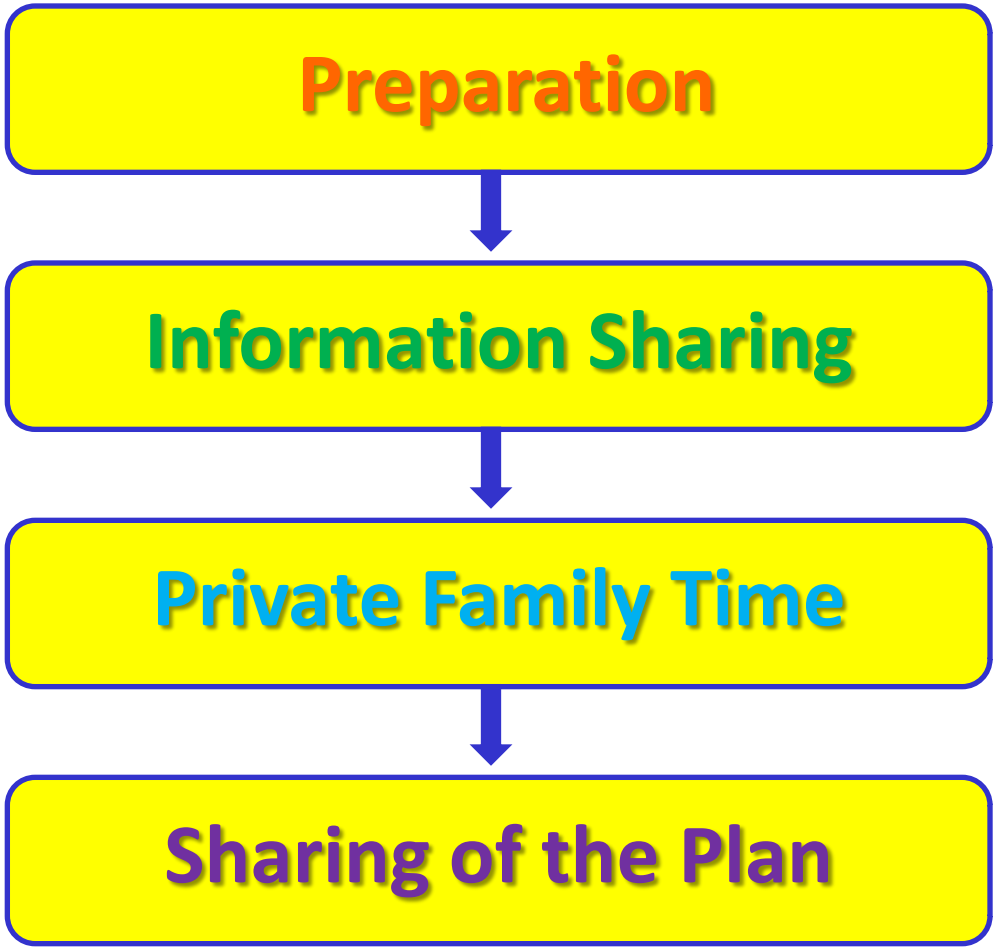
"Keeper of the Process."

"There is not a problem to resolve, there is a relationship to connect."

"Do no harm."

"Expect a miracle."

4 Phases of FCG Process



WHAT IS FCPC ?
FAMILY CASE PLANNING CONFERENCE

- Social worker, family and child/youth invite participants
- 90 minute meeting
- Fair and impartial facilitator
- No preparation of participants by facilitator
- Written plan provided at the end of the meeting
- Comfort items present (food, smoking space, playdoh) Supporting Success!

Purpose Of FCPC

- More immediate response
- Intended as an intervention at “crisis” decision points
- Engage family and community in planning, child safety/well being
- Widen the perspective and understanding of the child and family context, strengths, resources etc.
- Identify next steps/planning – what, who, when etc.
- Intention was to introduce families to FGC (brochures and engagement)

Mediation

- Court involved conflict situations when there is no agreement on the central issue in the case
- Some elements to a plan are in dispute and the goal is to resolve those disagreements
- Facilitated by a fair and impartial mediator from the Child Protection Mediator Roster and agreed upon by the social worker and family

Key to success

- All decision makers are present
- Early referrals
- Clear purpose
- Openness to options
- Demonstrated genuineness, respect and empathy
- Importance of review

Collaborative Planning and Decision Making Referral Process

The referral process will vary from region to region and at each delegated agency.

Common to all regions:

- Consistent with Practice Standard #4, worker provides information regarding CPDM processes and referral at defined presumption points and whenever a significant case-planning decision needs to be made about a child or youth.
- Families are provided with information and a collaborative decision is made on the most appropriate process

FGC Referral Process

Delegated worker advises the participants that:

- The family conference coordinator will contact them with more information
- Participation is voluntary
- If the family does not wish to participate in a FGC, other means of protecting the child/youth and meeting their needs, in the least disruptive manner, will be explored.

Service providers, legal counsel and/or others working with the parent(s) who wish to refer the family to FGC, can discuss FGC referral with the delegated worker with the family's consent.

Traditional Decision Making (TDM) Referral Process

The referring worker works closely with the family and community to ensure that everyone involved is informed about the options and consents to the process and understands the roles and procedures, and that the process is consistent with the Guiding Principles and Service Delivery Principles, and section 24 of the *CFCSA*.

Mediation Referral Process

- Any party can make a referral to mediation by contacting a mediator on the BC Mediator Roster.
  - However, delegated worker and family must voluntarily agree to mediation.
- **Follow referral procedures of community office and ensure:**
  - The family is provided with information on how to obtain qualified and approved mediators;
  - When a regional Mediation Coordinator or CPDM supervisor is in place, they make a referral to a mediator;
  - Questions or disagreements about mediators are directed to the Dispute Resolution Office for consultation;
  - If the family does not wish to participate in mediation, other means of protecting the child/youth and meeting the their needs, in a least disruptive manner, will be explored.

Preparation and Participation

All parties involved will be adequately prepared to attend and actively participate

Who is responsible for CPDM preparation?

FGC co-ordinator, the mediator, and/or the CPDM coordinator/supervisor

What does preparation for CPDM include?

Provision and understanding of information regarding CPDM

Note: Allow opportunity throughout the process for participants to ask questions and/or seek clarification.

During a CPDM Process

- Discussion of confidentiality and safety;
- Discussion of obligation of the parties to act in good faith to live up to the terms of the agreements/plan;
- Development of a plan for any change in circumstances that may occur for the child/youth and/or family (back-up plan, scheduled review of plan with all parties, and dispute resolution process); and
- Identification of resources that have been agreed to in the Collaborative Planning and Decision Making Process to the child/youth and family in order to support implementation of the plan.

Implementation and Review

- A collaborative approach is used to ensure the plan agreed to in the process is being actively followed, is addressing resolved disagreements and is meeting the needs of the child/youth.
- Delegated worker's role involves regularly reviewing the agreed upon plan and following up with all parties to implement a plan.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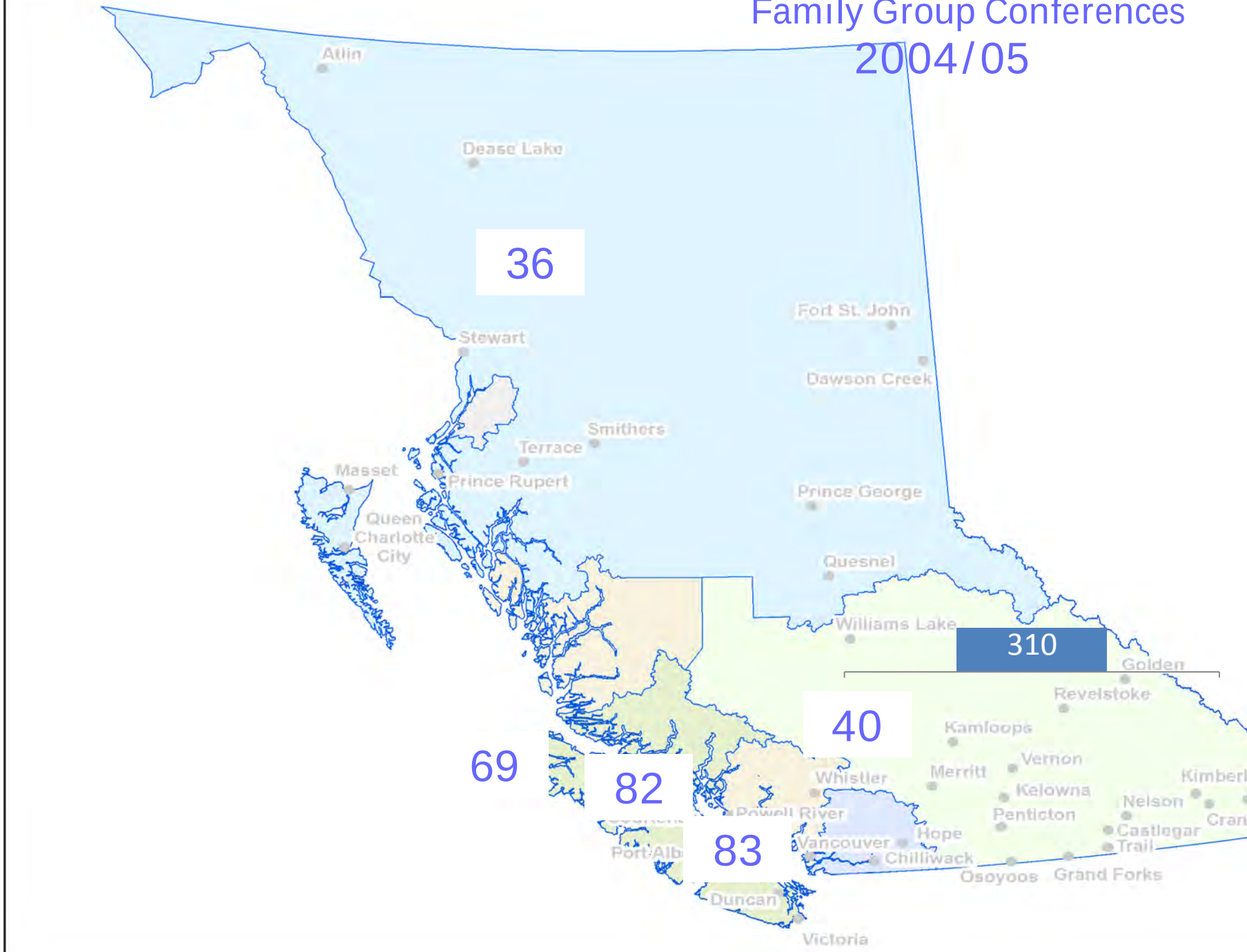
Stewart
Fort St. John
Dawson Creek
Smithers
Terrace
Masset
Prince Rupert
Prince George
Queen Charlotte City
Quesnel
Williams Lake
Golden
Revelstoke
Kamloops
Vernon
Whistler
Merritt
Kimberley
Kelowna
Fernie
Nelson
Cranbrook
Courtenay
Powell River
Penticton
Castlegar
Hope
Vancouver
Trail
Port Alberni
Chilliwack
Nanaimo
Osoyoos
Grand Forks
Duncan
Victoria

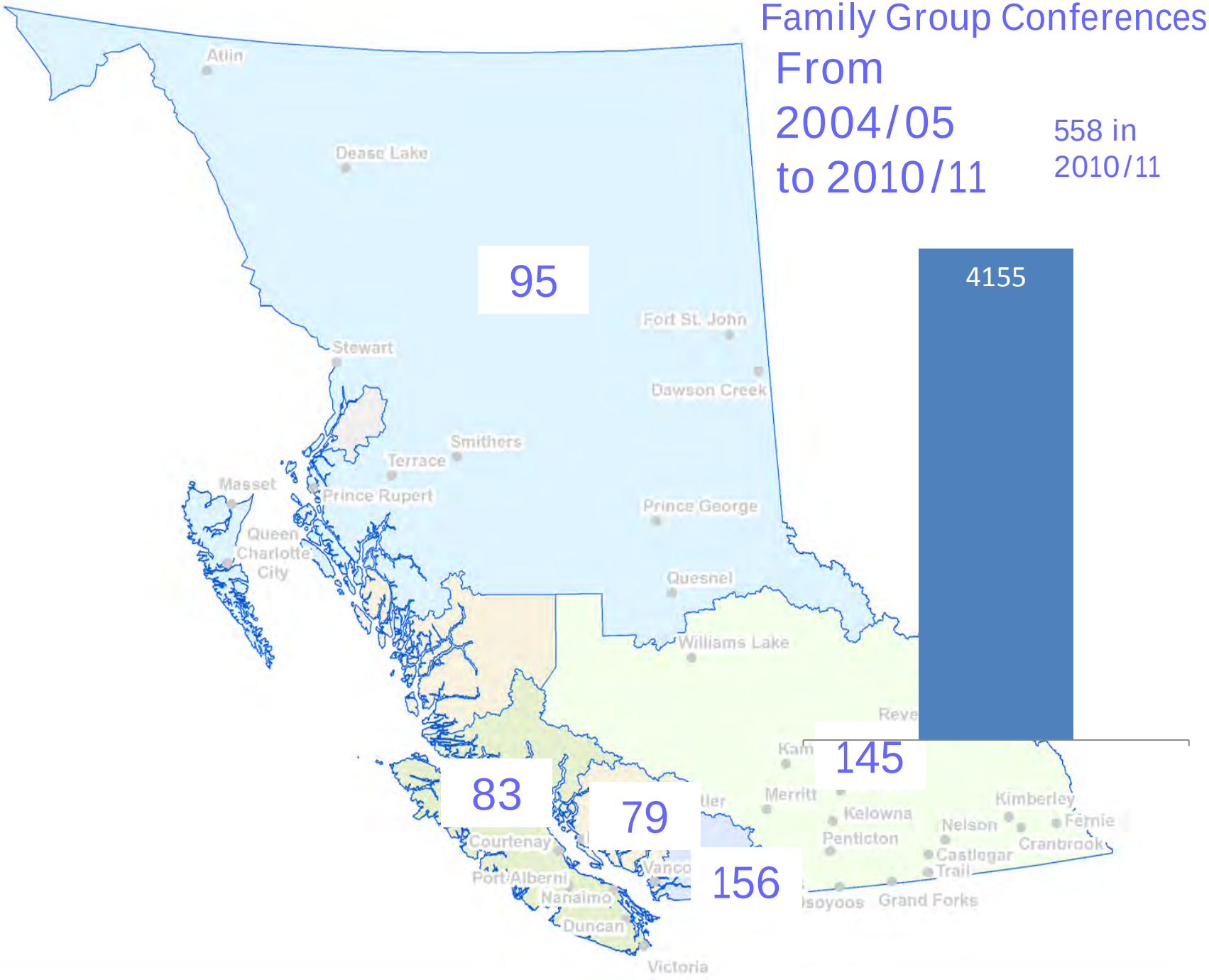
Family Group Conferences 2004/05



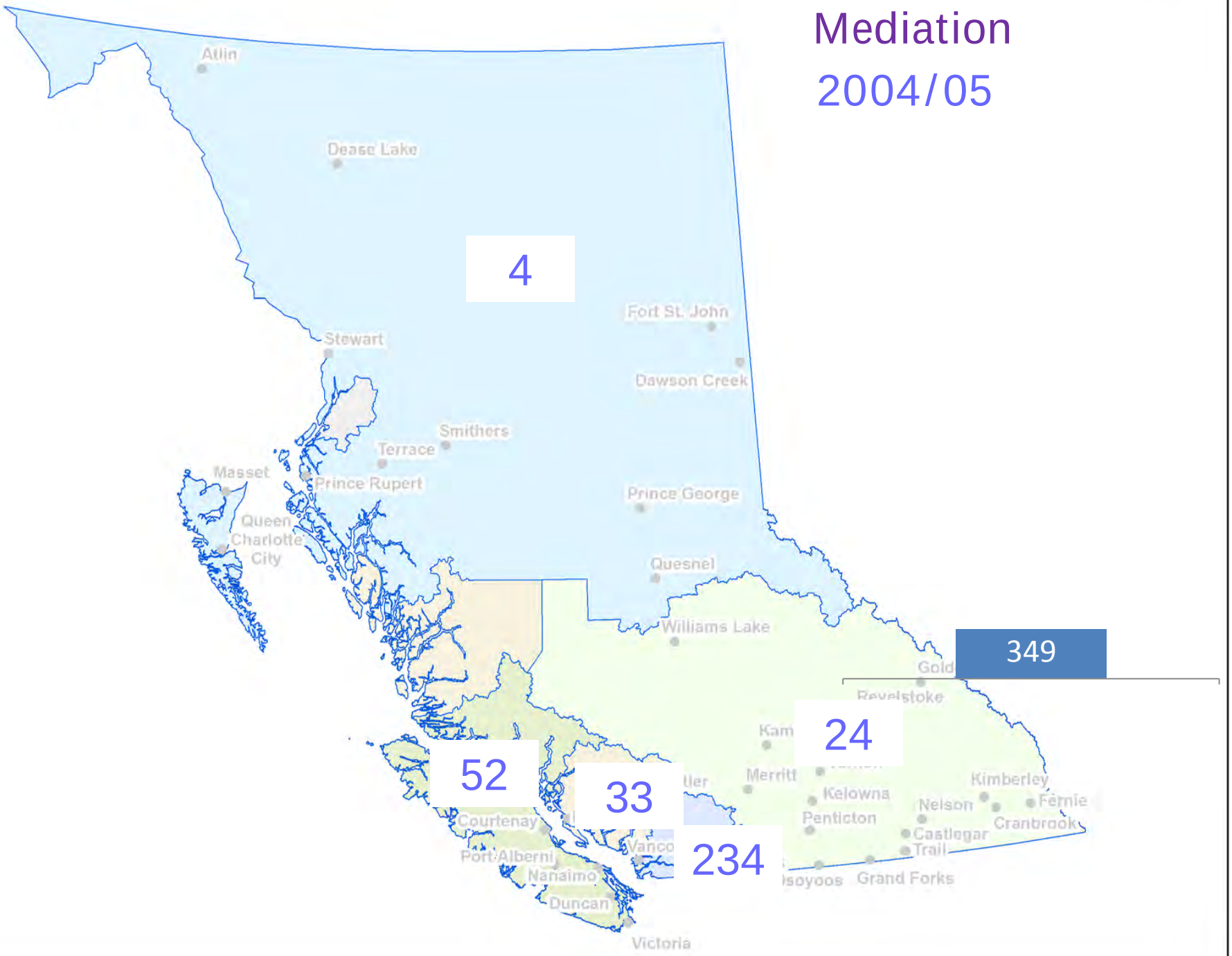
Family Group Conferences

From 2004/05 to 2010/11

558 in 2010/11

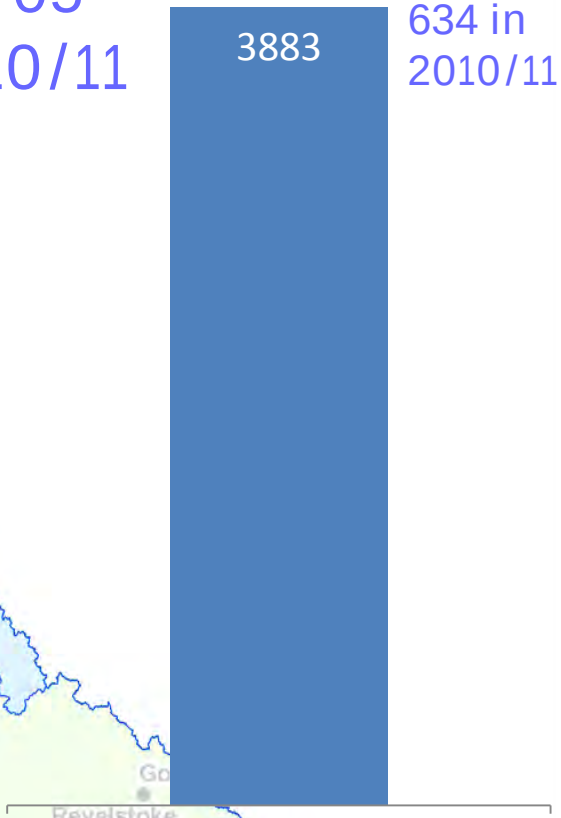


Mediation
2004/05



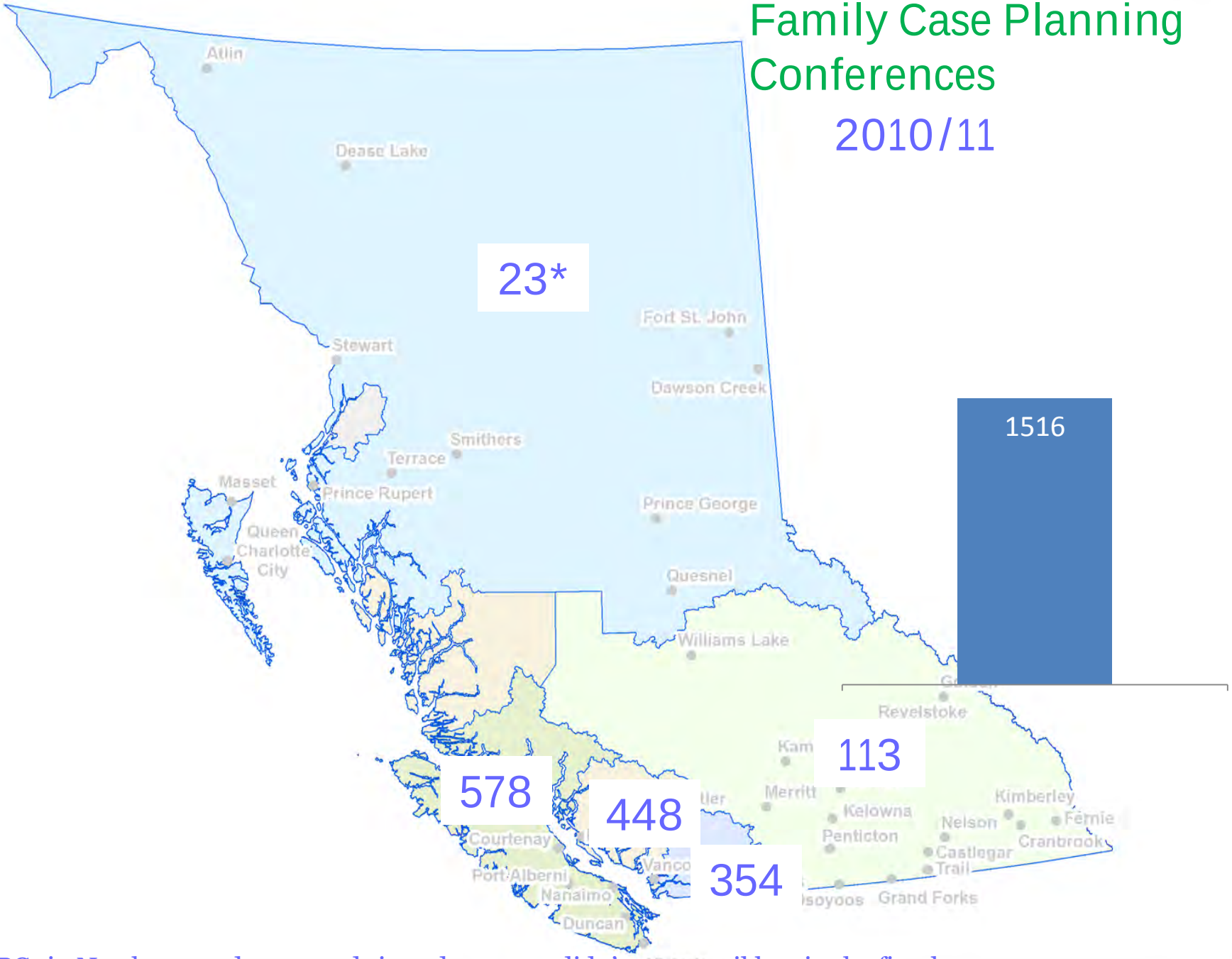
Mediation

From 2004/05 to 2010/11



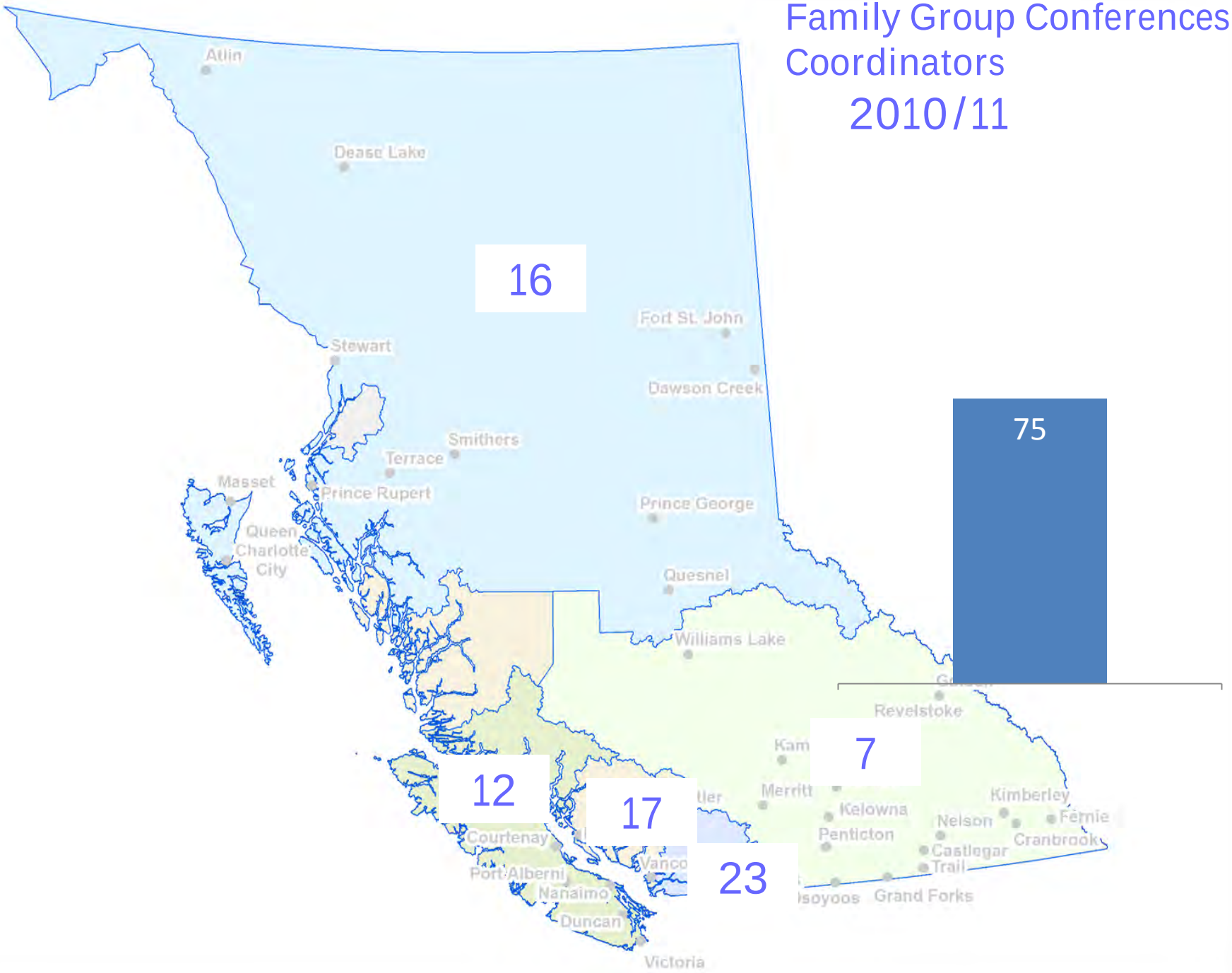
Family Case Planning Conferences

2010/11



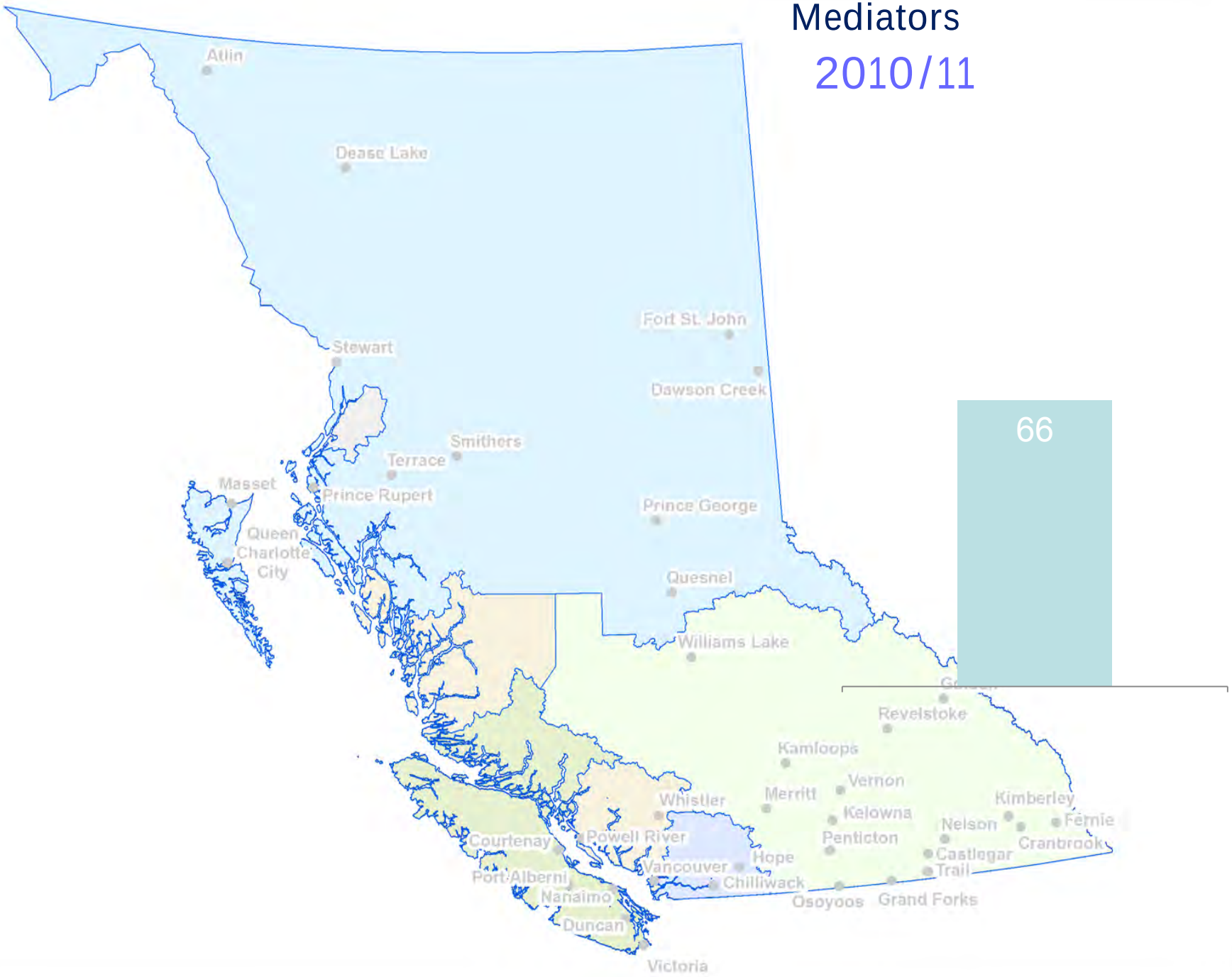
*FCPCs in North are undercounted since data entry didn't start until late in the fiscal year.

Family Group Conferences Coordinators 2010/11



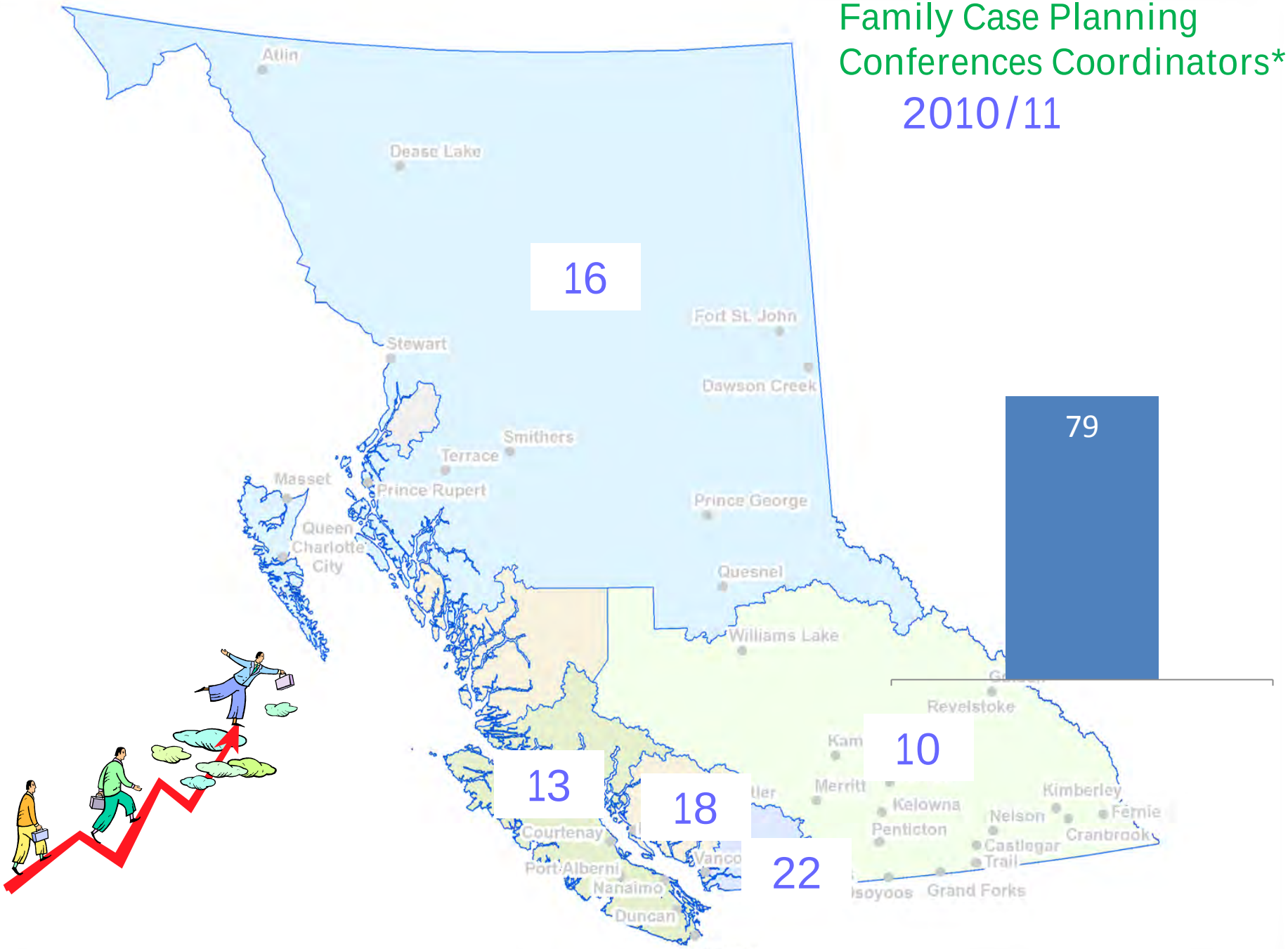
Mediators

2010/11



Family Case Planning Conferences Coordinators*

2010/11



*Most coordinators in the province facilitate both Family Group Conferences and Family Case Planning Conferen

3 Themes

- Collaborative Strengths Based Practice
- Presumption in Favour of FDR
- New Assessment Tools

1

1) Collaborative Strengths Based Practice

- Applies to the continuum of response to child protection reports - from intake / screening through to FDR, investigations and ongoing protection services.
- Acknowledges presenting problems from client's perspective
- Identifies and assesses ways families have coped before, available resources and exceptions to problems.

2

2) Presumption in Favour of FDR

- All offices are asked to undertake a presumption in favour of using FDR instead of an investigation where, in general:
  - the s. 13 concerns are less severe
  - primarily priority 3 and 4
  - a court application is not anticipated
  - parents are able/willing to participate in collaborative assessment and planning.

3

3) New Assessment Tools

- Structured Decision Making (SMD)
  - Family and Child Strengths and Needs Assessment
  - Family Vulnerability Assessment
  - Family Vulnerability Re-Assessment
  - Reunification Plan
  - Family Plan

Intent

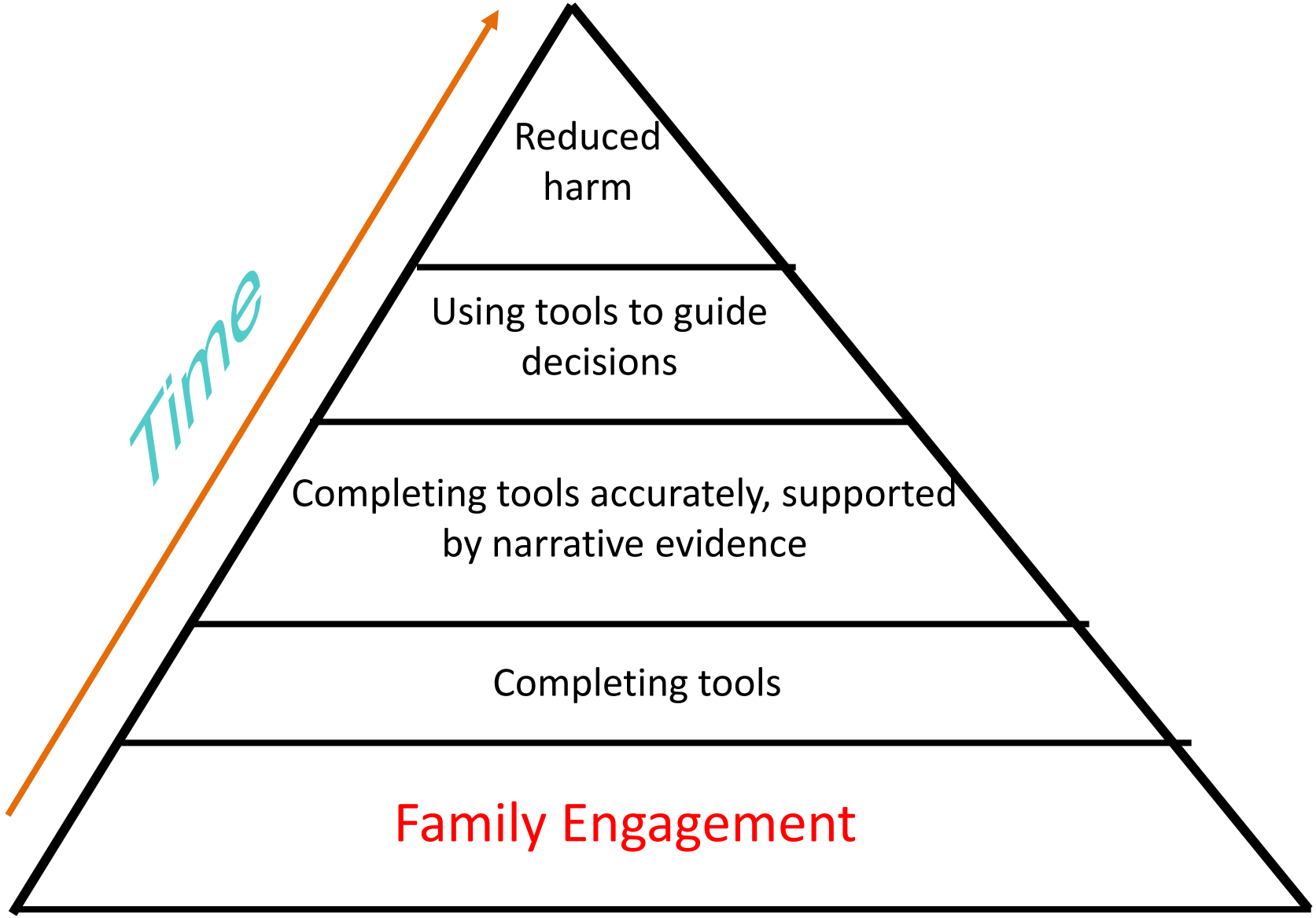
The new assessment tools are intended to better support decision-making through promoting:

- collaborative assessments of child and family strengths and needs;
- more valid and reliable assessments of the vulnerability of future harm;
- timely planning for children in care; and
- more efficient documentation so that less worker time is spent on paper work and more time is spent working with families.

SDM

- Comprehensive child protection case management
- Structured critical decision points
- Research- and evidence-based assessment tools

Building Toward the SDM® System's Goal



Questions or Comments?

A Wide Variety of Resources for MCFD Advocacy

I use my binder to point out ways that get us to the best possible outcomes – I point the standards or policies/procedures they need to follow, or recommendations made by authorities on the matter – I can use these resources to dispel misunderstandings they have of their own ministry or of others. I also use my binder with my client to point out what to expect and what is expected of them from the original source.

I prepare for meetings by using paper clips on key sections relating to the issue that is happening at that time – first using the Service Standards, then other MCFD/RCYBC resources and outside sources.

RESOURCES FOR ABORIGINAL/FIRST NATIONS CHILD PROTECTION:

- Delegated Aboriginal Child and Family Service Agencies Status (MCFD)
www.mcf.gov.bc.ca/about_us/aboriginal/delegated/pdf/agency_list.pdf

- Understanding Aboriginal Delegated Agencies Fact Sheet (LSS)
http://lss.bc.ca/assets/pubs/understandingAboriginalDelegatedAgenciesFactSheet.pdf

- Aboriginal Child Protection Process (LSS)
http://www.lss.bc.ca/assets/pubs/aboriginalChildProtectionProcessPosterWeb.pdf

- Jordan's Principal (MCFD)
www.mcf.gov.bc.ca/about_us/aboriginal/pdf/Factsheet%20Jordan's%20Principle%20April%208.pdf

- Schedule 1-2: List of Designated Representatives BC First Nations (Law)
http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/10_527_95#Schedule1

RESOURCES FOR THOSE WHO WORK WITH YOUTH:

- Champions for Change: A Guide to Effective Advocacy for Youth & Adults Who Support Them (Representative for Children and Youth)
http://wm.p80.ca/Org/Org64/Images/PDFs/Articles/RCY-ChampionsforChange-web.pdf

- The Representative for Children and Youth: Vision, Mandate and Goals (Representative for Children and Youth)
www.rcybc.ca/Groups/Fact%20Sheets/RCY%20Fact%20Sheet%20-%20Overview.pdf

- Complaints Process for Youth (MCFD)
http://www.mcf.gov.bc.ca/complaints/pdf/youth_complaints_brochure.pdf

- Hearing the Voices of Children and Youth: A Child-Centred Approach to Complaint Resolution
Representative for Children and Youth, January 2010
www.rcybc.ca/Images/PDFs/Reports/RCY_HearingtheVoices.pdf

- Guidelines of Provision for Youth Services (MCFD)
http://www.mcf.gov.bc.ca/youth/pdf/guidelines_provision_of_youth_services.pdf

- Standards for Youth Support Services and Agreements (MCFD)
http://www.mcf.gov.bc.ca/youth/pdf/stand_youth_sup_serv.pdf

- Advocacy: Supporting BC Children and Youth (Representative for Children and Youth)
www.rcybc.ca/Groups/Fact%20Sheets/RCY%20Fact%20Sheet%20-%20Advocacy.pdf

RESOURCES FOR ISSUES WITH FOSTER FAMILIES:

- Foster Family Handbook (MCFD)
http://www.mcf.gov.bc.ca/foster/pdf/handbook.pdf

- Protocols for Foster Homes (MCFD)
http://www.mcf.gov.bc.ca/foster/pdf/FHProtocols.pdf

- Standards for Foster Homes (MCFD)
http://www.mcf.gov.bc.ca/foster/pdf/standards_foster_homes.pdf

RESOURCES FOR THOSE WHO WORK WITH SPECIAL NEEDS CHILDREN AND THEIR FAMILIES:

- Isolated and Invisible: When Children with Special Needs are Seen but Not Seen (Representative for Children and Youth)
www.rcybc.ca/Images/PDFs/Reports/Isolated%20and%20Invisible%20FINAL%20.pdf

- Children and Youth with Special Needs: A Framework for Action (Ministry of Health Services, Ministry of Education, and Ministry for Children and Family Development)
www.mcf.gov.bc.ca/spec_needs/pdf/CYSN_FrameWorkForAction_Combo_LR.pdf

- A Transition Planning & Resource Guide for Youth with Special Needs and Their Families (MCFD)
http://www.mcf.gov.bc.ca/spec_needs/pdf/your_future_now.pdf

- Children and Youth with Special Needs Factsheet (MCFD)
http://www.mcf.gov.bc.ca/spec_needs/pdf/Factsheet_CYSN_Aug2010_FNL.pdf

GENERAL CHILD PROTECTION RESOURCES:

- Child Protection Process Flowchart (LSS)
http://www.lss.bc.ca/assets/pubs/parentsRightsKidsRightsFlowChart.pdf

- No Shortcuts to Safety: Doing Better for Children Living with Extended Family (Representative for Children and Youth)
www.rcybc.ca/Images/PDFs/Reports/RCY_CIHR%20FINAL%20no%20embargo.pdf

Table of Contents for a Core* CFCSA binder:

Most resources below are available at:
http://www.mcf.gov.bc.ca/child_protection/publications.htm

- Page 59-60 of the Christian Lee report from the Representative for Children and Youth *(included on the back of this sheet)*
  http://www.rcybc.ca/Images/PDFs/Reports/RCYChristianLeeReportFINAL.pdf
  - A synopsis of how social workers act in a way to cover their liabilities without actually providing service

- The Child, Family and Community Services Act
  www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96046_01
  - The act that governs all of child protection work
  - You may also want to have access to the regulations as well

- Child and Family Development Service Standards
  - Glossary of frequently misused terms
  - Very specific outline of each standard (like "support services to strengthen capacity") including the Definition and intention of standard, relevant legislation, policy, procedures, and other important information

- Aboriginal Service Delivery Change: A Conceptual Framework for Ministry Staff
  http://www.mcf.gov.bc.ca/about_us/pdf/aboriginal_conceputal_framework.pdf
  - Puts into words the criticisms/ considerations that exist for social workers doing child protection work

- Family Development Response or Investigation Reference Guide
  - Explains when FDR should occur or Investigation
  - Handy reference on page 8
  - Handy access to various screening tools

- The Collaborative Planning and Decision Making Policy and Procedure Guide
  http://www.lss.bc.ca/assets/communityWorkers/advocatesConference2008/presumptionInFavourOfCollaborativePlanning.pdf
  - The actual W5 of collaborative planning and decision making

- Alternative Dispute Resolution Processes: Family Group Conferences & Mediation
  - Short handout on the differences between FGC & Mediation

- Family Group Conference Reference Guide
  - Roles and responsibilities for those in FGC's
  - Policies and procedures for FGS's

- Family Group Conferencing for Parents
  - Plain language reference sheets

- Violence Against Women In Relationships Policy
  - The policies and procedures, resources and specific ways that social workers are to work with victims of intimate partner violence

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* Please modify this for your own practice (such as translated documents, QR codes for the relevant legislation, business card holder, other resources specific to your own practice, etc)

Between Aug. 2 and Aug. 24, 2007, Sunny was advised no fewer than 10 times to get Christian's name added as a no-contact person on Peter's conditions of bail. This advice came from a number of different professionals.

The Representative's investigators learned that Sunny was trying to understand how her husband was prohibited from having contact with her but was allowed to see his son. In practical terms, how would this work?

There are no supervised access programs in Victoria for children who are not in the ministry's care, and none of the service providers interviewed during the investigation saw it as their role to assist either parent with Peter's access to Christian. Instead they referred each parent to legal counsel and family court. Yet even if a referral had come before the family court, the Family Relations Act does not provide a definition of domestic violence, or a context for interpreting domestic violence incidents in the context of gender imbalances and power-based crimes (BC Association of Specialized Victim Assistance and Counselling Programs).

Moreover, MCFD staff said they advised Sunny to pursue adding Christian's name as a no-contact person even though they knew it would probably not happen. They stated they were aware that a parent cannot simply request that a court order be varied to include a child's name as a no-contact person, and they did not believe they had evidence to show a court that Christian was at risk or that the mother was unable to protect him. They suggested it to Sunny anyway, with a stated purpose to either "get it on the record" or to try anyway despite knowing that it was unlikely to be a successful strategy.

Despite suggesting several times to Sunny to have Christian's name added to the no contact bail conditions, the MCFD social worker, when consulted by the bail supervisor about whether Christian's name should be added to the no-contact bail condition, replied that she first needed to meet with Sunny and get more information in order to assess the child's safety.

- Page 59-60
Representative for Children and Youth's Report, 2009,
"Honouring Christian Lee – No Private Matter: Protecting Children Living With Domestic Violence"

3. Debt and Consumer Issues

Legal Services Society
British Columbia
www.legalaid.bc.ca

THE LAW FOUNDATION OF BRITISH COLUMBIA

Show me the Money – How to enforce RTB orders for monetary compensation

(Prepared by: Alison Ward, Barrister and Solicitor, Community Legal Assistance Society, November 16, 2011).

The Residential Tenancy Branch ("RTB") often makes orders that a landlord must pay money to a tenant. Examples are:

- an order to return a security deposit;
- a monetary order for breach of quiet enjoyment or property damaged or disposed of by a landlord;
- an order to pay one month's rent as compensation when evicted due to landlord use, etc.

This workshop is not about how to get orders for money from the RTB. The workshop is about how to *collect* money from a landlord, once a tenant has obtained an RTB order for monetary compensation.

Enforcement of RTB monetary orders is the sole responsibility of the party in whose favour the order was made; the RTB does not assist with enforcement of its monetary orders. If a monetary order is in favour of a tenant who still lives in the rental unit owned by the landlord that the order is against, the RTB may direct the tenant to deduct the monetary award from the rent payable (see RTA, s. 65(1)(b)). Rent should not be withheld unless the decision explicitly states this is allowed.

Step One: Send the landlord the RTB order and demand letter

The first step is always the same. Once you have an RTB monetary order against a landlord, you need to send the landlord a formal **demand letter** and the RTB order. The demand letter should

- identify yourself as advocate for the tenant;
- attach a copy of the RTB's Order;
- give the landlord a specific date and time by which the landlord must pay,
- tell the landlord how payment should be made, and where it should be sent or delivered (i.e. by check payable to the tenant sent to your office? by check payable to the tenant sent to the tenant's address of XYZ street.); and
- state that if the landlord does not pay by the deadline, you will suggest the tenant pursue enforcement of the order through the courts.

See Appendix A for a sample demand letter.

Send or deliver the demand letter to the landlord in such a way that you will be able to prove that the landlord received it. You could send it by registered mail, or have it hand delivered by someone who notes the date and time it was delivered to the landlord.

Having proof of when the landlord received the order will help you calculate the earliest date you can file the order for enforcement in court.

What if a landlord won't voluntarily pay?

If a landlord won't voluntarily pay, an RTB order for money owed can be enforced in either Provincial (Small Claims) or the Supreme Court of British Columbia.

In addition to enforcing an RTB order through the courts, you can let RTB management know if a landlord ignores RTB orders. Under sections 94.1 to 94.31 of the RTA, the Director of the RTB can assess complaints and impose fines of up to $5,000 per day while a contravention of the Act or Regulations continues, including failure to comply with the Order of a dispute resolution officer. While penalties have not been used much yet, it can be important to notify the RTB of instances of non-compliance by a landlord in order to document patterns. Repeated non-compliance by a landlord may lead to imposition of penalties.

Step Two: How, when and where to file an RTB order in Court:

Sections 84 and 85 of the *Residential Tenancy Act* say:

Director's orders may be filed in Supreme Court

> ***84*** *(1) A decision or an order of the director may be filed in the Supreme Court and enforced as a judgment or an order of that court after*
>
> *(a) a review of the director's decision or order has been*
>
> *(i) refused or dismissed, or*
>
> *(ii) concluded, or*
>
> *(b) the time period to apply for a review has expired.*
>
> *(2) Subsection (1) applies whether the decision or order is interim, temporary or final.*

Certain director's orders may be filed in Provincial Court

> ***85*** *(1) This section applies to a decision or an order of the director if*
>
> *(a) the decision or order is for* ***financial compensation or the return of personal property****, and*

> *(b) the amount required to be paid under the decision or order, excluding interest and costs, or the value of the personal property is within the monetary limit for claims under the* Small Claims Act.
>
> *(2) A decision or an order described in subsection (1) may be filed in the Provincial Court and enforced as a judgment or an order of that court after*
>
> *(a) a review of the director's decision or order has been*
>
> *(i) refused or dismissed, or*
>
> *(ii) concluded, **or***
>
> *(b) the time period to apply for a review has expired.*

a) What court? Provincial Court or Supreme Court?

Generally, unless there are inter-provincial issues, (discussed below) RTB monetary orders are filed for enforcement in the Provincial (Small Claims) Court of BC. The RTB can make monetary orders for up to $25 000, and the Provincial Court can enforce orders for up to $25 000. Enforcement in Small Claims Court is usually faster, cheaper and easier to understand than enforcement in Supreme Court.

This workshop is about enforcement of orders in Small Claims Court only. Enforcement in Supreme Court is a complicated topic that is beyond the scope of this presentation. However, see the section below regarding inter-provincial issues to be aware of situations where it may be prudent to file an RTB order for enforcement in BC Supreme Court rather than in Small Claims Court.

b) Timing: When to file an RTB Order with court

Sections 84 and 85 of the RTA provide an RTB order cannot be filed with a court until any internal review is completed or the time for internal review has expired.

Section 80 of the RTA sets the deadlines within which an application for internal review of an RTB order must be made. For most monetary orders, an application for internal review must be filed **within 15 days** after a copy of the decision or order is received by the party.

How do you calculate those 15 days? Are they business days? Or calendar days? The Dispute Resolution Rules of Procedure define “days” as follows:

> ***“****in the calculation of time expressed as “at least” a number of days, the first and last days must be excluded. If the date the document, notice or evidence must be served or given falls on a weekend or holiday, and it must be*
>
> - *Served on a business, or*
> - *Filed in an office,*
>
> *then it must be served or filed on the previous business day.*

If the document or notice must be provided to the RTB, weekends and holidays are not included in the calculation of days."

If neither party files for review of the director's order, then you can file a copy of the RTB order for enforcement with the courts, 15 business days after the landlord received it. Count 15 business days, starting the day after you know the landlord received your demand letter and the RTB order.

When that deadline has passed, phone the RTB and confirm that no internal review application has been filed. Once that is confirmed, you can proceed to file the RTB Order with Small Claims Court.

Question: Is there a maximum time frame in which you must file an RTB monetary order for enforcement with the courts in BC? For example, if a monetary order was made 5 years ago, can you still file it with Small Claims?

Answer: This seems to be a grey area. There does not seem to be a maximum lifespan attached to an RTB monetary order. If a tenant has an old monetary order that they want to enforce, they should proceed with the enforcement steps set out in this workshop. If the Small Claims Court refuses to file it saying it is "too old," the tenant should seek legal advice about their specific situation.

c) How to file a an RTB order with Small Claims Court

- **Original or Certified copy:**

Small Claims Court will only file an original or a certified copy of an RTB order for enforcement. These must be "clean" documents (i.e. with no notes or other writing on them). If you need a new certified copy of an Order (e.g. if a client has lost an Order, or has written all over an Order) the RTB will send additional certified copies upon request.

An RTB order can be filed with Small Claims Court either by mail, or in person at the Registry.

- **Filing Fees: Payment or waiver?**

There is a fee of $21 to file a copy of a certified RTB order with Small Claims Court.

If your client pays this fee, it is added to the amount of the RTB order and the tenant can collect it back from the landlord through the small claims enforcement process. The filing fee can be paid by cash, personal or company cheque, certified cheque, money order or bank draft payable to the Minister of Finance.

If the tenant cannot afford to pay the filing fee, the tenant can apply to waive it. An application to waive a filing fee is made to the Registrar of Small Claims Court under Small Claims Rule 20(1). This application is usually done by paper only and does not require an oral hearing.

Rule 20(1) says:

> *(1) Anyone who cannot afford the fees payable for registry services under Schedule A may apply to the registrar (see Rule 16 (3)), to be exempted from paying the fees.*

Rule 16(3) sets out the procedure to follow to apply to waive the $21 filing fee. It involves filing an *Application to a Registrar* (which is form #16), following the instructions on the form, and filing it at the registry. The Application should include detailed information about the tenant/applicant's income and expenses to illustrate that they cannot afford the filing fee. You can use a Statement of Finances to do this, although that is not mandatory. If possible, the tenant/applicant should also attach proof of their income to the application or statement of finances.

All court documents and applications in Small Claims Court should be signed by the client (not the advocate).

See Appendix B sample materials: Application to a Registrar
Sample statement of finances

- **What physical registry location to file at?**

The Small Claims Rules (Rule 1(2)) provide that when someone is starting a lawsuit in Small Claims Court, they must file the Notice of Claim at the Small Claims Court Registry closest to where the defendant lives or carries on business, or to where the event that resulted in the claim took place.

There is no such rule regarding what physical court registry an RTB order must be filed in for enforcement. Practically speaking, you will probably file it at the court registry location closest to where your client lives, to make enforcement easiest for them. However, if your client later moves or this registry location becomes impractical (e.g. because the debtor cannot travel there for court), Rule 17(8) of the Small Claims Rules allows the client to enforce the Order in another court location closer to the landlord:

> ***Creditor may enforce order at another place***
>
> *(8) The creditor may take steps to enforce a default order or a payment order at a registry other than where the court file is if*
>
> *(a) that registry is nearest to where the debtor lives or carries on business, and*
>
> *(b) the creditor files at that registry a certified true copy of the order and an affidavit stating the amount still owing.*

Step 3: Enforcing once an RTB order has been filed in Court

Once the RTB monetary order has been filed with the Court registry, this effectively turns it into a judgment of the Court where it is filed. That is, it has the same force and effect as a judgment of that court, and can be enforced in the same ways as a judgment of that court.

A court judgment (including a filed RTB order) is in effect for 10 years from the date it made. That means that **you can try and enforce an RTB monetary order through the courts for up to 10 years from the date it was filed by a court in BC**.

There is no way to renew a judgment. At the end of that 10 year period, the judgment/filed order will expire, unless the tenant files a new Notice of Claim to sue the landlord(debtor) on the judgment: this step must be taken before the 10 year limitation period expires. For example, if a filed RTB order says that a landlord must pay a tenant $10 000 and the landlord has not paid any of it in 10 years after it was filed with the court, the tenant can issue a Notice of Claim against the landlord and sue the landlord for the unpaid judgment amount.

Courts do not automatically enforce their own judgments. You and your client must decide what the best way is to enforce any particular order.

How do you pick a way to enforce an order?

To decide how to enforce a particular order, you first need to know two things:

1. What different enforcement options are available through Small Claims Court; and

2. What income or assets does the debtor/landlord have. That is, what might you be able to enforce against?

For detailed discussion of these issues, see the following materials:

Appendix C: *An Overview of Collection Procedures*, Small Claims Court Fact Sheet, The Law Centre (University of Victoria);

Appendix D: *Payment Hearings*, Small Claims Court Fact Sheet, The Law Centre (University of Victoria);

Appendix E: *Garnishing Orders*, Small Claims Court Fact Sheet, The Law Centre (University of Victoria); and

Appendix F: *Provincial Court Small Claims Handbook* (CLEBC, 2011) Chapter 8, "Enforcing the judgment."

Other considerations

1. What is an advocate's role in Small Claims Court?

Does an advocate have a right to attend, e.g. a payment hearing or speak to an application for a garnishing order?

Generally, a person involved in a Small Claims Court case has the right to be represented by a lawyer or articled student. The person does not have the right to be represented by an advocate. This means that an advocate does not have an absolute *right* to speak on behalf of a client in Small Claims Court.

In order for an advocate to speak on a client's behalf in court (e.g. to make submissions, or ask questions or otherwise present a case or application), **the advocate must obtain the Court's permission to do so.** A request for such permission is made at the start of each hearing or application, and it is made orally to the judge who is hearing that application.

Your client must always attend court. You cannot attend instead of your client. The client will also need to tell the judge that they would like you to help them with that day's hearing/ procedure.

To request permission to assist a client in a hearing, introduce yourself to the judge formally. Spell your name if it is not easy to spell. Judges in Small Claims Court are addressed as "Your Honour."

You should state their name, job position and name of the agency where they work. Tell the judge if you are funded by the Law Foundation and if you have a supervising lawyer. If you have a supervising lawyer, tell the judge the lawyer's name, and whether the lawyer is aware that they are in court that day on this application (the lawyer should be). Tell the judge what involvement you have had with the file so far (for example, did you prepare the application you are there on that day? Did you also draft the affidavit? Etc). Essentially you want to persuade the Court that that you are knowledgeable about the client's case and about court procedures, and that it will assist both the client and the Court/judge if you are allowed to speak on the client's behalf. It may also be helpful to tell the judge about any barriers that would make it difficult for the client to present their own case.

For example, you can say:

"Your Honour, my name is Susan Smith. I am a Law Foundation funded advocate at the Burnaby Women's Centre. I am asking for the Court's permission to assist Mr. Client in court today with this payment hearing.

My supervising lawyer is Betty Black; she is aware I am seeking the Court's permission to assist with this application today. Mr. Client is trying to enforce an order he obtained against his former landlord at the Residential Tenancy Branch. I represented Mr. Client in the hearing at the Residential Tenancy Branch, and helped him prepare all the documents for today's application. Mr. Client speaks English as a second language and

has a grade 6 education. I believe it would assist the Court if I am allowed to speak on Mr. Client's behalf today. Thank you."

2. Interprovincial Issues

You may encounter situations that raise inter-provincial issues.

Example: A client comes to see you. They just obtained an order from the RTB for monetary compensation from their landlord. The landlord owns the house the client lived in, in Vancouver. However, the landlord lives in Ontario. They want to know if you can help them enforce the RTB Order. Do they enforce it in BC or Ontario? And, how?

Considerations: Garnishing orders and other orders issued by Small Claims Court are only effective against assets, garnishees and people that are located in BC. Think about whether there may be assets or garnishees located in BC that you could enforce against through Small Claims Court. For example, if the landlord has new tenants who pay her rent each month, you could file the RTB Order with Small Claims Court and apply for a garnishing order against the new tenants in Vancouver.

Small Claims Court orders cannot attach income, garnishees or assets located outside BC. If the landlord has assets or income in Ontario that your client wants to enforce against, they cannot do that through BC Small Claims Court. To attach assets or income in Ontario, the client would have to enforce the order in Ontario.

Each province and territory in Canada has its own legislation regarding reciprocal enforcement of judgments from other provinces and territories. To see if an order from BC can be enforced in Ontario, the client would have to consult the Ontario legislation about reciprocal enforcement of judgments. They would first need to see if the Ontario legislation made it possible to enforce BC orders in Ontario and, if so, follow the process outlined in the Ontario legislation about how such extra-provincial orders are registered and enforced in Ontario.

Depending on what the reciprocal enforcement legislation for the other province or territory says, it may be necessary to first file the RTB order with the BC Supreme Court before trying to register and enforce it in another province or territory.

Sample provincial legislation about reciprocal enforcement of extra-provincial judgments:

BC: *Enforcement of Canadian Judgments and Decrees Act*

Saskatchewan: *Enforcement on Canadian Judgments Act.*

The provincial legislation in each of Alberta, Manitoba and Ontario is called the *Reciprocal Enforcement of Judgments Act.*

Show me the Money – How to enforce RTB orders for monetary compensation

List of Appendices:

A: Sample demand letter to landlord

B: Application to a Registrar and sample statement of finances

C: Law Centre Small Claims Court fact sheet: *An Overview of Collection Procedures*

D: Law Centre Small Claims Court fact sheet: *Payment Hearings*

E: Law Centre Small Claims Court fact sheet: *Garnishing Orders*

F: *Provincial Court Small Claims Handbook* (CLEBC, 2011) Chapter 8, "Enforcing the judgment."

Appendix A -

Appendix A – Sample demand letter to Landlord for payment of monetary order

To: Ms. B Landlord
XXX Oak Street
Vancouver, BC

By Registered Mail (or by hand delivery, etc)

November 22, 2011

Dear Ms. Landlord:

Re: Residential Tenancy Branch Order for payment of $500 to Ms. A Tenant

I am assisting Ms. Tenant with issues related to her former tenancy with you at 2222 Main Street, Vancouver.

On November 1, 2011, the Residential Tenancy Branch ("RTB") ordered that you pay Ms. Tenant the sum of $500.00. A copy of the RTB's order is enclosed for delivery.

The sum of $500.00 is payable to Ms. Tenant immediately. Kindly issue payment of $500.00 by cheque made payable to Ms. A Tenant and mailed to Ms. Tenant at her current address of 2957 Brick Road, Vancouver, BC V1V 1V1.

If Ms. Tenant has not received your payment on or before **5 pm on Friday December 9th**, she will be advised to seek legal advice regarding enforcement of the RTB order against you in court, plus payment of court costs and interest.

Ms. Tenant would prefer not to litigate this matter. She therefore looks forward to receiving your payment by December 9th. Should you have any questions or comments about this matter, or wish to discuss payment terms, please contact me at 604 123 4567.

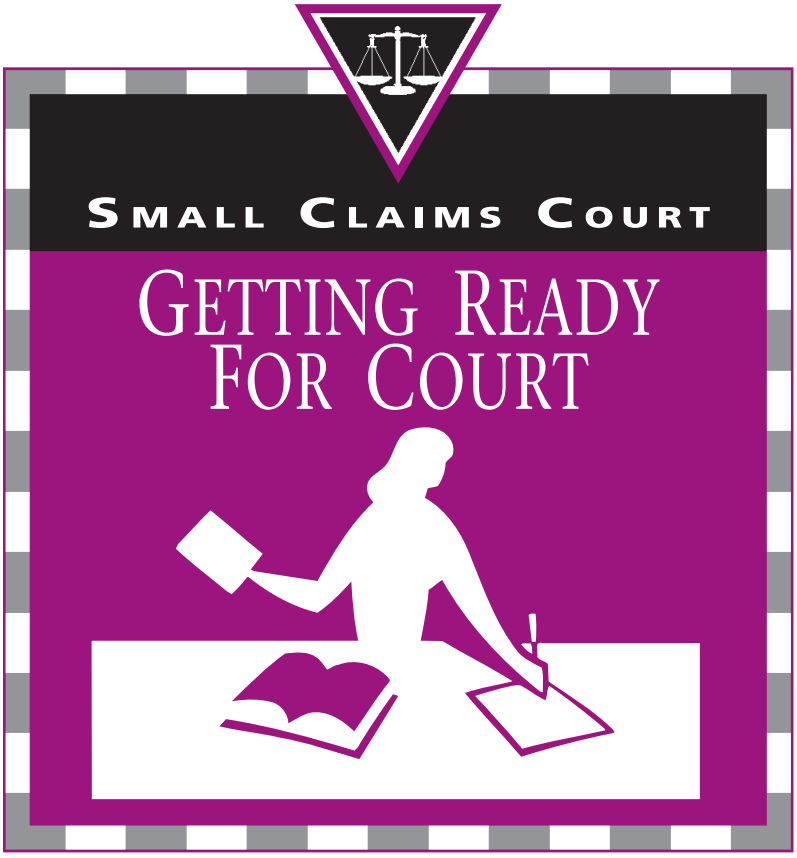
Yours truly,

Name of Agency

Ms. X Advocate

XA/xa
Encl. RTB order dated November 1, 2011
c.c. Ms. A. Tenant

APPLICATION TO THE REGISTRAR



PROVINCIAL COURT OF BRITISH COLUMBIA

FORM 16
SCL 016 11/2006
(OPC# 7530854519)

APPLICATION TO THE REGISTRAR

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA (SMALL CLAIMS COURT)

REGISTRY FILE NUMBER
REGISTRY LOCATION

APPLICATION TO THE REGISTRAR

Fill in the names of the parties, copying them from the Notice of Claim. Also, fill in the registry file number shown on the Notice of Claim.

In the case between:

_____ **CLAIMANT(S)**

and

_____ **DEFENDANT(S)**

FROM:

Fill in the name, address and telephone number of the applicant.

NAME _____

ADDRESS _____

CITY, TOWN, MUNICIPALITY _____ British Columbia PROV. _____ POSTAL CODE _____ TEL. # _____

Check the appropriate box.

The applicant asks for an order

- ☐ renewing a claim;
- ☐ renewing a third party notice;
- ☐ postponing a settlement conference;
- ☐ extending the time for filing a certificate of readiness;
- ☐ other:
- ☐ permitting service of a notice of claim outside B.C.;
- ☐ exempting the applicant from paying fees;
- ☐ permitting a hearing to be conducted by telephone;
- ☐ permitting another method of service;

If the other box is checked, give the details of the order you are asking for.

Give the facts you wish the registrar to consider and sign the Application.

The facts on which this application is based are as follows:

I certify these facts are true.

SIGNATURE OF APPLICANT

This will be completed by the court.

The Court orders that

date

by the registrar

FORM 16
SCL 016 11/2006
(OPC# 7530854519)

1-COURT REGISTRY 2-APPLICANT 3-OTHER PARTY

APPLICATION TO THE REGISTRAR

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA (SMALL CLAIMS COURT)

REGISTRY FILE NUMBER
REGISTRY LOCATION

APPLICATION TO THE REGISTRAR

Fill in the names of the parties, copying them from the Notice of Claim. Also, fill in the registry file number shown on the Notice of Claim.

In the case between:

_____ **CLAIMANT(S)**

and

_____ **DEFENDANT(S)**

FROM:

Fill in the name, address and telephone number of the applicant.

NAME _____

ADDRESS _____

CITY, TOWN, MUNICIPALITY _____ British Columbia PROV. _____ POSTAL CODE _____ TEL. # _____

Check the appropriate box.

The applicant asks for an order

- ☐ renewing a claim;
- ☐ renewing a third party notice;
- ☐ postponing a settlement conference;
- ☐ extending the time for filing a certificate of readiness;
- ☐ other:
- ☐ permitting service of a notice of claim outside B.C.;
- ☐ exempting the applicant from paying fees;
- ☐ permitting a hearing to be conducted by telephone;
- ☐ permitting another method of service;

If the other box is checked, give the details of the order you are asking for.

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The facts on which this application is based are as follows:

I certify these facts are true.

_____ SIGNATURE OF APPLICANT

This will be completed by the court.

The Court orders that

date _____ by the registrar _____

FORM 16
SCL 016 11/2006
(OPC# 7530854519)

1-COURT REGISTRY 2-APPLICANT 3-OTHER PARTY

APPLICATION TO THE REGISTRAR

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA (SMALL CLAIMS COURT)

REGISTRY FILE NUMBER
REGISTRY LOCATION

In the case between:

CLAIMANT(S)

and

DEFENDANT(S)

FROM:

NAME

ADDRESS

CITY, TOWN, MUNICIPALITY | British Columbia PROV. | TEL. # POSTAL CODE

The applicant asks for an order

- ☐ renewing a claim;
- ☐ renewing a third party notice;
- ☐ postponing a settlement conference;
- ☐ extending the time for filing a certificate of readiness;
- ☐ other:
- ☐ permitting service of a notice of claim outside B.C.;
- ☐ exempting the applicant from paying fees;
- ☐ permitting a hearing to be conducted by telephone;
- ☐ permitting another method of service;

The facts on which this application is based are as follows:

I certify these facts are true.

SIGNATURE OF APPLICANT

The Court orders that

date

by the registrar

APPLICATION TO THE REGISTRAR

FORM 16
SCL 016 11/2006
(OPC# 7530854519)

1-COURT REGISTRY 2-APPLICANT 3-OTHER PARTY

The Law Centre

A Service of the University of Victoria Faculty of Law

Small Claims Court Factsheets You Can Download:

- Factsheet 1.... An Overview of a Lawsuit in Small Claims Court
- Factsheet 2.... Starting a Lawsuit
- Factsheet 3.... Lawsuits Involving Persons Under 19 Years of Age
- Factsheet 4.... Preserving Property
- Factsheet 5.... Recovering Specific Property
- Factsheet 6.... Serving a Notice of Claim (Including Substitutional Service)
- Factsheet 7.... Obtaining a Default Order
- Factsheet 8.... What to do if You are Sued in Small Claims Court
- Factsheet 9.... Third Party Procedure
- Factsheet 10.... Cancelling a Default Order or Dismissal Order
- Factsheet 11.... Offers to Settle and Summary Judgement Applications
- Factsheet 12.... The Settlement Conference
- Factsheet 13.... Preparing for Trial
- Factsheet 14.... How to Appeal an Order Made in Small Claims Court
- Factsheet 15.... An Overview of Collection Procedures
- Factsheet 16.... Payment Hearings
- Factsheet 17.... Default Hearings
- Factsheet 18.... Seizing Assets
- Factsheet 19.... Garnishing Orders
- Factsheet 20.... Setting Aside Garnishing Orders
- Factsheet 21.... Mediation for Claims Up To $10,000

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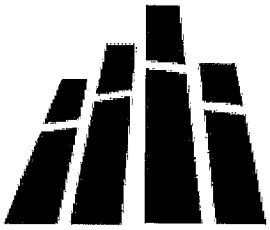
Appendix C



Published on *The Law Centre* (http://thelawcentre.ca)

An Overview of Collection Procedures

Prepared by Glenn Gallins
Revised April 2008
Funded by the PLE Program of the Legal Services Society

INTRODUCTION

This factsheet is about collecting debts after a Small Claims Court has made a decision that one person owes another person money. It gives information from the point of view of the person trying to collect and the person who must pay.

DEFINITIONS

First there are some words that should be defined.

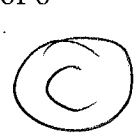
A "PAYMENT ORDER" is a court Order requiring money be paid. A Payment Order is sometimes called a Judgment. A Payment Order can be made because a Defendant failed to file a Reply, or attend a Settlement Conference or trial. It can also be made after a Settlement Conference or trial where a Judge has heard all the facts of the case. A Payment Order is effective for 10 years. If the amount owed has not been paid by then, there is a way of obtaining a new Payment Order and having an additional 10 years to collect.

A "DEBT" is the amount required to be paid by the Payment Order.

A "DEBTOR" under the Small Claims Rules is someone required to pay money because a Payment Order has been made against them.

A "CREDITOR" is someone a Payment Order requires a Debtor to pay money to.

COLLECTING DEBTS FROM THE CREDITOR'S POINT OF VIEW



When you think about it, there are only a few ways to make someone pay money they owe:

1. You could have them pay voluntarily. For example, the Debtor could be written a letter requesting payment by a particular date to a particular address.
2. You could have a Judge order them to pay the money all at once or by installments and have a way of punishing them if they do not pay.
3. You could take things they own and sell them.
4. You could take money owed to them by someone else, like their employer.
5. You could prevent them from dealing with land they own or indeed take land they own to pay the debt.

Not surprisingly, the Small Claims Rules [1] and the Court Order Enforcement Act [2] provide for most of these ways of collecting.

PAYMENT HEARINGS AND PAYMENT SCHEDULES

After a Payment Order is made a Judge or Registrar can conduct a Payment Hearing. Sometimes a Payment Hearing is held immediately after a trial or Settlement Conference. Sometimes a special date has to be set. The Judge at a Payment Hearing can:

- Order a date when the debt must be paid; or
- Make an installment order including the dates and amounts of installments; or
- Refuse to make an order in which case the whole debt is immediately payable.

In addition to the possibility of a Payment Schedule being ordered, Payment Hearings are useful because a Creditor can get from the Debtor information useful for other collection procedures. For example, a Creditor can find out the name of the Debtor's employer, where the Debtor banks, and what assets the Debtor owns.

For details about Payment Hearings see **Factsheet 16** [3] which is called "Payment Hearings."

DEFAULT HEARINGS

A Debtor who fails to comply with a Payment Schedule can be subject to two forms of punishment. First, the Creditor will be free to use other forms of collecting like seizing assets and garnishment (described below). Second, the Debtor can be made to attend a Default Hearing. If the Debtor's explanation, or failure to give an explanation, of why the Payment Schedule has not been complied with is considered by the Judge to amount to a contempt of Court, the Debtor can be jailed for up to 20 days -- and the debt is still owed by the Debtor to the Creditor.

For more information about Default Hearings see **Factsheet 17** [4] which is called "Default Hearings."

SEIZING ASSETS

If a Payment Schedule has not been made or is no longer in force a Creditor can get an Order of Seizure and Sale. This order allows a Bailiff to seize items owned by the Debtor. But there are some restrictions. Some of the Debtor's assets are exempt from seizure including:

- $4000 of the Debtor's household furnishings and appliances;
- One motor vehicle worth up to $5000; and
- Tools and other personal property of the Debtor that are used by the Debtor to earn an income from the Debtor's occupation.

The Bailiff can not break into a house to seize items. And items owned by the Debtor jointly with someone else won't be seized. In addition, the Creditor must first pay the Bailiff for the cost of the Bailiff's service.

If items are seized the Bailiff will sell them at auction or by another reasonable method. If enough money is obtained by the sale the Creditor will be reimbursed for the cost of seizure, plus the amount owed on the debt.

For more information about seizing assets see **Factsheet 18** [5] which is called "Seizing Assets."

GARNISHING WAGES AND OTHER MONEY OWED TO THE DEBTOR

If money is owed to the Debtor by an employer or other person, a Creditor can get an Order requiring the money owing to the Debtor be paid instead to the Small Claims Court registry. This procedure is called Garnishment and the Order is called a Garnishing Order. Money in a bank account can be garnished because the bank really "owes" the money to the Debtor. The procedure to get a Garnishing Order is described in **Factsheet 19** [6] which is called "Garnishing Orders."

REGISTERING A CERTIFICATE OF JUDGMENT AGAINST LAND

Registering a Certificate of Judgment against land owned by a Debtor prevents the Debtor from selling or mortgaging the land unless the debt owed to the Creditor is paid off. Even if the Debtor owns land jointly with another person, it may be useful to register a Certificate of Judgment against the land.

A Certificate of Judgment can be obtained at the Small Claims Court Registry from the Registrar. The cost is $30.00. The Certificate of Judgment can then be registered at the Land

Title Office where the land is registered. The cost of filing is $25.00. A Certificate is effective for two years, after which a new Certificate must be obtained and filed.

A search can be done at a Land Titles Office. There are four in BC and they are located in Kamloops, Prince George, Victoria and New Westminster. A search can also be done using the B.C. On-line [7] computer system to find out if the Debtor owns land. There is a fee for doing the search.

HAVING LAND OWNED BY THE DEBTOR SOLD TO PAY OFF THE DEBT

In some cases it is possible to obtain an Order to have the Debtor's land sold. However, if the land is used by the Debtor as a principal residence in the Capital Regional District or the Greater Vancouver Regional District, and the Debtor's equity in the land is less than $12000 the land is exempt from being taken and sold. If the land is located elsewhere in BC and is used by the Debtor as a principal residence and the Debtor's equity is less than $9000 the land is exempt from being taken and sold.

The process of having a Debtor's land sold to pay off a debt owed to a Creditor is very complicated, costly and time-consuming. Legal advice should be obtained to determine whether it would be financially worthwhile.

DRIVER'S LICENCE SUSPENSION

If the Payment Order was for a lawsuit for bodily injuries or damages to property worth more than $400 arising from a motor vehicle accident, a Creditor can apply to the Superintendent of Motor Vehicles to have the Debtor prohibited from driving. Section 91 of the Motor Vehicle Act [8] applies to this situation. The Superintendent must be supplied with a Certificate of Judgment, evidence of identity of the Debtor, and evidence of the Debtor's failure to satisfy the Payment Order.

For more information contact the Superintendent of Motor Vehicles. [9]

SOME OPTIONS FOR THE DEBTOR WHO CANNOT AFFORD TO PAY

Although a Payment Order has been made, a Debtor may not be financially able to pay the debt. The law provides some protections for Debtors. These include:

- the right to request a Payment Hearing and a Payment Schedule;

- the right to apply to the Court (see **Factsheet 16** [3]) to arrange a Payment Schedule;

- the right to be free from garnishment, seizure, or other collection procedures as long as the payments required by the Payment Schedule are made on time;

- the right to have some of the Debtor's assets free from seizure;

- the right in most cases to keep 70% of one's wages free from garnishment and to apply to increase the exemption up to 90% (see **Factsheet 20** [10] which is called "Setting Aside Garnishing Orders");

- the right to apply to have garnishing orders released (see **Factsheet 20** [10]);

- the right under Part 7, Division 1 of the Business Practices and Consumer Protection Act [11], to be protected from unacceptable collection practices by professional debt collectors;

- the right to seek protection under the Bankruptcy and Insolvency Act. [12] For more information contact a Chartered Accountant who is a Trustee in Bankruptcy. To locate a Trustee you can use the Yellow Pages [13] or myTelus.com [14].

FOR MORE INFORMATION

More information about these rights may be obtained from the local office of B.C. Debtors Assistance (See "Debtor Assistance" in the Blue Pages of the telephone directory) or from a lawyer.

You can speak with a lawyer for up to 30 minutes for a fee of $25 by obtaining a referral through the Lawyer Referral Service [15] (1-800-663-1919).

You could also contact a Legal Services Society Office [16] or a Community Law Office.

Please Click Here to Provide Us With Feedback [17]

Page Last edited: 2008-10-15 16:09

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Payment Hearings

Prepared by Glenn Gallins
Revised April 2008
Funded by the PLE Program of the Legal Services Society

INTRODUCTION

This factsheet is divided into four parts:

- Part 1 will tell you what Payment Hearings are for and will also tell you about Payment Schedules.
- Part 2 tells how a Creditor can request a Payment Hearing.
- Part 3 tells what is likely to happen at a Payment Hearing.
- Part 4 tells how a Debtor can request a Payment Hearing and what should be done if a person can not attend a Payment Hearing.

SOME DEFINITIONS

But first there are some words that should be defined.

A "PAYMENT ORDER" is a court order requiring money be paid. A Payment Order is sometimes called a Judgment. A Payment Order can be made because a Defendant failed to file a Reply, or attend a Settlement Conference or Trial. It can also be made after a Settlement Conference or Trial where a Judge has heard all the facts of the case. A Payment Order is effective for 10 years. If the amount owed has not been paid by then, there is a way of obtaining a new Payment Order and having an additional 10 years to collect.

A "DEBT" is the amount required to be paid by the Payment Order.

A "DEBTOR" under the Small Claims Rules is someone required to pay money because a Payment Order has been made against them.

A "CREDITOR" is someone a Payment Order requires a Debtor to pay money to.

Return

PART 1

THE PURPOSE OF PAYMENT HEARINGS

Payment Hearings can be held for a number of purposes. These include:

1. To allow a Small Claims Court Judge or Registrar to determine whether a Debtor has the financial ability to pay the debt;
2. To determine a date by which the debt must be paid;
3. To make a Payment Schedule under which a Debtor must pay the debt by installments of specific amounts on certain dates;
4. To allow a Debtor or Creditor to apply to vary a Payment Schedule;
5. To allow a Creditor to obtain information that would be useful for other types of collection procedures, like garnishment, seizing assets or registering a Certificate of Judgment against land.

Rule 12(12) of the Small Claims Court Rules

says that at a Payment Hearing a Debtor can be asked about:

1. The Debtor's income and assets;
2. Other debts owed by the Debtor;
3. Money owed to the Debtor;
4. The means the Debtor has or may have in the future to pay the debt; and
5. Any assets the Debtor has disposed of since the claim arose.

At the conclusion of a Payment Hearing a Judge can either:

1. Order a Payment Schedule, or
2. Refuse to make a Payment Schedule.

EFFECT OF A PAYMENT SCHEDULE

If a Judge orders a Payment Schedule, the Creditor can not use any other means of collection as long as the Debtor makes the required payments. If the Creditor learns that the debtor's financial circumstances have changed so the debt could be paid more quickly, the Creditor could apply to vary the Payment Schedule or have it cancelled.

If a Debtor defaults in making payments under a Payment Schedule by not paying the money due on an installment date, then all of the balance owing on the debt becomes due immediately. In addition, a Creditor is then free to garnish, seize assets, register a Certificate of Judgment against land owned by the Debtor, or enforce the Payment Order by any other legal means.

Thus a Debtor whose circumstances change so they can't make an installment payment when due should see if the Creditor would consent to a change in the Payment Order. If the Creditor agrees, an Application to the Registrar for a Consent Order can be made. If the Creditor will not consent, the Debtor should apply for a Payment Hearing to ask the court to vary the installment payments to reduce the amount to be paid, or lengthen the time between payments.

Return

PART II

WHEN ARE PAYMENT HEARINGS HELD

The Small Claims Court Rules allow Payment Hearings to be held at a number of times.

A Payment Hearing can be held if a Payment Schedule is not ordered at the time the Judge makes a Payment Order. This could happen when a Defendant (Debtor) fails to file a Reply or because the Defendant admitted the debt in a Reply and requested a Payment Schedule.

When a Payment Order is made and the Debtor and Creditor are in front of a Judge (for example, at a Settlement Conference or Trial), the Judge may order a Payment Hearing be held. A Payment Hearing could be ordered when the Debtor requires time to pay the debt and the Creditor does not consent to a proposal from the Debtor as to how and when the debt should be paid. In this case a Payment Hearing could be held immediately, or the date of the Payment Hearing could be set by the Judge while the parties are still in court.

A Payment Hearing can be held when requested by the Creditor.

A Payment Hearing can also be requested by a Debtor.

HOW A CREDITOR CAN REQUEST A PAYMENT HEARING

To apply for a Payment Hearing a Creditor should:

1. obtain a copy of the Payment Order;

2. complete a Summons;
3. file the Summons at the Small Claims Court Registry;
4. serve the Summons;
5. prepare proof of service; and
6. file proof of service.

OBTAIN A COPY OF THE PAYMENT ORDER

The first step is to obtain a copy of the Payment Order. A Payment Order should be in writing. The Court Registry staff or Creditor may fill out the form (which is available from the Registry). The Payment Order must be signed by the Registrar or a Judge.

PREPARE A SUMMONS TO A PAYMENT HEARING

Then a Summons must be prepared.

Click here to view a sample of a completed Summons form.
Click here to obtain a blank Summons form which you can use.

To complete the Summons you should:

1. Fill in the file number and the registry location as they appear on the Payment Order
2. Fill in the name and address and telephone number of the person being summoned. If the Debtor is an individual, put down that individual's name. If the Debtor is a company or partnership, put down the name of an officer, director or employee of the company you want summoned. If you do not know the name of any officer, director or employee, you may have to do a company search in person, by letter or by fax at the B.C. Corporate Registry office, 940 Blanshard Street, Victoria, B.C. V8W 3E6. A search could also be done by way of the B.C. On-line computer system which is available at Government Agents' offices throughout B.C.
3. Insert the Creditor's name and Debtor's name as they appear on the Payment Order or Default Order.
4. List what you want the Debtor to bring to court. Under the Small Claims Rules a Debtor can be required to bring any records or other things that relate to:

    a. The income and assets of the Debtor;
    b. Debts owed by, and to, the Debtor;
    c. The means the Debtor has of paying the debt; and
    d. Any assets the Debtor disposed of since the claim arose.

5. A general statement consisting of the above plus a specific request for income tax records, recent employment pay stubs, business records, vehicle registrations and a list of assets might be helpful.

FILE THE SUMMONS

After completing the Summons it should be filed at the Small Claims Court Registry. At the time the Summons is filed, the Registry staff will insert on the Summons the date, time and location of the Payment Hearing. Be sure the time of the Payment Hearing is far enough in advance to allow the Summons to be served properly.

SERVE THE SUMMONS

The Creditor or someone on the Creditor's behalf must serve the Summons. The Summons must be left with the person summoned. The Summons can not be mailed to the Defendant. In extraordinary circumstances, a Judge can allow service of a Summons by way of substitutional service. For general information about substitutional service, see **Factsheet 6**.

PREPARE AND FILE AN AFFIDAVIT OF SERVICE

An Affidavit of Service should be completed by the person who serves the Summons.

Click here to view a sample of a completed Affidavit of Service.
Click here to obtain a copy of a blank Affidavit of Service form you can use.

Filing the Affidavit of Service is necessary if the person summoned does not show up at the Payment Hearing. This is because a Judge can then issue a Warrant to arrest the person.

Return

PART III

WHAT HAPPENS AT A PAYMENT HEARING

Payment Hearings are usually conducted by a Judge, who is referred to as

"Your Honour."

However, in some locations in British Columbia, Payment Hearings are conducted by a Justice of the Peace, who is referred to as

"Your Worship."

Payment Hearings are usually held in a courtroom. On the day of the Payment Hearing both the Creditor and Debtor should be sure to attend court. While it is possible for the court to proceed in the absence of the Creditor, it is also possible that it will be cancelled or adjourned. If a Debtor does not attend, a Warrant can be issued for the arrest of the Debtor.

When the case is called, the parties should stand and tell the court that they are present and are ready to proceed with a Payment Hearing. The Judge will then direct you as to the procedure the Judge wishes to follow. Sometimes the Judge will start by asking the Debtor and Creditor if they have been able to come to an agreement as to a Payment Schedule. If not, the Debtor may be sworn or required to affirm to tell the truth. The Debtor will then be asked questions. Sometimes the Judge will ask most of the questions. Other times a Judge will allow the Creditor to ask the questions.

This factsheet contains sample questions which a Creditor might use at a Payment Hearing. A Creditor is not restricted to these questions. But the questions asked must be relevant to the things a Debtor can be asked at a Payment Hearing (see the list above).

Note: A Debtor should prepare for a Payment Hearing by reading Part 4 of this factsheet and following the instructions set out there.

TYPICAL QUESTIONS FOR A DEBTOR AT A PAYMENT HEARING

1. How do you earn your living?
2. What is the name of your present employer?
3. How frequently are you paid?
4. On what dates of the month are you paid?
5. How long have you worked at your present location?
6. Are you working full time?
7. Are there any other places where you are employed at the present time?
8. Are there any monies owing to you by your employers at the present time?
9. Do you have a share in the ownership of any businesses? How big a share?
10. Does anyone owe you money? Where can they be found?
11. Do you have any other sources of income?
12. What were your earnings last year?

13. Did you receive any gifts of money in the last year?
14. Did you receive any gifts worth more than $_____ since _____?
15. At the time this debt was incurred, who did you work for?
16. How were you paid?
17. Do you have any other debts to be paid?
18. What is the amount of those debts?
19. Since you incurred the debt that was the subject matter of this lawsuit, have you made payments on the other debts?
20. How many payments have you made on the other debts?
21. Do you live with anyone?
22. What is your marital status?
23. Does the person you live with work?
24. How much does that person earn?
25. How many people do you have to support?
26. Are there any other sources of income coming into your family unit?
27. Do you have a bank account?
28. Where is that bank account located?
29. Is it a joint bank account?
30. What other bank accounts do you have?
31. Do you have any children who live with you?
32. Do your children work?
33. How much do your children earn?
34. Do you have any cash elsewhere than in a bank account?
35. Do you have money in any other form such as traveller's cheques?
36. Do you have any expectation of inheriting any money or property?
37. Do you own land? Where is it located?
38. When did you last own land?
39. Who owns the house in which you live?
40. When was it bought? Who provided the money to buy it?
41. Do you own a motor vehicle? (If applicable, when did you last own a motor vehicle?) What kind of motor vehicle is it? What is its licence number?
42. Does your spouse own a motor vehicle? What kind of a motor vehicle? What is its licence number?
43. Is there any money owing on your or your spouse's motor vehicle? How much? Who is the money owed to?
44. Do you own any stocks or bonds?
45. What is the value of the furniture and other household effects which you own?
46. Do you own a boat? Where is it kept? Is there any money owing on it? To whom?
47. Do you own any jewelry?
48. Do you own any livestock?
49. Did you own any car or house or other property of value prior to a Payment Order being obtained against you? What has happened to those things?
50. Were you paid for those things, and if so, by whom?
51. How do you plan to pay the debt owed in this action?

Return

PART IV

HOW A DEBTOR CAN REQUEST A PAYMENT HEARING

The procedure a Debtor follows to schedule a Payment Hearing is similar (but not identical) to that of a Creditor. A Debtor should:

1. Prepare a Notice of Payment Hearing;
2. Serve the Notice on the Creditor; and
3. Prepare and file Proof of Service.

PREPARE A NOTICE OF PAYMENT HEARING

Click here to obtain a blank Notice of Payment Hearing form.

The form is very simple to complete. In the spaces provided merely fill in the Registry file number, the location of the Small Claims Court Registry, the name, address and telephone number of the Creditor as it appears on the Notice of Claim or Payment Order, and the name, address and telephone number of the Debtor.

FILE THE NOTICE OF HEARING

Make four photocopies of the Notice of Payment Hearing and then file the Notice at the Small Claims Court Registry. At the time of filing the Clerk will fill in on the form the date, time and location of the Payment Hearing. Be sure enough time is allowed for service because a Creditor must receive the Notice of Hearing at least seven days before the Payment Hearing.

SERVE THE NOTICE OF HEARING

You can serve the Notice of Hearing in three ways:

1. Leave a copy with the Creditor.
2. Mail it by ordinary mail to the Creditor's address.
3. Mail it by registered mail. If it is mailed, it is presumed to have been delivered fourteen days after being sent, unless there is evidence of earlier delivery.

As mentioned, the Creditor must receive the Notice seven days before the hearing. Thus, the soonest the Payment Hearing could take place would be eight days after the Notice was filed. (To have the hearing so soon would require the Court Clerk to have made the Court date eight days after filing the Notice form and the Creditor would have to be given a copy of the Notice on the same day it was filed.)

PREPARE FOR THE HEARING

The reason a Debtor will request a Payment Hearing is to have a Payment Schedule ordered or varied. The legitimate goal of a Debtor then should be to advise the Court of the Debtor's financial circumstances so that an appropriate order for payment can be made by the Judge.

Listed above are the typical questions which a Creditor might ask at a Payment Hearing. A Debtor should prepare the information needed to answer these and similar questions. In addition, the Debtor should prepare a Statement of Income and Expenses. Click here to obtain a blank form that can be used for that purpose. The form will show the Judge the Debtor's ability to pay the debt owed to the Creditor.

It is vital for a Debtor with little money to be sure not to get saddled with a Payment Order to make payments that can not be met. Failure to comply with a Payment Order may lead to a Default Hearing, and if the Debtor's explanation for not paying is found to be in contempt of court, the Debtor could be jailed. So it is vital that the Judge be presented with an accurate budget showing all of the expenses which the Debtor has.

In addition, a Debtor who is on welfare may wish to bring to the Judge's attention the following

information:

1. The Debt Collection Act governs debt collection practices of debt collectors in British Columbia.
2. The Director of Debt Collection on September 11, 1989, issued a report which stated that, "It is the opinion of the director that the demand for payment of a debt from a welfare recipient who clearly has welfare as his/her sole income, is contrary to the public interest. Money diverted from the necessities of life to the Creditor reduces the Debtor's standard of living from a level which is already at a minimum and is a use of the welfare money that is not intended or approved by the Minister of Social Services."
3. The Debtor may suggest to the Judge that the policy which applies to debt collectors should also apply to others seeking to enforce a Payment Order against someone on welfare. The Debtor who is on welfare should ask the Court to make a very low order or no order for payment.

THE PAYMENT HEARING

On the day appointed, the Debtor must attend the Payment Hearing. The Debtor should bring financial records about the things listed above. Financial records will help support the Debtor's position.

When the case is called in court the Debtor should tell the Judge why a Payment Hearing was requested. For example, the Debtor might say:

> *"Your Honour, I have requested this Payment Hearing so that a Payment Schedule can be arranged."*

If a Payment Schedule already exists, the Debtor might say:

> *"Your Honour, I have requested this Payment Hearing so the Payment Schedule can be varied because my financial circumstances have worsened."*

The hearing will then be held as the Judge directs. A Debtor can expect to be asked questions by the Judge and the Creditor. The Debtor should be sure to tell the Judge that the Debtor prepared a budget. A copy should be given to the Judge and the Creditor.

If the Judge orders a new or revised Payment Schedule, a new Payment Order should be prepared, signed by the Judge and filed at the Court Registry.

WHAT HAPPENS IF A DEBTOR FAILS TO ATTEND A PAYMENT HEARING

If a Debtor fails to attend a Payment Hearing the Judge can issue a Warrant for the arrest of the Debtor. However, before the Warrant will be put into force to arrest the Debtor, the Registrar must first write to the Debtor and give the Debtor Notice of Arrest. The Debtor then has 7 days to arrange to attend court voluntarily.

So what a Debtor should do if the Debtor has not attended a Payment Hearing is immediately telephone the Small Claims Court Registry to find out when the Debtor can be brought before a Judge or Justice of the Peace. At the time suggested, the Debtor should go to Court. The Warrant can then be cancelled and a new date can be set when the Debtor must appear in Court for a Payment Hearing.

Note: If the Debtor does not attend court on the new date a Warrant for the immediate arrest of the Debtor can be issued. The sheriff or the police will then be in a position to arrest the Debtor.

The Law Centre
A Service of the University of Victoria Faculty of Law

Garnishing Orders

Prepared by Glenn Gallins
Revised April 2008
Funded by the PLE Program of the Legal Services Society

WHAT IS IN THIS FACTSHEET

This factsheet describes what garnishment is. Then it tells how to:

1. Garnish money owed to a Debtor before the Small Claims Court has made an order that the money is owed;
2. Garnish wages owed to a Debtor after Small Claims Court has made an order that the Debtor owes money;
3. Have money which has been paid into court as a result of a Garnishing Order, then be paid to the person entitled to the money.

WHAT IS A GARNISHING ORDER?

Let us suppose the person you have sued has money in a savings account in a bank. It is his money. The bank owes it to him and he could get it by going to the bank and withdrawing it. The effect of a Garnishing Order is to have that money paid into the court registry so it is available to be paid to you if you win the lawsuit.

SOME DEFINITIONS

Before going further, some words need to be defined. These words appear on the forms used to get a Garnishing Order.

A "Claimant" is the person who starts a lawsuit in Small Claims Court.

A "Defendant" is the person being sued.

"A Garnishing Order Before Judgment" is a Garnishing Order issued by the court before the Claimant has won the lawsuit.

"A Garnishing Order After Judgment" is a Garnishing Order issued by the Court after the lawsuit is over and the Court has declared money is owed.

A "Judgment Creditor," who is also called a "Creditor by Judgment (or Order)" is a person who has obtained a Court Order for money against another person.

A "Judgment Debtor," who is also called a "Debtor by Judgment (or Order)" is the person who has been declared by a Court Order to owe money to the Judgment Creditor.

A "Garnishee" is someone who owes money to a Defendant or Judgment Debtor.

"Attachment Proceedings" is another term used for garnishment.

WHEN CAN A GARNISHING ORDER BE GRANTED

If a lawsuit is for debt, that is, for a specific sum of money due under a contract, then a Garnishing Order can be obtained *before* the lawsuit is over. If the Claimant wins the lawsuit the money obtained as a result of the Garnishing Order will be available at the Court Registry and can be paid to the

Claimant.

If the lawsuit is not for a debt, a Garnishing Order can only be obtained *after* a Court order has been granted declaring the amount of money due to the winner of the lawsuit.

WHAT MONEY CAN BE GARNISHED

To obtain a Garnishing Order, a Garnishee must be located in British Columbia.

After a Court Order is granted, any money payable by a Garnishee to a Judgment Debtor can be garnished including wages.

Before a Court Order is granted, wages can *not* be garnished.

The rest of this factsheet will tell you how to obtain Garnishing Orders. First, how to obtain a Garnishing Order Before Judgment will be described. Then, how to garnish wages with a Garnishing Order after Judgment will be described.

GARNISHING ORDERS BEFORE JUDGMENT

A Garnishing Order before Judgment is a special kind of order. This is because it is granted to one side of a lawsuit before the court has decided who should win the lawsuit. Since the Small Claims Court has jurisdiction in disputes for amounts up to $25,000 plus interest, it is possible for a Claimant to get a Garnishing Order for $25,000 plus interest if that is the value of the debt being claimed by the Claimant. So $25,000 plus interest owed by a Garnishee to a Defendant might be paid to the Court Registry (and sit and earn no interest) until trial.

Because the impact of a Garnishing Order before Judgment can be so great on a Defendant, the law requires the person seeking the order to follow the required procedure exactly. Errors in completing forms or not following other requirements might allow a Defendant to have the Garnishing Order set aside or permit a Garnishee to refuse to pay money owed to the Defendant to the Court Registry.

FIND OUT THE CORRECT NAME OF THE GARNISHEE

The first step to obtain a Garnishing Order is to find out the correct legal name of the Garnishee. This is because if you use the wrong name on the Garnishment documents, the Garnishee can refuse to pay to the Court money owed to the Defendant. If the Garnishee is a company, a search at the B.C. Corporate Registry Office would be useful. The way to do this search is described in **Factsheet 2.**

OVERVIEW OF THE NEXT STEPS

To obtain a Garnishing Order you must then:

1. Prepare and swear an Affidavit;
2. Prepare a Garnishing Order form;
3. File the Garnishing Order and Affidavit at the Court Registry and pay the required fee;
4. Serve the Garnishing Order and Affidavit on the Garnishee and Defendant.

PREPARE AN AFFIDAVIT

There are two types of Affidavits. One is used if it is to be sworn before the Notice of Claim has been filed at the Small Claims Court Registry. This affidavit is called an Affidavit in Support of a Garnishing Order Before Action. If the Notice of Claim has already been filed, an Affidavit in Support of a Garnishing Order Before Judgment should be sworn and filed.

Because it is usually easier to start a lawsuit first by filing a Notice of Claim, only an Affidavit in Support of a Garnishing Order Before Judgment will be described.

Click here to view a sample of a completed Affidavit in Support of a Garnishing Order Before

Judgment.

Click here to obtain a blank Affidavit in Support of a Garnishing Order Before Judgment which you can use.

The Affidavit should be completed by filling in:

1. The court file number which will have been put on the Notice of Claim by the Court Registry staff when the Notice of Claim was filed;
2. The name of the Registry such as the "Victoria Registry";
3. The name of the Claimant and Defendant as they appear on the Notice of Claim;
4. The name and address and occupation of the person who will swear the Affidavit (usually the Claimant);
5. If the Claimant is swearing the Affidavit tick the box before the words "I am the above-named claimant";
6. In paragraph 2 after the words "This Action is pending and was commenced on the" insert the date the Notice of Claim was filed (e.g., the 3rd day of April 2003).
7. In paragraph 3 after the words "The nature of the course of action is," insert the words *"as set out on the Notice of Claim, a copy of which is attached to this Affidavit and marked Exhibit 'A'"*;
8. In paragraph 4 insert the name of the Defendant after the word " Defendant," then insert the amount owing to the Claimant after the words "the sum of";
   The amount owing should be the amount agreed to in the contract which is the basis of the lawsuit. Unless that contract provides for interest for late payments or other default by the Defendant, interest should *not* be included.

   Also, only the amount which is due on the date the Affidavit is sworn can be claimed. For example, let's suppose 3 payments of $200 each are due by installments as of April 1st, May 1st and June 1st. The Defendant has missed the April and May payments and the Claimant decides to sue on May 15th. The Claimant can only sue for $400 at this time, unless the contract contained what is known as an "acceleration clause." This clause would make the total remaining balance due if a default in payment occurred.

   Finally, if the Claimant owes money to the Defendant for some reason, that amount should be deducted from the amount claimed.

9. In paragraph 5 list the name, address, and description of the Garnishee.
   For example:
   "Deep Cove Credit Union, 1000 Wharf Street, Mill Bay, B.C., *a Credit Union*";
   or
   "Stan Jones, 2110 High Road, Kamloops, *Real Estate Agent*";
   or
   "The Royal Bank of Canada, 9201 Kings Road, Victoria, B.C., *a Chartered Bank*".

Next make a photocopy of the Notice of Claim.

SWEAR THE AFFIDAVIT

The Affidavit must be sworn and the Notice of Claim must be attached as Exhibit "A". Affidavits can be sworn by a Notary, Lawyer or an authorized person at the Small Claims Court Registry. There will be a fee for swearing the Affidavit. The person who swears the Affidavit should stamp the Notice of Claim with an exhibit stamp, and should fill in the information on that stamp.

The exhibit stamp says:

"This is Exhibit "A" to the Affidavit of _____ sworn the _____ day of _____ 200__."

Then there is a place for the person taking the oath to sign.

It is vital that all words crossed out and any corrected errors on the Affidavit be initialed by the person taking the oath. Remember, a Garnishing Order can be set aside if an Affidavit is not properly

completed. The money paid to the Court Registry by a Garnishee might then be returned to the Defendant.

PREPARE A GARNISHING ORDER

Click here to view a sample of a completed Garnishing Order Before Judgment.
Click here to obtain a blank Garnishing Order Before Judgment form.

To complete the form:

1. Fill in the name of the Plaintiff (Claimant) and Defendant as they appear on the Notice of Claim;
2. Fill in the correct name of the Garnishee;
3. After the words "on reading the Affidavit of" fill in the name of the Claimant and the date the Affidavit was sworn;
4. On the lines provided on the form, fill in the name and address of the Defendant;
5. On the lines provided on the form, fill in the name and address of the Garnishee;
6. On the line which says "Amount due," fill in the dollars and cents of the debt owed in the correct column;
7. Leave blank the line dealing with cost of attachment proceedings. The Small Claims Court Registry Clerk will fill in this line. The Clerk may grant expenses for swearing the Affidavit and serving the Garnishing Order on the Garnishee and Defendant. After filling in how much to allow for expenses, the Registrar will also fill in the area for the "total amount attached."

TAKE THE DOCUMENTS TO THE COURT REGISTRY

Next the draft Garnishing Order and Affidavit should be taken to the Small Claims Court Registry. The Garnishing Order will be completed and signed by the Registrar. The Order and Affidavit can then be filed. A fee will be charged.

SERVE THE GARNISHING ORDER

The Garnishing Order must be served on the Garnishee and the Defendant. The goal is usually to surprise the Defendant so the Defendant does not defeat the garnishment by collecting his or her money first (for example, by withdrawing it from a bank account). So the Garnishee is usually served first, and then the Defendant is served.

Garnishing Orders can be served in the same way as a Notice of Claim, by giving it directly to the Garnishee or it may be served by mailing a copy to the person to be served by registered mail to the last known post office address of that person.

See **Factsheet 6** called "Serving Documents" for more information.

WHAT THE GARNISHEE MUST DO

When a Garnishee receives a Garnishing Order the Garnishee is required by the

Court Order Enforcement Act

to pay to the Court Registry money the Garnishee owes to the Defendant, up to the amount required by the Garnishing Order. If the Garnishee does not owe any money to the Defendant, then the Garnishee should file Dispute Note at the Court Registry.

If money is paid to the Court Registry, a notice will be sent to the Claimant stating the amount paid into court.

SETTING ASIDE A GARNISHING ORDER

The Defendant can apply to have the Garnishing Order set aside, in whole or in part. For more information about how a Defendant can do this, see **Factsheet 20** , which is called "Setting Aside Garnishing Orders."

Money garnished before judgment will be held at the Court Registry unless the Defendant is successful in having it released. The money will not draw interest. The money will then be available to be paid out to the party who wins the lawsuit.

A Garnishing Order for wages can only be obtained after an Order has been obtained against the person being sued.

A private employer and a government employer can be garnished.

MONEY EXEMPT FROM GARNISHMENT

Generally, 30% of a person's wage can be garnished, except that a single person must be left with at least $100 per month and a person with dependants, $200 per month.

Money due to a Defendant for income assistance from the Ministry of Human Resources or the Workers' Compensation Board **CAN NOT** be garnished.

The rest of this Factsheet will describe garnishing wages from a private employer, the B.C. Government and the Federal Government.

GARNISHING WAGES FROM A PRIVATE EMPLOYER OR THE B.C. GOVERNMENT

If you are garnishing wages from a **private employer** or from the **Provincial Government**, you must do the following:

1. File a Judgment (which in Small Claims Court is often referred to as a "Payment Order");
2. Prepare an Affidavit in Support of Garnishing Order After Judgment;
3. Prepare a Garnishing Order After Judgment;
4. Swear the Affidavit in Support of Garnishing Order After Judgment **WITHIN** seven (7) days of the Debtor's payday;
5. Serve the Garnishing Order on the employer and on the Debtor within seven (7) days of the paydate;
6. File at the Small Claims Court Registry an Affidavit of Service proving that a copy of the Garnishing Order was given to the Debtor.

OBTAIN A PAYMENT ORDER

The first step is to have a Payment Order completed and filed at the Small Claims Court Registry. If you have obtained a Default Order, you should see **Factsheet 8** called "Default Orders" for instructions as to how to prepare the necessary document. If you obtained an Order from a Judge at trial, you will need to have a Payment Order completed.

For more information see **Factsheet 13** called "Preparing for Trial."

PREPARE AN AFFIDAVIT IN SUPPORT

Click here to view a sample of a completed Affidavit in Support of Garnishing Order After Judgment.

Click here to obtain a blank Affidavit in Support of a Garnishing Order After Judgment form which you can use.

To complete the Affidavit, fill in the following information:

1. The Court file number as it appears on the Notice of Claim;
2. The name of the Registry where the lawsuit took place;
3. The name of the person awarded judgment should be inserted before the words "Judgment Creditor";

4. The name of the person against whom judgment was granted should be inserted before the words "Judgment Debtor";
5. The name, address and occupation of the person who is swearing the Affidavit;
6. If you are going to swear that the contents of the Affidavit are true, tick the box before the words "make oath and say that." If you are going to affirm that the contents of the Affidavit are true, tick the box in front of the words "solemnly affirm that";
7. Most likely you will leave the words "I am the person entitled to enforce the Judgment or Order referred to in this affidavit." Put a line through the words "I am the solicitor for the person entitled to enforce the judgment or order hereafter referred to in this affidavit." Also put a line through the words "I am acting for the person entitled to enforce the judgment or order hereafter referred to in this affidavit, and I am aware of the facts hereafter referred to in this affidavit";
8. In paragraph two on the form, fill in the amount of money which the Court found owing to you;
9. Then fill in the amount of money still owing;
10. Then fill in the name of the Debtor;
11. Then insert your name (as Creditor);
12. In paragraph three fill in the name and address and description of the Garnishee. The description might be: employer, credit union, bank, etc.

Once you have completed the Affidavit, you should take it to a notary public or a lawyer, or an authorized person at the Small Claims Court Registry so that it may be sworn. There will be a fee for swearing the Affidavit. Lawyers and notaries are listed in the Yellow Pages. Telephone first to find out the fee for this service. Some people charge much more than others do for the same service.

PREPARE A GARNISHING ORDER

Click here to view a sample of a completed Garnishing Order (After Judgment).

Click here to obtain a blank Garnishing Order (After Judgment) form which you can use.

To complete a Garnishing Order fill in the following information:

1. The Court number as it appears on the Notice of Claim;
2. The name of the Registry where the lawsuit took place;
3. Your name before the words "Judgment Creditor";
4. The name of the person you obtained the Judgment against before the words "Judgment Debtor";
5. The name of the Garnishee. If you wish to garnish wages, the Garnishee is going to be the employer of the Judgment Debtor. If the employer is a Limited Company, you must be sure to use the exact legal name of the employer. This will require you to do a search at the B.C. Corporate Registry Office. The way to do this search is described in **Factsheet 2**;
   If the Garnishee is the Provincial Government, the name of the Garnishee is "Her Majesty the Queen in the Right of the Province of British Columbia";
6. After the word "before" leave a blank so that this area can be completed by the Registrar;
7. After the words "on reading the Affidavit of" insert your name as the person who swore the Affidavit in Support of the Garnishing Order;
8. After the words "sworn on" insert the date on which the Affidavit was sworn;
9. Insert the Judgment Debtor's name and address in the box provided on the form;
10. Insert the Garnishee's name and address in the box provided on the form;
    Note: If the Garnishee is Her Majesty The Queen in the Right of the Province of British Columbia, insert the address:

    Government Payroll Office
    Office of the Comptroller General
    Ministry of Finance
    617 Government Street
    Victoria, B.C. V8V 4R8

Under the address line you should also indicate the name of the Ministry the Judgment Debtor works for if you know it. For example, you could write: "Judgment Debtor works for the Ministry of Health." This information will help ensure that the right person's wages get garnished.

11. Then in the lower portion of the form, insert the amount due on the Order or the balance owing.

You should now have completed the following forms:

1. A Payment Order;
2. An Affidavit in Support of a Garnishing Order After Judgment; and
3. A Garnishing Order (After Judgment).

FILE THE DOCUMENTS

These forms should be taken to the Small Claims Registry for filing. The Small Claims Registry will then give you a copy of the Garnishing Order for service on the Garnishee.

SERVE THE AFFIDAVIT AND GARNISHING ORDER

The Affidavit and Garnishing Order should then be served on the Garnishee.

If the Garnishee is a private employer, the Affidavit and Garnishing Order may be given to the private employer in several ways:

1. It can be given personally to the employer;
2. It can be mailed registered to the last known address of the employer. For more information on service see **Factsheet 6** called "Serving Documents."

If the Garnishee is the B.C. Government, the Court Order Enforcement Act says the Garnishing Order should be served on the Deputy Minister of Finance. In fact the Affidavit and Garnishing Order may be served on:

Government Payroll Office
Office of the Comptroller General
Ministry of Finance
617 Government Street
Victoria, B.C. V8V 4R8

Service can be done by registered mail. Service can also be done by having a person over 19 years old serve the Affidavit and Garnishing Order personally. The Government Payroll Office is located at 617 Government Street on the second floor of the South Wing.

SERVE THE JUDGMENT DEBTOR

In addition to serving the Garnishee, the Judgment Debtor must also be served with the Garnishing Order.

The Judgment Debtor must be served before money will be paid out of Court to you.

Service of the Garnishing Order on the Judgment Debtor can be done in three ways:

1. By giving the Judgment Debtor a copy;
2. By mailing a copy by registered mail to the Judgment Debtor's last known post office address;
3. By an alternate method of service ordered by the Registrar. See **Factsheet 6** called "Serving Documents" for the procedure.

WHAT THE GARNISHEE MUST DO

If wages were due and owing within 7 days of the date of the serving of the Garnishing Order and Affidavit in Support on the Garnishee, 30% of the wages of the Judgment Debtor should be paid into Court by the Garnishee.

GARNISHING WAGES OF FEDERAL EMPLOYEES

The garnishment of wages of Federal employees is governed by a Federal statute called the Garnishment, Attachment and Pension Diversion Act.

OVERVIEW OF THE PROCEDURE

1. Obtain a copy of the Consent Order, Default Order or the Order obtained after a Settlement Conference or trial (sometimes called a Payment Order) which states how much money is owed to the Judgment Creditor;
2. Obtain a Garnishing Order following the same steps described above for obtaining such an order;
3. Prepare an Application Under Part 1 of the Garnishment, Attachment and Pension Diversion Act (GAPDA);
4. Serve the Application, Garnishing Order and the Order which states how much money is owed to the Judgment Creditor. Service of these documents on the Federal Government must be done within 30 days of the date the Garnishing Order was issued by the Small Claims Registry.

OBTAIN A COPY OF THE ORDER WHICH STATES HOW MUCH MONEY IS OWED TO THE JUDGMENT CREDITOR

If you do not have a copy of this Order you can obtain one from the Small Claims Court Registry.

OBTAIN A GARNISHING ORDER FOLLOWING THE SAME STEPS DESCRIBED ABOVE FOR OBTAINING SUCH AN ORDER

Click here to view the steps for obtaining a Garnishing Order.

PREPARE AN APPLICATION UNDER PART 1 OF THE GARNISHMENT, ATTACHMENT AND PENSION DIVERSION ACT (GAPDA)

Click here to view a copy of a completed Application Under Part 1 of the GAPDA.

Click here to obtain a blank Application Under Part 1 of the GAPDA which you can use.

At the top of the form you will see that it requires you to include a copy of the "garnishee summons" with the Application. A garnishee summons is another term for a Garnishment Order.

The Application form requests a great deal of information to help identify the correct federal employee whose wages are to be garnished. You may not know some of the required information. Complete the form with as much information as you can. For example, you may not know the Debtor's date of birth, social insurance number, Personal record identifier, Personnel Office address, occupation or home telephone number. All this information can be left blank if you do not know the answers.

To complete the form:

1. Ensure that in Box 1 you insert the Debtor's name as it appears in the Garnishment Order;
2. In answer to Question 5 tick the box that indicates in what capacity the Debtor is employed by the Federal Government. Most likely they will be an employee of a department of the Federal Government or a Crown Corporation;
3. You may not know whether the Debtor receives a salary or remuneration. If the Debtor is an employee of a federal department or Crown Corporation, tick the salary box;
4. Tick the box in answer to Question 21. Then insert the amount of the debt that remains unpaid. This should be the same amount as indicated in the Garnishing Order;
5. Be sure to complete the information in the Declaration section of the form, including signing and

dating the form.

SERVE THE APPLICATION, GARNISHING ORDER AND THE ORDER

The GAPDA says that service of the documents on the Federal government in connection with garnishment proceedings must be effected at the place specified in the regulations. The regulations specify that in British Columbia service of the documents can be done by personally delivering them or by sending them by registered mail to:

Department of Justice
Vancouver Regional Office
Attention: Garnishment Registry
Royal Centre
1900 - 1055 West Georgia Street
Vancouver, B.C. V6E 3P9

Thirty percent of the wages of the Judgment Debtor should be paid into Court by the Federal Government.

The Judgment Debtor might try to reduce the amount available by bringing an application to the Court. For information about how this might be done see **Factsheet 20**, which is called "Setting Aside Garnishing Orders."

HOW TO GET MONEY PAID OUT OF COURT

If the Judgment Debtor does not try to reduce the amount available to the Judgment Creditor then there are three possible ways to get the money which has been paid into court, paid out.

1. If you obtained a Default Order (because the Defendant did not file a Reply) a special rule applies. You can merely file an Affidavit of Service of the Garnishment Order on the Judgment Debtor and wait until 3 months after the money was paid into Court before requesting it be paid to you. Click here to obtain a blank Affidavit of Service form. It is printed on the back of the Garnishment Order.
   You can then go to the Small Claims Court Registry where the money is and request that it be forwarded to you. Usually the Court will request the Ministry of Finance to forward a cheque to you. It may take up to 4 weeks to get the money.

2. A faster way to get the money out of Court is to have the Judgment Debtor consent in writing to have the money paid to you.
   Click here to view a sample completed Consent to Payment Out of Court.
   Click here to obtain a blank Consent to Payment Out of Court that you can use.

3. The last way to get the money out of Court is to give the Judgment Debtor a Notice of Payment Out. If the Judgment Debtor doesn't dispute that Notice within 10 days, you can apply to the Court to have the money paid out to you.

   Click here to view a sample completed Notice of Payment Out.
   Click here to obtain a Notice of Payment Out which you can use.

   The Notice may be served personally on the Judgment Debtor. Section 13 (3) of the Court Order Enforcement Act also permits service of the Notice on the Judgment Debtor by mailing a copy of the Notice registered mail to the last known post office address of that person. If the Judgment Debtor can not be served personally and there is no known address for the Judgment Debtor, you may have to make an application for substitutional service of the Notice. For more information about this procedure see sections 12(2), 13(2) and 9(5) of the Court Order Enforcement Act and **Factsheet 6**.

   After the Notice has been given to the Judgment Debtor, you must wait 10 days. If the Judgment Debtor does not file a dispute to the paying out of the money, you can then go to the Small Claims Registry and ask to have the money paid to you. You must provide the Registry with an Affidavit of Service to prove that the Judgment Debtor was served with the Notice.

Provincial Court Small Claims Handbook

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Appendix F

The Continuing Legal Education Society of B.C. is a not-for-profit society created for the benefit of members of the British Columbia bar to provide quality educational services at a reasonable cost. CLEBC services are made possible through the invaluable contributions of hundreds of volunteer faculty and authors. Operations are entirely self-funded through course registrations and publications sales. The Society's Board of Directors and staff welcome suggestions for future CLEBC services.

Enforcing the Judgment

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I. INTRODUCTION [§8.1]

A. SCOPE OF THIS CHAPTER [§8.2]

This chapter describes the procedures available to a creditor who is recovering on a judgment made by the Provincial Court under the *Small Claims Act*, and the options available to the court in dealing with a debtor who fails to comply with a court order.

In British Columbia, the judgment enforcement process is subject to a mix of old and new legislation, requiring the judgment creditor's lawyer to review carefully the most effective means for recovery on the judgment. British Columbia statutes relevant to collections law include the *Business Practices and Consumer Protection Act*, *Court Order Enforcement Act* (which provides substantive and procedural law for garnishment, foreign judgment registration, and post-judgment registration against real and personal property), *Court Order Interest Act*, *Creditor Assistance Act*, *Debtor Assistance Act*, *Enforcement of Canadian Judgments and Decrees Act*, *Fraudulent Conveyance Act*, *Fraudulent Preference Act*, *Law and Equity Act*, *Limitation Act*, and *Personal Property Security Act*. Specifically, the focus of this chapter is on the procedures for recovering a small claims judgment.

For a detailed treatment of collections law, other sources must be consulted. See, for example, *British Columbia Creditors' Remedies: An Annotated Guide* (CLEBC, 2001). See also the "Collections" chapter in each edition of CLEBC's *Annual Review of Law and Practice*. Three other texts on Canadian collections law are C.R.B. Dunlop, *Creditor-Debtor Law in Canada,* 2nd ed. (Carswell, 1995), F. Bennett, *Bennett on Creditors' and Debtors' Rights and Remedies* (Carswell, 2006), and L.R. Robinson Q.C., *British Columbia Debtor-Creditor Law and Precedents* (Carswell, 1993).

B. PRELIMINARY CONSIDERATIONS [§8.3]

In Provincial Court small claims proceedings, three types of orders may be made that require a party to pay money:

(1) A *consent order* may be made by the registrar or judge at the initiation of the parties at any stage in the proceeding under Rule 16(1) (see §4.38 and FP 20). If the debtor fails to comply with the order, the creditor may commence collection proceedings. Alternatively, an agreement may be made at a settlement conference under Rule 7(20) (see §5.17 and FP 10). If the debtor does not comply with the agreement, the agreement is cancelled and the creditor may file an affidavit of non-compliance (FP 7) and a payment order (FP 52). After filing the payment order, the creditor may take enforcement measures under Rule 7(16).

(2) A *default order* may be made by a judge under Rule 6, Rule 7.2(24) and (25), or Rule 7.3(39) and (40), and in some circumstances by a registrar, when a party has failed to file a reply or has not attended a mediation session. The procedures are described in §4.10 to §4.25. If a default order is filed, the creditor may pursue enforcement measures under Rule 6(12).

(3) A *payment order* in Form 10 may be made by a judge or a registrar in a variety of circumstances. For example, a payment order may be made after a party admits to a claim under Rule 3(6) or Rule 4(3.2) (see §3.48); following a mediation where a party fails to comply with a provision of a filed mediation agreement under Rule 7.2(31) and (32), Rule 7.3(48) and (49), and Rule 7.4(40)(b) (see §2.23); at a settlement conference under Rule 7(14)(c), (16), and (17) (see §5.9 and §5.17); at a trial conference under Rule 7.5(14)(b) and (16); at a simplified trial under Rule 9.1(22)(1)(iii) and (26)(b); at a summary trial for financial debt under Rule 9.2(11)(b) and (13)(a); at any time the parties settle the claim through the formal "offer to settle" procedures under Rule 10.1 (see §5.36); or at a trial (see §7.37). Payment orders are discussed in §8.4 to §8.8.

Most orders enforced in Provincial Court are orders made in proceedings under the *Small Claims Act*. However, other types of judgments may be enforced in the Provincial Court (for example, an order of restitution following a criminal conviction, or an order for an outstanding debt owed to the province for non-payment of a loan or fee).

A proceeding to reciprocally enforce a foreign judgment cannot be brought in Provincial Court. Such a proceeding must be brought in the Supreme Court (*Court Order Enforcement Act*, s. 29) (see §2.10). However, it is possible to commence a new action pursuant to the foreign judgment in either Provincial Court or Supreme Court (*Court Order Enforcement Act*, s. 38; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Silverstar Properties Ltd. v. Veinotte*, [1998] B.C.J. No. 2385 (QL) (S.C.)). To enforce a Provincial Court order in a reciprocating jurisdiction, a party should contact a court registry in that jurisdiction.

Limitations for judgments are governed by s. 3(3)(f) of the *Limitation Act*, which provides a ten-year limit for bringing an action "on a local judgment for the payment of money or the return of personal property", running from the date on which the right to bring the action arose. For discussion of limitation periods generally, see §3.3. Parties should be aware that the *Limitation Act* is under review and that limitation periods may change substantially in the future.

In many cases, more than one judgment creditor will be attempting to collect from the debtor. An analysis of the principles governing execution priorities is beyond the scope of this chapter. One of the starting points is the *Creditor Assistance Act*, which establishes a pro rata sharing scheme for most execution proceeds obtained by a court bailiff. For information about execution priorities, consult one or more of the secondary sources cited in §8.2.

Under the *Foreign Money Claims Act*, R.S.B.C. 1996, c. 155, the court has discretion to make an order for payment of money measured in a currency other than Canadian currency. Under the Act, the court may make an order for the judgment to be measured in

foreign currency and converted into equivalent Canadian funds at the time payments are made on the judgment. See also *Exquisite Excavation Corp. v. Exchequer Energy Resources Ltd.* (1985), 63 B.C.L.R. 273 (C.A.), in which the court declined to accept an argument that an affidavit in support of a garnishing order was defective because it stated the amount owed only in United States funds.

Counsel seeking to bring certain applications involving the collection of debts arising from "pay-day loans" should be aware of the Practice Direction by the Chief Justice issued on January 18, 2005. Pursuant to this Practice Direction, all applications and matters relating to default orders or judgments, enforcement proceedings, or payment out of funds held by the court in "pay-day loans" cases are assigned to a judge for consideration. This is in light of the court's decision in *A OK Payday Loans Inc. v. Watt*, 2004 BCPC 467, which determined that no default judgments, trials or enforcement proceedings concerning "pay-day loans" should proceed while certain class action proceedings are before the courts (see also *Consolidated Financial Corp. v. Forde*, 2005 BCPC 209).

II. PAYMENT ORDERS [§8.4]

A. GENERAL [§8.5]

Recovering on a judgment is often more difficult than obtaining the judgment itself.

Under Rule 11(1), if a trial judge decides that payment must be made by one party to another party following the trial, the judge must make a payment order (Form 10; FP 52). The only exception is where judgment has been reserved (Rule 11(15)). If judgment has not been reserved, recovery may start immediately and the debtor should request a payment hearing.

Where a claimant succeeds on its claim and a defendant succeeds on its counterclaim, one may be set off against the other "such that the party that comes out ahead emerges with a judgment for the net

amount" (*General Building Painting & Pressure Washing Ltd. v. Vozza*, 2008 BCPC 184 at para. 46; *Phillips v. Telus Corp.*, 2002 BCPC 499 at para. 25).

The judge must ask the unsuccessful party—the debtor—whether time to pay is required (Rule 11(2)(a)). If the debtor says no, the judgment must be paid immediately (Rule 11(7)), and the creditor may take any of the steps listed in Rule 11(11) to recover the judgment.

If the debtor does require time to pay, the judge must ask the debtor when he or she proposes to pay (Rule 11(2)(b)). The debtor may propose a payment schedule. The successful party—the creditor—must then be asked whether he or she agrees with the debtor's proposal (Rule 11(3)).

If the creditor agrees with the proposal, the judge may order payment by a set date or by instalments (Rule 11(4)). If the creditor does not agree with the proposal, the judge may still order a payment schedule, or may order a payment hearing (Rule 11(5)).

If a payment hearing is ordered under Rule 11(5), the creditor may not take any steps to collect the debt before the payment hearing (Rule 11(8)). If a summons to a payment hearing has been filed, the creditor must not take any collection steps until the payment hearing has concluded or the summons has been withdrawn or cancelled (Rule 11(17)).

If a payment order is made in the absence of the parties because the judge reserved the decision, the creditor may take any of the steps listed in Rule 11(15) and the debtor may ask for a payment hearing (see *T & L Electric Ltd. v. Hovey*, 2004 BCPC 409).

If a payment order is made in favour of a person under 19 years of age, a judge may order the amount owed under the order be paid to the public trustee for that person (Rule 11(16)). The *Infants Act*, R.S.B.C. 1996, c. 223 contains other provisions relating to the ability of minors to pursue actions, some of which are discussed in §3.16.

A payment order may also be made under Rule 7.2, Rule 7.3, or Rule 7.4, where the parties have reached an agreement at mediation (Rule 7.2(30) and (31) and Rule 7.3(48) and (49)). If any of the provisions of a filed mediation agreement require the payment of money, and a party fails to comply with these provisions, the party not in default may:

(1) file an affidavit of non-compliance; and

(2) after that, file a payment order for

  (a) the amount specified in the mediation agreement less any amount already paid in compliance with the mediation agreement, or

  (b) if no amount was specified in the mediation agreement, for the amount of the claim less any amount already paid in compliance with the mediation agreement (Rules 7.2(31), 7.3(49), and 7.4(40)(b)(ii)).

If a party fails to comply with a provision of a filed mediation agreement, and the mediation agreement established an amount of liquidated damages that is to be payable on default, the non-defaulting party may file an affidavit of non-compliance and a payment order for that amount (Rules 7.2(32), 7.3(49), and 7.4(41)). (See §2.23.)

B. IF A PAYMENT SCHEDULE IS ORDERED [§8.6]

A payment schedule requires the debt to be paid by a set date or by instalments (Rule 11(4)). If a payment schedule is ordered, the creditor may not take any other steps to collect the debt as long as the scheduled payments are being made by the debtor (Rule 11(6)).

The registration of a certificate of judgment in the land title office does not constitute a "step to collect the debt" within the meaning of Rule 11(6) (*Royal Bank of Canada v. Li*, [1994] B.C.J. No. 2084 (QL) (Prov. Ct.)).

If the debtor defaults on the payment schedule, the balance of the judgment immediately becomes due and the creditor can take steps set out in Rule 11(11) to collect the outstanding balance (Rule 11(14)). These steps include execution as if a payment schedule had not been ordered and a default hearing.

C. IF A PAYMENT SCHEDULE IS NOT ORDERED [§8.7]

If neither a payment schedule nor a payment hearing has been ordered, the creditor is free to take measures to collect on the judgment (see Rule 11(7)). Rule 11(11) provides that collection measures include:

(1) an order for seizure and sale;

(2) a payment hearing;

(3) garnishment;

(4) a default hearing (only where the debtor has defaulted on a payment schedule); or

(5) any other means permitted by law.

D. POWERS OF A REGISTRAR [§8.8]

A registrar is permitted to make a payment order (Rule 11(9)). The registrar may make a payment order, without a hearing, if a defendant agrees to pay all or part of a claim on a reply and the claimant consents (Rule 11(10)(a)).

The registrar may order a payment schedule, without a hearing, if a defendant proposes or requests such a schedule in the reply, and the claimant consents to the order (Rule 11(10)(b)). When the claimant does not consent to such an order, the registrar may issue a summons to the defendant to attend a payment hearing (Rule 11(10)(c)).

III. PAYMENT HEARING [§8.9]

A. GENERAL [§8.10]

A payment hearing is a hearing before a judge or justice of the peace to determine the debtor's ability to pay and to consider whether a payment schedule should be ordered (Rule 12(1)).

Such a hearing may be sought by the creditor to have the debtor disclose, under oath, his or her assets so that the creditor can attempt to have those assets seized and sold.

Alternatively, the creditor or debtor may want a hearing to set up a payment schedule. A debtor may want a payment schedule ordered to prevent other execution proceedings as long as the debtor complies with the schedule. A creditor may want a payment schedule to ensure that some effort will be made to pay off the judgment debt. The court will examine the debtor's ability to pay.

The hearing can be scheduled at the request of the creditor, the debtor, or a judge.

Counsel should note that the importance of payment hearings was emphasized in *Consolidated Financial Corp. v. Malong*, 2004 BCPC 280, wherein the court held that an affidavit in support of a garnishing order after judgment is defective if it does not contain a provision that the defendant was advised of his or her option to request a payment hearing, and that after a reasonable time to exercise that option, the defendant has failed to do so.

B. IF THE CREDITOR REQUESTS A HEARING [§8.11]

To obtain a payment hearing, the creditor must complete and file a summons in Form 12 (Rule 12(3)) (the summons is reproduced at FP 63). Note that a payment hearing cannot be sought by a creditor who has an order for seizure and sale outstanding, except when the creditor has the advance permission of a judge (Rule 12(4)) obtained by filing an application to a judge under Rule 16(7).

The registry will provide a date for the payment hearing.

The creditor must name a person to appear and give evidence on behalf of the debtor:

(1) if the debtor is an individual, the individual is named;

(2) if the debtor is a corporation, the creditor may name an officer, director, or employee (Rule 12(5));

(3) if the debtor is a partnership, a partner may be named (Rule 12(6)).

A company officer cannot evade the payment hearing by resigning after being served with a summons (*Kamloops Carpet Warehouse v. South Thompson Guest Ranch Ltd.* (16 June 1995), Kamloops 26064 (B.C. Prov. Ct.)).

The summons normally names the debtor, although in some circumstances another person with relevant knowledge (such as an accountant of a corporate debtor) may be summoned. (See *Shumay v. Franklin*, [1996] B.C.J. No. 328 (QL) (Prov. Ct.), in which the court ruled that the debtor's mother and litigation guardian could reasonably be expected to have knowledge about the debtor's ability to pay.)

Rule 12(8) provides a mechanism for the representative of the debtor named in the summons to have the summons set aside if he or she is not the "right" person to provide information on behalf of the debtor. For example, if a creditor were to nominate the president of a large company, a mayor, or a partner who did not have detailed knowledge of the financial affairs of the debtor, that person could apply to have someone else named instead. An application to a judge must be filed, setting out the reasons why the nominee is not the right person to appear and setting out the name or names of one or more others who could testify. The application is heard before a judge, normally with proper notice to the creditor, although the motion could presumably be heard on an ex parte basis (Rule 16(10)), provided it is urgent. If the judge accedes to the application, the summons will be cancelled and the registrar directed to issue a new summons in the name of another person (Rule 12(8)).

Once filed, the summons must be served on the debtor, by leaving the summons with the person, at least seven days before the date of the payment hearing (Rule 12(7)). Service by mail is not permitted (Rule 18(12)(b)). The court can make an order for substituted service of a summons to a payment hearing, if the judge is satisfied that the debtor, who is avoiding the court process, will receive de facto notice of the hearing and of the fact that non-appearance may lead to the debtor's arrest (*Ho v. Porter*, [1994] B.C.J. No. 1574 (QL) (Prov. Ct.); see also *Martin v. Universal Cleaning Equipment Inc. (c.o.b. Kirby Home Products)*, 2005 BCPC 234). The summons cannot be served outside British Columbia.

The creditor does not have to file proof of service of the summons in the registry. However, if the debtor does not attend, the creditor cannot get an order for a warrant for arrest of the debtor, or its representative, without proof of service. The proof of service of a summons may be by an affidavit of service (Rule 18(14)(e)) (see FP 8), which is filed with the registry. Alternatively, service may be proven by oral evidence (Rule 18(15)) from the person who personally effected service.

The creditor may apply to hold a payment hearing at a different place than where the court file is, if that registry is closer to where the debtor lives or carries out business (Rule 17(8)). The creditor must file a certified true copy of the order and an affidavit stating the amount still owing.

C. IF THE DEBTOR REQUESTS A HEARING [§8.12]

To obtain a payment hearing, the debtor must fill out and file a notice in Form 13 (Rule 12(10)) (reproduced at FP 38).

The registry will provide a date for the payment hearing before a judge or a justice of the peace.

Once filed, the notice must be served on the creditor at least seven days before the date of the payment hearing (Rule 12(11)).

Service by mail or e-mail is permitted (Rule 18(12)(b) and (c)). Because service by mail is presumed to be served 14 days after mailing (Rule 18(13)), the notice would have to be mailed at least 21 days before the date of the payment hearing. Service by e-mail is deemed to occur on the day of transmission if the document is transmitted before 4:00 p.m., or on the next day that is not a Saturday or holiday if the document is transmitted after 4:00 p.m. The notice would have to be e-mailed at least seven days before the payment hearing on a day that is not a Saturday or holiday, or eight days before the payment hearing if e-mailed on a Saturday or holiday.

Service may be proven by a certificate of service in Form 4 (Rule 18(14)(c)) (reproduced at FP 18). Alternatively, oral evidence can be given (Rule 18(15)) from the person who personally effected service.

D. IF THE JUDGE ORDERS A HEARING [§8.13]

A judge may order a payment hearing after judgment if the creditor does not agree to a payment schedule as suggested by the debtor (Rules 11(5)(a) and 12(2)(c)).

E. WHAT THE DEBTOR MUST BRING TO THE HEARING [§8.14]

The debtor does not have to bring any records or items to the payment hearing unless the creditor describes the records on the summons or a judge has ordered such records to be brought (Rule 12(9)). The summons to a payment hearing, Form 12 (FP 63), has a blank space to be filled in by the creditor, who can set out what must be brought. Some suggested items include:

(1) banking records;

(2) financial statements;

(3) tax returns and supporting documents;

(4) payment records;

(5) credit card statements;

(6) utility bills;

(7) RRSP statements;

(8) lists of receivables; and

(9) client lists.

If a payment hearing has been ordered by a judge, the judge may instruct the debtor to complete a statement of finances (FP 60) and to bring specific records to the hearing that support the statement of finances.

Even if the hearing has been initiated by the creditor, the creditor can serve a statement of finances with the summons (after specifying the statement on the summons), and the debtor will be expected to bring the completed statement to the hearing.

F. THE HEARING [§8.15]

Rule 12(12) provides that at the hearing, the debtor may be sworn or affirmed to give evidence about:

(1) the income and assets of the debtor;

(2) the debt owed to and by the debtor;

(3) any assets that the debtor has disposed of since the claim arose;

(4) the means that the debtor has, or may have in the future, of paying the amount owed.

The creditor and the judge each may ask questions of the debtor regarding these matters. A list of questions drafted by the Law Society of British Columbia for similar examinations in the Supreme Court may be used as a guide for questioning the debtor (see FP 26).

After hearing any evidence, the creditor and the debtor may make submissions on the appropriate amount of any payment schedule which may then be ordered by the court (Rule 12(13)). The results of the payment hearing are recorded on an application record/order form (FP 12), which is then made available to the parties.

G. NON-ATTENDANCE [§8.16]

If the creditor does not attend the hearing, the judge may hold the hearing without the creditor, cancel it, or postpone it (Rule 12(14)).

If the debtor or the named representative does not attend, the creditor may ask the judge to issue a warrant for the arrest of the person (Rule 12(15)) (see §8.46). To obtain a warrant, the creditor must produce evidence that the debtor or its representative was properly served with the summons. An affidavit must be filed to satisfy the court (Rule 18(14)(e)) if the hearing was instigated by the claimant. Alternatively, oral evidence to prove service can be given from the person who personally effected service (see Rule 18(15)).

IV. ORDER FOR SEIZURE AND SALE [§8.17]

A. GENERAL [§8.18]

An order for seizure and sale is a device in which property belonging to the debtor can be seized and sold at public auction. The net proceeds of the sale, if any, are provided to the creditor.

A judgment creditor may ask the registrar for an order for seizure and sale if a payment schedule has not been ordered (Rule 11(7)) or complied with (Rule 11(14)(b)). The creditor must complete an order for seizure and sale in Form 11 (FP 51) and file it at the registry (Rule 11(12)). If the registrar is satisfied, he or she may issue the order (Rule 11(12)). The debtor is not notified of the order before seizure.

The creditor may suggest that particular property should be seized—for example, a car or computer—or that general property of the debtor be seized or sold. If general property is to be seized, the *Court Order Enforcement Act* provides that certain types of the debtor's property are immune from seizure. Property may not be seized if it is owned jointly with someone else. (Household goods in many cases will therefore not be seized.) The Act permits seizure of, among other property, money, bills of exchange, RRSPs, a debtor's equity of redemption in goods and chattels, stocks, shares, and dividends. The Act sets out specific procedures for the seizure of shares, although the exigibility of shares (for example, shares subject to an option to purchase by a third party), and genuinely realizing their value (particularly for small, non-reporting companies) may be difficult.

Sections 70 to 76 of the *Court Order Enforcement Act* establish categories of personal property exempt from seizure and sale. Sections 71 and 71.1 provide as follows:

> **Personal property of debtor**
>
> **71.** (1) Subject to subsections (2) to (4) of this section and section 71.2, the following goods and chattels of a debtor, at the option of the debtor, are exempt from forced seizure or sale by any process at law or in equity:
>
> (a) necessary clothing of the debtor and the debtor's dependants;
>
> (b) household furnishings and appliances that are of a value not exceeding a prescribed amount;
>
> (c) one motor vehicle that is of a value not exceeding a prescribed amount;
>
> (d) tools and other personal property of the debtor, not exceeding in value a prescribed amount, that are used by the debtor to earn income from the debtor's occupation;
>
> (e) medical and dental aids that are required by the debtor and the debtor's dependants;
>
> (f) any personal property prescribed by the regulations that is of a value not exceeding a prescribed amount.

(2) This section must not be construed as exempting any property from seizure in satisfaction of a debt incurred for the purpose of acquiring property otherwise exempt under subsection (1).

(3) This section must not be construed as permitting a trader to claim as an exemption any of the goods and merchandise which form a part of the stock and trade of his or her business.

(4) This section does not apply to a corporate debtor.

Principal residence of debtor

71.1 (1) Subject to section 71.2, the principal residence of a debtor is exempt from forced seizure or sale by any process at law or in equity if the value of the debtor's equity in the principal residence does not exceed a prescribed amount.

(2) This section does not apply to

(a) a corporate debtor, or

(b) a debtor who is party to a proceeding in respect of a mortgage.

The Court Order Enforcement Exemption Regulation, B.C. Reg. 28/98, prescribes the following exemption amounts:

(1) $4,000 for household furnishings and appliances;

(2) $5,000 for one motor vehicle if the debtor is not a maintenance debtor under the *Family Maintenance Enforcement Act*, or $2,000 for one motor vehicle if the debtor is a maintenance debtor;

(3) $10,000 for tools and other personal property used by the debtor to earn income from the debtor's occupation.

The regulation also sets out the prescribed amount of equity in the debtor's principal residence. If the debtor's principal residence is in the Capital Regional District or Metro Vancouver, the amount is $12,000. If the debtor's principal residence is not in those areas, the amount is $9,000.

No registry filing fees apply to an order for seizure and sale. However, when a creditor submits an order to the registrar, he or she must:

(1) attach a covering letter addressed to the court bailiff containing instructions for the execution;

(2) attach any searches or other documents (see §8.19); and

(3) show the receipt to the registry to confirm the deposit has been paid (see §8.20).

B. SEARCHES [§8.19]

Numerous searches may be performed to identify the debtor's assets and ability to pay, allowing the creditor to determine if an order of seizure and sale will be worthwhile. See §8.51 for a summary of searches that apply generally to the collections process. Provide the court bailiff with as much information as possible about each asset to aid execution.

The most commonly seized items in Provincial Court small claims proceedings are motor vehicles. A creditor should first search to see if the debtor has a motor vehicle. The search will confirm registered ownership (although this step does not necessarily confirm beneficial ownership). The search is done by requesting a motor vehicle search from:

Attn: Vehicle Records Searches
Head Office
Insurance Corporation of British Columbia
Room 154
151 West Esplanade
North Vancouver, B.C.
V7M 3H9

Telephone: 604-661-2233 or 1-800-464-5050
Fax: 604-443-7307
Website: www.icbc.com

With an ICBC account and password, requests can be made by fax or telephone; otherwise they must be made by letter or in person at customer service.

A fee of $15 is charged for each certified document or extract. Cheques should be made payable to ICBC.

Note that a motor vehicle name search cannot be conducted before judgment without the debtor's consent, although in some cases it is possible to obtain special permission from ICBC to perform the search without the debtor's consent. After judgment has been rendered, a copy of the entered judgment must accompany the request for a motor vehicle search.

Next, the creditor should search to see if the property or motor vehicle is already subject to a claim by someone else. For example, a bank may have registered a claim against a motor vehicle. If there is an encumbrance, the sheriff or court bailiff will only seize the car if the value is greater than the amount outstanding on the loan. (The debtor's equity in the vehicle, or any other targeted item, also must be worth more than the court bailiff's fees for time spent and charges such as towing, storing, and advertising, or the item will not be seized.)

A personal property registry search may be requested from:

B.C. Registry Services
2nd Floor, 940 Blanshard Street
Victoria, B.C.
V8W 3E6

Mailing Address:
P.O. Box 9431
Stn. Prov. Govt.
Victoria, BC
V8W 9V3

Telephone: (250) 356-8609 or
(from Vancouver) (604) 775-1042
Fax: (250) 387-3055
Website: bcregistryservices.gov.bc.ca/bcreg/pprpg/index.page

This search can also be made through the BC OnLine web site (www.bconline.gov.bc.ca).

A lawyer (or other searcher) must have a billing number with the registry in order to conduct telephone or fax searches. A fee of $7 plus service charge applies to unassisted computer searches through BC OnLine. A cheque should be made payable to the Minister of Finance.

Although the Provincial Court does not have jurisdiction to grant relief under the *Personal Property Security Act* (see *Gord Hill Log Homes Ltd. v. Cancedar Log Homes*, 2006 BCPC 480), an applicant may still apply under Supreme Court Civil Rule 10-1 (Detention, Preservation and Recovery of Property) in Provincial Court for an order seizing property (*Hassell v. Regency Motor Cars* (1996), 11 P.P.S.A.C. (2d) 243 (B.C.S.C.); *First City Trust v. 282674 B.C. Ltd.* (1993), 82 B.C.L.R. (2d) 123 (S.C.)).

C. BAILIFF FEES [§8.20]

The seizure and sale is not done by the creditor but by private bailiffs. While sheriffs and bailiffs appointed by the province formerly provided this service, private bailiffs now perform this function for most areas of the province. For regions of the province where sheriff services are still available, see §3.65 for a description of sheriff fees.

The creditor is responsible for engaging a bailiff. Listings of private bailiffs can be found in the Yellow Pages under "bailiff" (or consult chapter 19 of CLEBC's *Due Diligence Deskbook* or chapter 3 of CLEBC's *British Columbia Creditors' Remedies*). A creditor can sometimes have the bailiff make the appropriate searches and investigations for an appropriate fee. If the creditor provides no information about the assets, the bailiff will charge the creditor for time spent obtaining that information.

Before an order for seizure and sale is issued, the court will normally require a receipt to confirm payment of a deposit from the creditor for the fees and expenses of the bailiffs or sheriffs. The amount of the

deposit is determined by the bailiff or sheriff. The deposit should be paid to the bailiffs and the receipt obtained.

The deposit and fees are added to the judgment and, depending on the amount, if any, received for any goods seized and sold, the creditor may be reimbursed for part or all of the fees paid.

Before attempting to seize any goods, the bailiff or sheriff will give the opportunity for the debtor to pay, and the debtor will frequently do so.

D. PROCEEDS OF SALE [§8.21]

Any goods seized are sold by public auction. The proceeds are first paid to the sheriff or bailiff for their actual costs which may or may not exceed the amount of the deposit. The creditor then receives any balance up to the amount of the judgment and deposit. Any surplus is paid to the debtor. (See Part 5 of the *Court Order Enforcement Act*.)

If the sheriff or bailiff is unsuccessful in locating or selling assets, the order will be returned to the creditor. The creditor is then free to take any other execution steps and may ask the registrar for an order that the fees paid to the sheriff or bailiff be added to the costs payable by the debtor.

E. DURATION OF THE ORDER [§8.22]

An order for seizure and sale is valid for one year. If not enforced within 12 months after issue, the order expires (Rule 11(13)). The creditor is, however, free to ask the registrar to issue another order.

V. DETENTION AND RECOVERY OF PROPERTY BEFORE JUDGMENT [§8.23]

Supreme Court Civil Rule 10-1 allows detention, preservation, and recovery of property pending judgment. The Supreme Court Rule is applicable under Small Claims Rule 17(18).

An application must be made to the court. The application may be made without notice to the other parties if the applicant is concerned that the property will be harmed or disappear if notice is given.

In addition to the general power of an order governing the detention, preservation, and recovery of property pending resolution of a matter, the Supreme Court Civil Rule allows the following pending resolution of the dispute:

(1) a fund may be paid into court or otherwise secured if the right of a party to it is in dispute (Supreme Court Civil Rule 10-1(2));

(2) income from property in dispute may be paid as directed by the court (Supreme Court Civil Rule 10-1(3));

(3) property may be delivered to the claimant pending judgment (Supreme Court Civil Rule 10-1(4)). This delivery may or may not be on terms, including an undertaking by the claimant to pay any damages which might arise.

As part of any order, the court may allow a person to enter upon any land or building (Supreme Court Civil Rule 10-1(1)).

VI. EXECUTION AGAINST LAND—CERTIFICATE OF JUDGMENT [§8.24]

If the debtor owns land in British Columbia, the creditor may register the judgment against the land. Registration against the land may allow payment of the judgment on any sale or transfer of the property, depending on the price and the priority of the judgment. It will usually prevent the debtor from selling or mortgaging the property until the debt is paid.

A name search can be conducted at the land title office through BC OnLine to determine if the debtor owns land in British Columbia (see §8.51). A judgment may be registered even if the land is held in joint tenancy and only one of the tenants is a debtor.

The claimant must obtain a certified certificate of judgment (see FP 13) from a registrar of the court (*Court Order Enforcement Act*, s. 88(4)). A $30 fee is charged for the certificate (see §3.65). The original certificate is then filed, by the creditor, in the land title branch in the district in which the land is located. The application must be prepared in Form 17 under the Land Title Act Regulations. An original certificate may be obtained and filed against more than one property in the name of the debtor, by including the legal description of each property on the application.

The land title office charges fees to register the judgment against each parcel of land. (The fee was $30.05 in November 2010, but current information should be obtained from the land title branch in question.)

The registration is good for only two years but can be renewed before the registration expires. If renewed within the original 24-month period, the original priority is maintained (see ss. 83 and 91 of the *Court Order Enforcement Act*). In a renewal, a new certificate of judgment is not necessary, although a new Form 17 application must be submitted along with a copy of the certificate of judgment.

After the judgment is registered, the creditor can apply to the Supreme Court for an order to have the land sold. This procedure is complicated and costly. The *Court Order Enforcement Act* sets out three hearings that must be held in the Supreme Court before property is put up for sale: an initial "show cause" hearing under s. 92; a registrar's hearing to determine details of the title (s. 94); and a confirmation hearing before the court for a sale order (s. 94). For details, see B.J. Ingram, "Execution Against Real Property", chapter 4 of the CLEBC course materials, *Creditors' Remedies—1999* (CLEBC, 1999).

Registration is normally released through the land title branch in question. The land title office will require a Form C under the *Land Title Act* signed by a creditor before a lawyer or notary; the applicable land title office fee is $30.05. Creditors are also able to submit a Form C electronically through the Land Title Branch Electronic Filing System (for details, see http://www.ltsa.ca/ electronic-filing-system).

A creditor can register a certificate of judgment in the land title office even if a payment schedule is in effect, because such registration does not constitute a "step to collect the debt" within the meaning of Rule 11(6) (*Royal Bank of Canada v. Li*, [1994] B.C.J. No. 2084 (QL) (Prov. Ct.)).

VII. GARNISHMENT AFTER JUDGMENT [§8.25]

A. GENERAL [§8.26]

Garnishment after judgment requires a third party, the garnishee, to pay into court monies owing to the defendant/debtor. Unlike pre-judgment garnishment, the debtor's wages may be partially garnished.

The process is governed by the *Court Order Enforcement Act*. The judgment creditor must:

(1) prepare and file an affidavit in support of the garnishment;

(2) prepare a draft garnishing order;

(3) obtain the order at the registry; and

(4) serve both the affidavit and the order on the garnishee and the defendant.

While the meticulous care required in the preparation of pre-judgment garnishment documents is not as strictly enforced with post-judgment garnishment, the documents should be prepared properly because mistakes may mean the order may be set aside.

B. WHAT CAN BE GARNISHED [§8.27]

Just about any debt can be garnished, as long as it is located in British Columbia.

Thirty per cent of a debtor's wages may be garnished, subject to a minimum exempted $100 per month for a person without dependants and $200 per month with dependants (*Court Order Enforcement Act*, s. 3(5)). (This section has obviously not kept current with inflation.) Under the definition of "wages" in s. 1 in the Act, the calculation is based on the employee's net pay. See also §8.36.

Both the federal and provincial governments provide that the salary of civil servants may be garnished. For federal government employees, the *Garnishment, Attachment and Pension Diversion Act* overrides some of the procedures otherwise dictated by the *Court Order Enforcement Act*. A federal form entitled a garnishment application (see FP 31) is prescribed by the Garnishment and Attachment Regulations. Service is made at the Garnishment Registry, Department of Justice, Vancouver Regional Office, 900-840 Howe Street, Vancouver, B.C. V6Z 2S9 (telephone: (604) 666-2061; fax: (604) 666-1585).

Pursuant to s. 6(3) of the *Court Order Enforcement Act*, provincial government employees must be served with garnishing orders at:

> Legal Encumbrance Section
> Office of the Comptroller General
> Ministry of Finance
> Second Floor, 617 Government Street
> PO Box 9413 Stn Prov Govt
> Victoria, BC. V8W 9V1
>
> Telephone: (250) 387-3364
> Fax: (250) 953-0462

However, if the salary or wages of the public servant are usually paid other than from that office, garnishing orders must also be served on the board, commission, government agent, or officer by or through whom the salary or wages of the public servant are usually paid (*Court Order Enforcement Act*, s. 6(3)(a)). In addition, if the salary or wages of the public servant are payable by an agent of the government, the chief officer or chair of the agent of government, or the officers by, or through, whom the salary or wages of the public servant are usually paid, must also be served (*Court Order Enforcement Act*, s. 6(3)(b)).

C. THE AFFIDAVIT [§8.28]

1. REQUIREMENTS [§8.29]

Unlike most of the small claims documents, garnishment requires an affidavit sworn before a notary public or commissioner for taking oaths. The affidavit can be sworn at the Provincial Court registry for a fee of $31.

The affidavit must set out:

(1) the amount awarded under the payment order;

(2) the amount still owing; and

(3) the name and address of the garnishee.

Counsel should note that a decision held that an affidavit in support of a garnishing order after judgment is defective unless it contains provisions that:

(1) the defendant has been served with a copy of the default order; and

(2) the defendant was advised that he has an option to request a payment hearing, and after being given a reasonable time to exercise that option, has failed to do so (*Consolidated Financial Corp. v. Malong*, 2004 BCPC 280).

FP 3 reproduces the affidavit form most commonly used in the Provincial Court. The form (prescribed by *Court Order Enforcement Act*, Schedule 1, Form B) is generic and allows a number of choices. If the preprinted version of Form B is used, any changes or deletions must be initialed by both the person swearing the affidavit and the commissioner or notary public. If not, the affidavit may be flawed, allowing the order to be later set aside. If there are many changes to the preprinted form, the affidavit should be word-processed, leaving out the portions of the preprinted form that are not applicable.

2. THE AMOUNT AWARDED IN THE PAYMENT ORDER [§8.30]

The amount awarded in the payment order includes the sum, interest, and expenses awarded in judgment.

3. THE AMOUNT STILL OWING [§8.31]

If any of the total amount awarded has been paid to the creditor, it must be subtracted from the total and the balance indicated in the affidavit. Amounts previously paid into court but not yet in the hands of the creditor need not be taken into account.

4. THE NAME AND ADDRESS OF THE GARNISHEE [§8.32]

A brief description of the garnishee is required. Some examples are set out at §4.49.

In addition, the garnishee must be properly identified. When in doubt, do a company search or telephone the financial institution.

The precise address of the garnishee must be included. For banks and other financial institutions, the precise branch must be indicated.

5. MORE THAN ONE GARNISHEE [§8.33]

The affidavit may refer to more than one garnishee and be used for several garnishing orders (*Court Order Enforcement Act*, s. 26). However, it is advisable to prepare a separate affidavit and a separate draft order for each garnishee to minimize the risk of the orders being set aside by the defendant or garnishee.

D. THE GARNISHING ORDER [§8.34]

The judgment creditor fills out the draft garnishing order (FP 29), except for the costs of attachment proceedings and the total amount attached, which are determined by the registry.

Care must be taken to ensure:

(1) the garnishee is properly identified with its full legal name (if in doubt, the claimant may want to do a company search or, if applicable, even call the garnishee itself); and

(2) the address of the garnishee is properly identified. If garnishing a bank or financial institution, the precise branch address must be identified and served. A bank or financial institution need not check all its branches to see if there is an account. Often the branch can be determined from a cheque or invoice from the defendant, if available.

A judgment creditor may obtain and serve more than one garnishing order to garnish the same amount (see §4.52).

E. SERVICE [§8.35]

See §4.53 for a description of the service requirements on individuals, companies, and partnerships. Service of the garnishing order on an individual is made:

(1) personally in the same manner as service of a notice of claim; or

(2) by registered mail.

Both the garnishee and the defendant must be served, and the debtor must be served "at once" or within a time set by the judge or registrar and noted on the garnishing order (*Court Order Enforcement Act*, s. 9(2)). However, the garnishee is invariably served first to prevent the defendant withdrawing the funds before the garnishee is served. If the creditor discovers, on serving the garnishee, that the order will be unsuccessful, the order does not need to be served on the debtor. Only the garnishing order need be served, although common practice is to serve the affidavit in support as well.

If service cannot be made on the garnishee or the defendant personally, the court may allow substituted service of the order (*Court Order Enforcement Act*, s. 9(5)).

The judgment creditor should prepare and file a certificate of service (Form 4; see FP 18) to prove service on the garnishee and the defendant. No order can be made for payment to the judgment creditor of any money paid into court by the garnishee until proof of service has been filed (*Court Order Enforcement Act*, s. 9(3)). In practice, the registry usually does not require the filing of an affidavit of service on the garnishee, except when the creditor requests a garnishing order absolute (see §4.54).

F. PAYMENT INTO COURT BY THE GARNISHEE [§8.36]

If monies were owing to the debtor at the time of service of the garnishing order on the garnishee, the garnishee must pay into

court what is then owed to the debtor, up to the sum identified in the order (*Court Order Enforcement Act*, ss. 9(1) and 10). Normally, the registry will send a notice to the judgment creditor identifying the date and the amount paid into court.

When wages are garnished, the order, once served on the garnishee employer, is valid for seven days (*Court Order Enforcement Act*, s. 3(1)). If wages are to be paid to the debtor within those seven days, 30% of the net wages must be paid into court subject to a minimum exemption of $100 per month for persons without dependants and $200 per month for persons with dependants. A creditor or debtor may apply to a judge in Form 17 (FP 14) to increase or decrease the amount of wages that is exempt from attachment (see *Court Order Enforcement Act*, s. 4(3)). The order may be appealed to the Supreme Court within 14 days after the order was made (s. 4(5)).

As such, when garnishing wages, make sure the order is served close to a pay period. Often a telephone call to the employer will obtain information about when wages are paid. Alternatively, try to serve close to the middle or end of each month.

If no monies were owing at the time of service of the order, or wages are not due within seven days of service, the garnishee need not do anything. However, if the garnishee does not provide an explanation to the registry, or fails to formally dispute liability, he or she risks the possibility that the creditor will pursue a garnishment order absolute (see §4.54).

G. DEBTOR'S APPLICATION TO RELEASE THE GARNISHING ORDER [§8.37]

A debtor may apply to have a garnishing order released (*Court Order Enforcement Act*, s. 5(1)). This application is normally for one of four reasons:

(1) the affidavit or garnishing order was defective;

(2) the debtor can show that the garnishing order is a hardship and should be released;

(3) the debtor can show that the creditor has already been paid in full;

(4) the judgment creditor has garnished more than the total amount of the judgment.

The test to be used by the registrar is what is "just in all the circumstances" (*Court Order Enforcement Act*, s. 5(2)). Counsel making this application should note that the requirements set out by the *Court Order Enforcement Act* with respect to garnishing orders after judgment must be applied in a way that is consistent with the provisions of the *Small Claims Act* and Small Claims Rules, as well as the intent and purposes of the Act (*Consolidated Financial Corp. v. Malong*, 2004 BCPC 280). The registrar may:

(1) release the order;

(2) decide that it is a matter for a judge to hear (in this case, the defendant need prepare and speak to an application; again, the judgment creditor need not be notified); or

(3) decline to release the order. The debtor can then appeal that decision to a judge (Rule 17(21)). An application must be filed and spoken to. Notice to the judgment creditor of this application would appear necessary because it is an application under the Small Claims Rules rather than under the *Court Order Enforcement Act*.

In practice, the registrar often decides to refer the matter to a judge. However, practice varies around the province, depending in part on the availability of a judge.

If the garnishing order is released, the funds are paid out of court at the debtor's direction. A copy of the registrar's or judge's order releasing the garnishing order must be sent to the creditor and to the garnishee (*Court Order Enforcement Act*, s. 5(5)).

In releasing funds, the registrar or judge may make an order that the judgment be paid by instalments and fix the amounts and terms of those instalment payments (*Court Order Enforcement Act*, s. 5(2)). The court may vary an instalment order at any time if the creditor or debtor files an application and gives three days' written notice to the other party (s. 5(3)).

H. PAYMENT OUT OF COURT [§8.38]

Any monies paid into court are held pending payment out or further order of the court.

The parties may agree to have all or a portion of the monies paid out of court (*Court Order Enforcement Act*, s. 13(4)). This procedure is common when the parties have settled the matter of payment of the judgment themselves. The debtor must file a consent to payment out specifying:

(1) the amount to be paid out;

(2) the person or persons to whom the money is to be paid out. (For example, the parties may agree that half the monies are to be paid to each party.)

The consent to payment out form appears at FP 24.

Alternatively, the creditor may apply for payment out of court. This application can be done by:

(1) serving on the other party a notice of payment out; or

(2) waiting three months and then having the money paid directly to the creditor, but only if the payment order was the result of a default order (see *Court Order Enforcement Act*, s. 13(1)(b)).

If the creditor takes the former option, the notice of payment out is to be either personally served or sent by registered mail (*Court Order Enforcement Act*, s. 13(3)). The creditor must file an affidavit of service along with the notice.

If the debtor does not file a letter disputing the payment out within ten days of service of the notice, the creditor can get the money

paid out (*Court Order Enforcement Act*, s. 13). Remember that if the notice is served by registered mail, the ten days commence after receipt has been acknowledged, not from the date of mailing. A copy of the notice of payment out is found at FP 39.

If a dispute is filed, the matter will be set down by the registry for a hearing before a judge.

Counsel should note that payment out of court applications in "pay-day loan" cases must be referred to a judge in accordance with the Practice Direction by the Chief Justice issued on January 18, 2005. Pursuant to decisions by the court (*A OK Payday Loans Inc. v. Watt*, 2004 BCPC 467 and *Consolidated Financial Corp. v. Forde*, 2005 BCPC 209), such applications may be unable to proceed.

I. RECOVERING COSTS [§8.39]

Under s. 10 of the *Court Order Enforcement Act*, the registrar may allow the claimant the costs of issuing a garnishing order. These costs may include the following: (1) the registry fee for issuing the order; (2) the registry fee for swearing the affidavit; (3) the expenses for service of the documents on the debtor and the garnishee; and (4) the registry fee for swearing the affidavits of service. Additional expenses may be allowed at the discretion of the registrar. The creditor is entitled to recover costs if he or she succeeded in attaching monies and having them paid out of court; if the creditor takes further steps to recover on the judgment, he or she may include the costs in the amount still owing. If the garnishing order was not successful, the registrar may decide not to allow costs if the creditor went on a "fishing expedition".

The costs for obtaining a garnishing order must be reasonable. Claimants may be required to prove the actual cost of service and not merely be granted a standard amount for service of process, as that could amount to a "windfall" for the claimant (see *Consolidated Financial Corp. v. Malong*, 2004 BCPC 280).

VIII. DEFAULT HEARING [§8.40]

A. GENERAL [§8.41]

If a debtor has refused to obey a payment schedule, the creditor may have the debtor brought before a court to request a further order, a warrant for arrest, or imprisonment of the debtor.

Alternatively, under Rule 13(1), the creditor may request a default hearing if the debtor does not obey a payment schedule:

(1) made in a settlement conference (Rule 7(14)(c));

(2) made in a trial conference (Rule 7.5(14)(b));

(3) made at the trial (Rule 11(4));

(4) made at a payment hearing (Rule 12(13)); or

(5) changed under Rule 17(3).

The creditor must complete a summons (Form 14; FP 62) and file it at the registry (Rule 13(2)). The registrar must then set down a default hearing.

B. WHO MUST APPEAR [§8.42]

If the debtor is an individual, that person must appear.

If the debtor is a company, an officer, director, or employee may be summoned to the default hearing (Rule 13(3)).

If the debtor is a partnership, a partner may be summoned to the default hearing (Rule 13(4)).

C. WHAT THE DEBTOR MUST BRING TO THE HEARING [§8.43]

The debtor need not bring any records or items to the default hearing unless the creditor describes the items on the summons (Rule 13(6)). Form 4 has a blank space to be filled in by the creditor, setting out what must be brought. Some suggested items are:

(1) banking records;

(2) financial statements;

(3) tax returns and supporting documents;

(4) payment records;

(5) credit card statements;

(6) utility bills;

(7) RRSP statements;

(8) lists of receivables; and

(9) client lists.

D. SERVICE [§8.44]

Service of the summons must be made personally by a court bailiff or sheriff, at least seven days before the date of the default hearing (Rule 13(5)).

E. THE HEARING [§8.45]

At the hearing, the judge may:

(1) confirm the terms of the payment schedule or other order (Rule 13(7)(a));

(2) change the terms of a payment schedule or other order in any manner that the judge thinks is fair to the debtor and the creditor (Rule 13(7)(b));

(3) order a warrant of imprisonment of up to 20 days if the debtor has not obeyed a payment schedule and the judge considers the debtor's explanation, or lack thereof, to amount to contempt of court (Rule 13(8)); or

(4) order a warrant of arrest if the person ordered by a judge to attend either in person or on having been served with a summons, does not attend (Rule 13(9)). A judge may only make this order at the request of the creditor.

IX. WARRANTS OF ARREST [§8.46]

Rule 14(1) provides that warrants for arrest can be issued in response to disobedience of three Small Claims Rules:

(1) Rule 9(7), disobeying a summons;

(2) Rule 12(15), failing to attend a payment hearing; and

(3) Rule 13(9), failing to attend a default hearing.

A warrant for arrest can only be issued by a judge, or, in the case of a failure to attend a payment hearing, a judge or a justice of the peace. If a witness disobeys a summons, the court can issue the warrant on its own volition (Rule 9(7)). For a warrant under the other two Rules, the creditor must first request such a remedy. A formal application is optional if the creditor requests a warrant. The creditor can simply make the request at the hearing when the person fails to attend (Rule 17(13)).

A warrant is prepared by the court, in Form 9 (FP 71). Once issued by the registry, the warrant is valid for 12 months (Rule 14(8)).

The warrant is then served by the registry on the person named (Rule 14(1)). The registry can do so by leaving a copy of it with the person, or mailing it to the person by registered mail, regular mail or e-mail (Rule 18(12)(b) and (c)).

What happens after the warrant is issued depends on whether the warrant is served:

(1) Rule 14(6) provides that should the person attend court voluntarily after notification that a warrant exists (by, for example, a telephone call from the registry or a sheriff), the warrant is cancelled (that is, before it is served). Rule 9(8) is to the same effect. Presumably the person is then free to leave, without sanction. That would be the logical consequence, given the lack of a warrant on which the court could act. However, Rule 9(9) provides that, despite the automatic cancellation of the warrant, the judge may release a reticent witness on conditions or detain that person until his or her presence is no longer required.

(2) Rule 14(2) provides that, after being served with a warrant, the person named may contact the registry to attend voluntarily. If the person then attends court voluntarily, the warrant is automatically cancelled (Rule 14(6)). However, the person is normally asked to appear before a judge who will ensure that he or she understands the consequences of a future failure to appear (namely, a warrant for immediate arrest). The judge or justice of the peace may release the person and may order the person to attend on another date (Rule 14(5)).

(3) If the person served with a warrant does not arrange to appear in court voluntarily within seven days of service, a sheriff or peace officer may arrest the person (Rule 14(3)). With service by mail deemed to take effect 14 days after mailing (Rule 18(13)), a person cannot be arrested until at least 21 days after the warrant was mailed. After arrest, the person must be brought promptly to court (Rule 14(4)). The person can be brought before a judge or a justice of the peace (Rule 14(5)). The judge or justice may release the person and may order the person to attend on another date (Rule 14(5)). If the person fails to appear on that date, a judge (not a justice of the peace) may issue a warrant for immediate arrest (Rule 14(7)), or the person may be imprisoned for contempt (Rule 19(1)(d)); there is no right at this point to a voluntary appearance.

The court may make orders that the registry try to contact the debtor, or that the debtor may be released only upon posting security (*Martin v. Universal Cleaning Equipment Inc. (c.o.b. Kirby Home Products)*, 2005 BCPC 234).

See FP 49 for a sample order following an appearance on a warrant.

If a warrant is issued for the arrest of a debtor or officer, director, or employee of a corporate debtor, this step does not stop execution proceedings. The creditor can continue to take steps to recover on the judgment (Rule 11(18)).

X. WARRANTS OF IMPRISONMENT [§8.47]

A warrant of imprisonment (Form 15; FP 72) may be issued under Rule 13(8) if a debtor has refused to obey a payment schedule (see §8.41), or under Rule 19(1), if a person has disobeyed the court at a hearing in one of the ways specified (see §8.46).

The warrant is prepared by the registry and should name a correctional centre where the person named is to be taken (see Rule 15(1)).

If a judge issues a warrant of imprisonment, a sheriff or peace officer may arrest the person named in the warrant and deliver that person to the director of the correctional centre named in the warrant (Rule 15(1)).

A warrant of imprisonment remains in force for 12 months from the date of its issue. If not served within that time, it expires (Rule 15(2)).

A. IMPRISONMENT UNDER RULE 13(8) [§8.48]

Under Rule 13(8), a judge may issue a warrant of imprisonment if a debtor refuses to obey a payment schedule and the judge considers the debtor's lack of a satisfactory explanation to amount to contempt of court.

If a warrant of imprisonment is issued under Rule 13(8), the person named cannot be imprisoned for more than 20 days (Rule 13(8)).

If imprisoned under Rule 13(8), the debtor has options to secure release:

(1) the debtor may pay the amount stated in the warrant to the registrar, peace officer, or warden who has custody of the person (Rule 15(3));

(2) if the money is paid to the registrar, the registrar must issue a receipt to the debtor and pay the amount to the creditor (if the debtor has not yet been arrested, the registrar must cancel the warrant of imprisonment) (Rule 15(4));

(3) if the money is paid, or a receipt shown, to a sheriff, peace officer, or warden, the debtor must be released (Rule 15(5)). The sheriff, peace officer, or warden must then forward the money to the registry for payment to the creditor (Rule 15(6)).

If the debtor does not secure his or her release from custody, and serves the time, the debt is not released and the creditor remains free to collect it (Rule 15(7)).

B. IMPRISONMENT UNDER RULE 19(1) [§8.49]

Under Rule 19(1), a judge may issue a warrant of imprisonment if a person at a hearing:

(1) refuses to be sworn or affirm, or answer a question;

(2) refuses to produce a record or other evidence;

(3) does not obey a direction of a judge; or

(4) repeatedly fails to attend court when summoned or ordered to do so and does not provide adequate reasons for failing to attend.

For a warrant to be issued under Rule 19(1), the person must refuse while in the courtroom. If the person is not in the courtroom, no warrant can be issued. If a warrant of imprisonment is issued under Rule 19(1), the person named cannot be imprisoned for more than three days. A person imprisoned under Rule 19(1) cannot secure his or her release by payment of the judgment, but he or she may apply to a judge for release on conditions, as may be set by the judge (Rule 19(4)).

Rule 19 should be used as a last resort, but at the same time, the integrity of the court process must be considered (*Vancouver (City) v. Lam*, [1994] B.C.J. No. 1582 (QL) (Prov. Ct.)).

XI. CONTEMPT [§8.50]

Contempt, as defined in Rule 19, is when a person, at a hearing before a judge, refuses to be sworn, affirm, answer a question, or produce a record or other evidence; fails to obey a direction of the judge; or repeatedly fails to attend court and does not provide adequate reasons for failing to attend.

A judge may then:

(1) issue a warrant of imprisonment requiring the person to be imprisoned for not more than three days (Rule 19(1));

(2) dismiss a claim or application under Rule 19(2) if the person is:

(a) the claimant or applicant;

(b) an officer, director, or employee who is an authorized representative of the claimant or applicant; or

(c) a partner or manager of a partnership that is the claimant or applicant;

(3) continue as if no reply had been filed under Rule 19(3) if the person is:

(a) the defendant or a third party;

(b) an officer, director, or employee who is an authorized representative of the defendant or a third party; or

(c) a partner or manager of a partnership that is the defendant or a third party.

(If the claim was in debt, the claimant or defendant would have a default order. If the claim was not in debt, the claimant or defendant would no longer have to prove liability but would still have to prove damages or the relief sought.)

Rule 19 establishes a court's power to punish contempt in the face of the court. If the person is outside the courtroom or before a registrar, contempt cannot be found.

XII. SEARCHES [§8.51]

A judgment is only as valuable as the ability to realize on it. The first step toward realization is to identify any assets owned by the debtor. According to D.R. McGowan, in "Where There is a Will, There is a Way: Locating Assets and Initiating Legal Proceedings" in *Creditors' Remedies—1999* (CLEBC, 1999), the following are some of the searches that a creditor may conduct to obtain information about the debtor's ability to satisfy a judgment:

(1) *Land Title Office.* This online search reveals the debtor's registered interests in lands in British Columbia. Searches must be done for each land title district. Title will indicate the date of last transfer, charge holders, and pending litigation for property. The searcher must ensure that the style of cause in any action is consistent with the identification of the

debtor in the land title search, to ensure that a judgment can be registered once obtained. Land title searches can also reveal other pending actions against the debtor, which in turn may reveal further useful information in court registry files. Searches can be done by both address and name. Address searches often reveal corporate land owners related to the personal debtor.

(2) *BC Assessment Online.* This online search shows the current assessed value of any real property, and the timing and value of recent transfers.

(3) *Company Searches.* This online search identifies current and former corporate names, the date of incorporation, the date of the last annual report, the names and addresses of directors and officers, the location of registered and records offices, and whether the company is in receivership. A name search can reveal similarly named companies that may have corporate affiliations. The search can also identify the capacity of the company at the time of the contract, and the company's current capacity. Note that some registered assets may still be under a former corporate name. The timing of incorporation may be relevant to potential personal liability for pre-incorporation contracts. The date of the last annual report provides clues as to the possibility of the company being dissolved. Names and address of directors and officers can reveal the location of their residences and potential ties to corporate shareholdings.

(4) *Personal Property Registry.* This online search reveals personal property subject to a registered security interest by another creditor. Search results identify secured creditor, base debtor, and co-debtors. The existence of related co-debtors may provide an additional source of recovery. The terms of security interests are obtainable from the secured creditor and can provide clues as to equity. The timing of security interests can be critical in identifying potential non-arm's length fraudulent preferences.

(5) *Motor Vehicle Search.* This request is made in writing, enclosing the judgment; the results reveal whether the debtor is the registered owner of any vehicles.

(6) *Bank of Canada Search.* This search is made either in writing or online. Search results reveal whether a corporate debtor's inventory is subject to a registered charge under s. 427 of the *Bank Act.*

(7) *Credit Bureau.* This online search provides the debtor's credit rating, and gives clues of the debtor's overall financial status. It includes the debtor's social insurance number, date of birth, spouse, employer, current and former addresses, outstanding litigation and judgments, and credit relationships. Please note, however, that pursuant to the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, a credit report cannot be obtained without the debtor's consent.

(8) *Skip Tracing.* This search is conducted by an investigation company, and provides information about the debtor's whereabouts as well as information about the debtor's assets and lifestyle.

(9) *Court Registry.* This search is normally conducted by agents for each court registry, and shows whether the debtor is involved in any actions against other parties. Court searches can now be conducted online through Court Services Online: see https://eservice.ag.gov.bc.ca/cso/index.do. A file search can also reveal what other people already know about the debtor. The *Creditor Assistance Act* can also give the creditor a means of sharing in the fruits of someone else's labour.

(10) *Court Bailiff Search.* This search is conducted by agents for each jurisdiction; it reveals whether the debtor is subject to an outstanding writ of execution and the identity of the judgment creditor. A telephone call to the judgment creditor may reveal what the party knows about the debtor. The *Creditor Assistance Act* can also give the creditor a means of sharing the fruits of someone else's labour.

(11) *Probate Registry.* This search is conducted by agents for each court registry; it reveals whether the debtor is a beneficiary of an estate. If the debtor is a beneficiary, it may be possible to issue a garnishing order or obtain an assignment of proceeds of the estate.

(12) *Bankruptcy Registry.* This search is conducted through the office of the Superintendent of Bankruptcy by telephone or written request; it reveals whether the debtor (either corporate or individual) has made an assignment in bankruptcy.

(13) *Unclaimed Bank Balance Search.* This online search of the Bank of Canada's website reveals whether a debtor has an unclaimed balance in a Canadian financial institution. While the sum in each account may be insignificant, the search is fast and free and may identify an account subject to garnishment.

(14) *Business Licence Search.* This search is conducted by an agent in each municipality (usually through the municipal offices); the results reveal whether the debtor owns or operates a business, and if so, the location and type of business.

(15) *Ship Registry Search.* This search is conducted by an agent or by written request; it reveals whether the debtor owns a registered vessel. Registries are maintained at all major ports by reference to the name of the vessel or its registration number. There is also an online vessel registration query system at www.tc.gc.ca/shipregistry/menu.asp. Unfortunately, many vessels are not registered.

(16) *Manufactured Home Registry Search.* This online search reveals whether the debtor is the owner of a mobile or manufactured home.

(17) *Telephone Directories.* Numerous directories are available, all of which are useful. The Telus White pages, both current and historical, are a gold mine of names, addresses, and telephone numbers. Criss Cross offers a way to match telephone numbers to addresses and vice versa, coupled with the ability

to contact neighbours who frequently offer assistance by informing callers of forwarding addresses. Prophone is a CD-Rom version of most Canadian telephone directory white pages, and can be searched with very little information, to identify current addresses and telephone numbers of wayward debtors. Business directories typically list all small businesses in the Vancouver and Lower Mainland areas, including business addresses, telephone numbers, and principals.

(18) *Internet.* For the technophile, something new is added daily. At the very least, an Internet search may reveal the debtor's web page and the information that somewhere out there is a computer vulnerable to seizure. Increasingly, searches through Google or social networking sites such as Facebook and MySpace can reveal information about a person. Some of the more useful sites are:

(a) to help locate addresses and phone numbers in Canada, or around the world:

Superpages—business and people finder	www.superpages.com
Canada: 411	www.canada411.ca
Google	www.google.com

(b) to provide information and links to publicly traded companies:

TMX Group	www.tmx.com
Marketwire	www.marketwire.com
advice for investors	www.adviceforinvestors.com
Yahoo!Finance	finance.yahoo.com

(c) to locate lawyers throughout Canada and around the world:

Martindale & Hubble	www.martindale.com
Canadian Law List	www.canadianlawlist.com

See also "Searches at a Glance" in *British Columbia Creditors' Remedies—An Annotated Guide* (CLEBC, 2001–).

Some common procedural questions in Small Claims Court

* Prepared by Alison Ward, Barrister and Solicitor, CLAS, November 21, 2011

1. **What court documents can be filed by fax?**
2. **Can a hearing be held by telephone?**
3. **What fees apply in Small Claims Court? Can you waive them? How?**
4. **What costs can someone recover in Small Claims Court?**

1. Fax Filing in Small Claims Court

Different Small Claims Court registries have different rules for what court documents can be filed with that court registry by fax. In each case, you will need to consider what kind of document you are trying to file, and what registry you are working with.

Each time you want to know if a client can file something by fax, you need to look at two things:

a) Rule 17.1 of the Small Claims Rules (attached), called "Procedures in Fax Filing Project Registries," and

b) Provincial Court Practice Direction, Fax Filing Pilot Project (attached).

Rule 17.1(1) defines 14 Provincial Court registries in BC as "fax filing pilot project registries." The list might surprise you: Vancouver and Victoria are not on it.

If you are working with a registry that is a fax filing registry, your next question is: can **this** particular kind of document be fax filed with the Registry?

Rule 17.1(2) sets out a list of things that cannot be fax filed with a fax filing registry. This includes DRO's orders under the *Residential Tenancy Act* (although the Rule refers to old section numbers in the *Residential Tenancy Act*; DRO orders still cannot be filed by fax, even in fax filing registries). Notices of Claim and Replies can be fax filed in such registries. So can other kinds of applications, like applications to a registrar, applications for payment hearings, etc.

If you are working with a registry that is NOT a fax filing registry

Rule 17 (entitled "General") applies to all Small Claims Court registries that are not fax filing registries. It says:

> 17 (17) A registrar may accept for filing any document, **except a notice of claim or a reply**, that has been transmitted to the registry by a fax machine.

Rule 17(17) is clear that Notices of Claims and Replies cannot be filed by fax in registries that are not part of the fax filing pilot project. But Rule 17(17) seems to contradict the fax filing rule as it suggests that something like a DRO order, which cannot be filed by fax in a fax filing pilot project registry, can be filed by fax in other registries. In practice this is not the case. Registries that are not in the fax filing project seem to apply Rule 17.1(2) (which lists things that cannot be fax filed with a fax filing registry) to their own operations.

Registries that are not in the fax filing pilot project seem to be inconsistent in their practice. In my experience, if you are working with a registry that is NOT a fax-filing project registry and you want to file a document with the registry, it is **always** best to phone the registry and confirm whether they will accept a particular document (e.g. an application for a payment hearing, or application to a registrar etc) for filing by fax, and to confirm the fax number you should use.

2. Can a hearing be held by telephone?

Let's say your client has applied for a payment hearing with the landlord that she has an RTB order against. Your client lives 100 km away from the Registry and has small children. She would have to hire a babysitter to attend the hearing in person, and she cannot afford to do that.

Can she attend the hearing by telephone?

Analysis: Rule 16(2) (Applications to the Court) (copy attached) says:

> *A registrar may make any of the following orders without a hearing:*
>
> > *(c.1) an order permitting **a hearing** to be conducted by telephone.*

Therefore, with permission from the Registrar, a party can attend any Small Claims Court hearing by telephone. However, the party must apply for permission from the Registrar in advance. It is not possible to attend a trial in Small Claims Court by telephone (personal attendance is required for trials), as a trial is not considered to be a "hearing."

To apply for permission to attend a hearing by telephone, see Rule 16(3) (called "how to apply to a registrar):

> *(3) To apply for an order listed in subrule (2), a party must complete an application (Form 16), following the instructions on the form, and file it at the registry.*

3. What fees apply in Small Claims Court? Can they be waived?

Schedule A of the Small Claims Rules (attached) sets out the filing fees that must be paid in to the Small Claims Registry.

Rule 20(1) of the Small Claims Rules says:

> *(1) Anyone who cannot afford the fees payable for registry services under Schedule A may apply to the registrar (see Rule 16 (3)), to be exempted from paying the fees.*

An application to the Registrar to waive a filing fee is done by paper only and usually does not require an oral hearing. Rule 16(3) of the Small Claims Rules sets out the procedure to follow to apply to waive filing fees. It involves filing an *Application to a Registrar* (which is form #16), following the instructions on the form, and filing it at the registry. The Application should include detailed information about the applicant's income and expenses to illustrate that they cannot afford the filing fee. You can use a Statement of Finances to do this, although that is not mandatory. If possible, the tenant/applicant should also attach proof of their income to the application or statement of finances.

4. What costs can someone recover in Small Claims Court?

Rule 20 of the Small Claims Rules (attached) deals with fees and expenses that can be recovered in Small Claims Court. Rule 20(2) provides:

Successful party to receive filing and service fees

> *(2) An unsuccessful party must pay to the successful party the following expenses, unless a judge or registrar orders otherwise:*
>
> > *(a) any fees the party paid for filing any documents;*
> >
> > *(b) reasonable amounts the party paid for serving any documents;*
> >
> > *(c) any other reasonable charges or expenses that the judge or registrar considers directly relate to the conduct of the proceeding.*

Under Rule 20(7), a creditor who is enforcing an order in Small Claims can ask a judge to add the amount of any filing fees they paid, to the amount the debtor owes them. Someone who succeeds in a lawsuit in Small Claims Court is also entitled to have

Unlike the BC Supreme Court, an unsuccessful party cannot be required to pay any of the other party's legal fees in Small Claims Court.

Under Rule 20(6) if one party or witness drives up expenses unnecessarily (e.g. by repeat adjournments, or unnecessary applications), a judge can order them to pay expenses another party or witness had as a result of their conduct. If a party pursues a merit-less case to trial, a judge can also order the person to pay a penalty of 10% of the value of the claim to the other party. This power is used in exceptional circumstances.

(1)

Rule 17.1 — Procedures in Fax Filing Pilot Project Registries

Definition

(1) In this rule:

"clerk" means a member of the registry staff;

"fax filing pilot project registry" means the Chilliwack, Cranbrook, Dawson Creek, Kamloops, Kelowna, Nelson, Penticton, Prince George, Rossland, Salmon Arm, Smithers, Terrace, Vernon or Williams Lake Small Claims registry.

[en. B.C. Reg. 10/2003, s. 1.]

Application of this rule

(2) Despite rule 17 (17) and subject to this rule, if a registry is a fax filing pilot project registry, a registrar or clerk may accept any document in a filing that has been transmitted to the registry by fax, except the following:

(a) a certificate of service respecting an application for a default order;

(b) a certificate of judgment under section 88 of the *Court Order Enforcement Act*;

(c) an order under section 76 of the *Offence Act*;

(d) a director's order under section 22 (8) of the *Residential Tenancy Act*;

(e) an decision or order of an arbitrator or the director under section 57 (5) of the *Residential Tenancy Act*;

(f) a restitution order under section 741 of the *Criminal Code*.

[en. B.C. Reg. 10/2003, s. 1.]

When a fax filing may be refused

(3) A registrar or clerk may refuse to accept a filing that is transmitted to a fax filing pilot project registry by fax for any one or more of the following reasons:

(a) the filing is not accompanied by a fax cover sheet in Form 20;

(b) the filing relates to more than one claim;

(c) the filing and the fax cover sheet exceed 20 pages in length and the registrar has not given leave;

(d) applicable registry services fees have not been paid;

(e) in the opinion of the registrar or clerk, the filing is illegible and cannot be used by the court;

(2)

(f) the filing is incomplete;

(g) the filing should have been transmitted to another fax filing pilot project registry;

(h) the filing does not otherwise conform to practice and procedure under these rules and any applicable enactment.

[en. B.C. Reg. 10/2003, s. 1.]

When a fax filing is filed

(4) A filing that is transmitted to a fax filing pilot project registry by fax and received by the registry fax machine will be filed as soon as is practicable, provided that it has not been refused under subrule (3).

[en. B.C. Reg. 10/2003, s. 1.]

When a fax filing is considered to be filed

(5) A filing that is transmitted to a fax filing pilot project registry by fax is considered to be filed on the date stamped on it by a clerk.

[en. B.C. Reg. 10/2003, s. 1.]

Original of fax filing may be required by judge

(6) A judge may require that the original of a document transmitted to a fax filing pilot project registry by fax in accordance with this rule be produced.

THE HONOURABLE TOM J. CRABTREE
CHIEF JUDGE

THE PROVINCIAL COURT
OF BRITISH COLUMBIA

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(3)

AMENDED
PRACTICE DIRECTION
Fax Filing Pilot Project

"The review period outlined in this Practice Direction has been extended from the original date of July 31, 2003 and now extends to July 1, 2012."

(1) Fax Filing Pilot Project Locations

The provisions of this practice direction apply to the fax filing pilot project that is being conducted in the following registries and will continue until July 1, 2012. Documents will only be accepted for fax filing at these registries when sent to the designated fax filing number for that registry set out below:

Chilliwack	-	(604) 795-8397
Cranbrook	-	(250) 426-1498
Dawson Creek	-	(250) 784-2218
Kamloops	-	(250) 828-4345
Kelowna	-	(250) 979-6768
Nelson	-	(250) 354-6133
Penticton	-	(250) 492-1290
Prince George	-	(250) 614-7923
Rossland	-	(250) 362-7321
Salmon Arm	-	(250) 833-7401
Smithers	-	(250) 847-7344
Terrace	-	(250) 638-2143
Vernon	-	(250) 549-5461
Williams Lake	-	(250) 398-4264

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(2) Definitions

In this practice directive:

"faxed submission" means a transmission by fax to the registry, relating to a single court file, containing a fax cover sheet (Form 20 – Small Claims Rule 17.1; Form 32 – Provincial Court (Family) Rule 5.1) and the documents transmitted for filing with that fax cover sheet.

(3) Effect of fax filing

Where a document has been accepted for filing under this practice direction, that document will be deemed to satisfy the requirements of any Provincial Court Rule that refers to the original.

(4) Documents accepted for faxing filing

Any document may be transmitted by fax to the Provincial Court of British Columbia with the exception of the following:

(a) pursuant to Rule 5.1 of the Provincial Court (Family) Rules

i. an application for an order under Rule 2(1) or (2) if the application is filed in a family justice registry or the court file for the proceedings is transferred under Rule 19 to a family justice registry (see Rule 5(1))

ii. a statement of finances under section 13 of the Family Maintenance Enforcement Act

(b) pursuant to Rule 17.1 of the Small Claims Rules

i. a certificate of service respecting an application for a default order

ii. a certificate of judgment under section 88 of the Court Order Enforcement Act

iii. an order under section 76 of the Offence Act

iv. a director's order under section 22(8) of the Residential Tenancy Act

v. a decision or order of an arbitrator or the director under section 57(5) of the Residential Tenancy Act

vi. a restitution order under section 741 of the Criminal Code

(c) pursuant to s. 17(1) of the Small Claims Act, a decision or order of the director filed under s. 85(2) of the Residential Tenancy Act.

(5) Requirements of faxed submission

A faxed submission:

(a) must relate to one file

(b) must contain a Fax Cover Sheet

(c) should not exceed 20 pages in length

(d) may contain more than one document for filing.

(See Rule 5.1(3) of the Provincial Court (Family) Rules and Rule 17.1(3) of the Small Claims Rules)

(6) Submissions longer than 20 pages

Any faxed submission in excess of 20 pages will be accepted only if leave has been obtained from a registrar or clerk of the court.

(See Rule 5.1(3) of the Provincial Court (Family) Rules and Rule 17.1(3) of the Small Claims Rules)

(7) Hours of registry for fax filing

(a) Documents will be processed in the registry from 9:00 a.m. to 4:00 p.m., Monday through Friday except for statutory holidays.

(b) Documents received after 4:00 p.m. will be deemed to be received on the following business day.

(c) The date and time of receipt will be evidenced by the transmission time assigned by the registry fax machine.

(d) All documents will be processed in the order that they are received.

(8) Document filed in registry

A document is filed in the registry when date stamped by the registry and the requirement is met for the payment of applicable registry services fees including the fax confirmation fee.

(9) Date document is filed

A document will be considered filed as of the date stamped by the registry.

(See Rule 5.1(5) of the Provincial Court (Family) Rules and Rule 17.1(5) of the Small Claims Rules)

(10) Responsibility of person submitting a document

It is the responsibility of the person submitting a document to ensure that the document is received in the registry within the required filing time. The registry takes no responsibility for difficulty experienced when transmitting a document by fax to the registry.

If the person submitting the document requires it to be filed on the day the document is faxed to the registry, a note must be made on the Fax Cover Sheet. The registry staff cannot guarantee that any document will be filed on the day it is received in the registry.

(6)

(11) Refusal to accept faxed document

(a) A registrar, clerk of the court and/or the court will refuse to accept a document by fax if the document is one of the documents set out in paragraph (4) above.

(b) A registrar, clerk of the court and/or the court may refuse to accept a document by fax if, in the opinion of the registrar, clerk of the court and/or court, the document is incomplete or the document is illegible as a result of the faxing process.

(See Rule 5.1(3) of the Provincial Court (Family) Rules and Rule 17.1(3) of the Small Claims Rules)

(12) Confirmation of filing

(a) Subject to 12(b), the registry staff will return to the person submitting the document a confirmation that the document has been filed. This confirmation will consist of:

- a cover sheet, stating the fees paid and any comments about the filing
- the first page of the document, showing the date stamp and file number, and
- any other page altered by registry staff.

(b) It is in the discretion of a registrar or clerk of the court whether the confirmation will be returned by fax or by some other method.

(13) Court may request original document

A judge may require that the original of a document transmitted to a registry by a fax machine be produced at any time during a proceeding.

(See Rule 5.1(6) of the Provincial Court (Family) Rules and Rule 17.1(6) of the Small Claims Rules)

Tom J. Crabtree
Chief Judge

August 12, 2010

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Court Rules Act; Small Claims Act

SMALL CLAIMS RULES

[includes amendments up to B.C. Reg. 271/2010, September 24, 2010]

Rule 16 — Applications to the Court

Consent orders

(1) A registrar may make an order that all parties to a claim consent to if one of them

(a) files an application that contains the particulars of the order requested, and

(b) satisfies the registrar that their consent was given.

Some applications may be granted without a hearing

(2) A registrar may make any of the following orders without a hearing:

(a) an order renewing a claim or a third party notice (see Rules 2 (7) and 5 (5.1));

(b) an order changing the date of the settlement conference (see Rule 7 (7);

(b.1) an order changing the date of a mediation session (see Rule 7.2 (11), 7.3 (30) or 7.4 (18));

(b.2) an order changing the date of a trial conference (see Rule 7.5 (5) or (6));

(c) an order extending the time for filing a certificate of readiness (see Rule 7 (10) or 7.4 (13));

✳ (c.1) an order permitting a hearing to be conducted by telephone;

(c.2) an order directing that a party may attend a mediation session by telephone (see Rule 7.2 (14) or 7.4 (24));

(c.3) an order authorizing a person to attend a mediation session by telephone (see Rule 7.3 (25));

(c.4) an order changing the date of a trial (see Rule 9.1 (14) or 9.2 (4));

(d) an order permitting service of a notice of claim outside British Columbia (see Rule 18 (6));

(e) an order permitting another method of service (see Rule 18 (8) (a));

✳ (f) an order exempting someone from paying fees (see Rule 20 (1));

(8)

(g) any other order that the registrar is authorized to make without notice to another party.

[am. B.C. Regs. 148/97, s. 14; 172/2003, s. 5; 286/2005, s. 4 (a) and (b); 360/2007, s. 13.]

How to apply to a registrar

(3) To apply for an order listed in subrule (2), a party must complete an application (Form 16), following the instructions on the form, and file it at the registry.

Registrar may prepare the order or refer it to a judge

(4) The registrar may prepare, sign and record an order under subrule (1) or (2) or Rule 11 (10) or may refer the application to a judge.

[am. B.C. Reg. 148/97, s. 14.]

What the judge may do

(5) If the application is referred to a judge, the judge may make the order or direct the applicant to appear before a judge to explain why the order should be made.

Some applications require a hearing

(6) A judge may make any of the following orders after a hearing:

(a) an order changing the date of a trial (see Rule 4 (7) or 9 (6));

(b) an order permitting a third party claim to be made (see Rule 5 (1));

(c) a default order if no reply to a counterclaim or third party notice is filed (see Rule 6 (2)) or if an application is made under Rule 7.2 (25), 7.3 (40) or 7.4 (34);

(c.1) an order transferring a claim to the Supreme Court (see Rule 7.1 (1) (a) and (2));

(c.2) an order extending the time for serving an offer to settle (see Rule 10.1 (1) (b));

(d) an order permitting a late reply to be filed (see Rule 6 (8));

(e) an order for a medical examination (see Rule 7 (12) or 7.4 (15));

(f) an order setting a place for a trial (see Rule 7 (19));

(f.1) an order exempting a disputed claim from the application of Rule 7.2 (see Rule 7.2 (10)) or Rule 7.3 (see Rule 7.3 (29));

(f.2) a mediation compensation order (see Rule 7.2 (32) (b), 7.3 (50) (b) or 7.4 (41) (b));

(f.3) an order exempting a claim from the application of Rule 7.4 or exempting a party from attending a mediation session (see Rule 7.4

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(7));

(g) an order cancelling a summons to witness (see Rule 9 (5));

(h) an order permitting a creditor to ask for a payment hearing (see Rule 12 (4));

(i) an order changing or cancelling an order made in the absence of a party (see Rule 17 (1));

(j) an order cancelling a default order or dismissal order (see Rules 7.2 (27), 7.4 (36) and 17 (2)), and if the application is granted the judge may order payment of any reasonable expenses of the other party related to the cancellation;

(k) an order changing or cancelling the terms of a payment schedule (see Rule 17 (3));

(k.1) an order postponing or adjourning a trial (see Rule 17 (5.1);

(l) an order extending or shortening a time limit (see Rule 17 (12));

(m) an order for failing to obey a rule (see Rule 17 (13));

(n) a review of a decision of a registrar (see Rule 17 (22));

(o) any other order that a judge has the power to make and notice of which is served on another party.

[am. B.C. Regs. 148/97, s. 14; 172/2003, s. 6; 286/2005, s. 4 (c) to (e); 360/2007, s. 14.]

How to apply to a judge

(7) To apply for an order listed in subrule (6), a party must complete an application (Form 17), following the instructions on the form, and file it at the registry where the court file is unless the registrar allows the application to be filed at another registry (see subrule (8)).

Application may be filed at another registry

(8) A registrar may allow an application under subrule (7) to be filed at another registry if

(a) all the parties agree, or

(b) the registrar is satisfied that the application is urgent.

Applicant must serve notice

(9) At least 7 days before the date set for hearing an application under subrule (7), the applicant must serve a copy of the application, and the affidavit if required (see Rule 17 (2)), on each party that would be affected by the order requested unless the application is for a default order because no reply to a third party notice has been filed.

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Service not required in urgent cases

(10) If satisfied that an application is urgent, a registrar may allow an application to be made under subrule (6) even though the other parties have not been served.

Where the application will be heard

(11) An application under subrule (7) will be heard at the court served by the registry where the court file is, except that the registrar may allow it to be heard at another location of the court if

(a) all the parties agree, or

(b) the registrar is satisfied that the application is urgent.

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Rule 20 — Fees and Expenses

If a person cannot afford the fees

(1) Anyone who cannot afford the fees payable for registry services under Schedule A may apply to the registrar (see Rule 16 (3)), to be exempted from paying the fees.

Successful party to receive filing and service fees

(2) An unsuccessful party must pay to the successful party the following expenses, unless a judge or registrar orders otherwise:

(a) any fees the party paid for filing any documents;

(b) reasonable amounts the party paid for serving any documents;

(c) any other reasonable charges or expenses that the judge or registrar considers directly relate to the conduct of the proceeding.

Determination of expenses

(3) A judge may determine the amount of the expenses that are payable under subrule (2) or refer the matter to the registrar.

Registrar's determination

(4) If a judge refers the matter to the registrar, the registrar must determine the amount of expenses as soon as practicable.

A judge may order a penalty

(5) A judge may order a party to pay the other party up to 10% of the amount claimed or the value of the claim or counterclaim if the party made a claim, counterclaim or reply and proceeded through trial with no reasonable basis for success.

Compensation for unnecessary expenses

(6) A judge may order a party or witness whose conduct causes another party or witness to incur expenses to pay all or part of those expenses.

Compensation for collection expenses

(7) To compensate a creditor for the cost of collecting payment due under a default order or payment order, a registrar may order the debtor to pay expenses, limited to those in Schedule A.

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IMPORTANT INFORMATIO

B.C. Reg. 261/93

O.C. 1030/93

Deposited July 30, 19

effective October 1, 19

Court Rules Act; Small Claims Act

SMALL CLAIMS RULES

[includes amendments up to B.C. Reg. 271/2010, September 24, 2010]

Schedule A

[en. B.C. Reg. 74/98; am. B.C. Regs. 10/2003, s. 2; 172/2003, s. 8; 458/2004; 459/2004; 285/2005; 371/2008.]

Fees

You must pay these amounts for the following services:

	Registry Services	$
1	For filing a notice of claim	
	(a) for claims up to and including $3 000	100
	(b) for claims over $3 000	156
2	For filing a reply, unless the defendant has agreed to pay all of the claim	
	(a) for claims up to and including $3 000	26
	(b) for claims over $3 000	50
3	For filing a counterclaim or a revised reply containing a new counterclaim	
	(a) for counterclaims up to and including $3 000	100
	(b) for counterclaims over $3 000	156
4	For filing a third party notice	25
5	For filing an application for a default order	25
5.1	For returning confirmation of acceptance or refusal of a filing transmitted to a fax filing pilot project registry by fax, by mail or fax	10
5.2	For filing a request for judgment or for dismissal	25
5.3	For filing an application for a mediation compensation order	25
6	For a search of a record, other than	
	(a) an electronic search conducted from outside the registry, or	
	(b) a search of a record of a proceeding by	
	(I) a party to that proceeding, or	
	(II) the party's solicitor	8
6.1	For returning by mail, fax or electronic mail the results of a search of an existing case, the aggregate of the following:	
	(a) fee for returning the results	10
	(b) cost per page faxed or mailed	1
6.2	For accessing from outside the registry, including, without limitation, viewing, printing or downloading, any record that is found by or created in response to an electronic search or request, including, without limitation, an index of	

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	cases produced in response to a search query	6
7	For copies, per page	1
8	For a certified copy of a record (a) for 10 pages or less (b) for each additional page over 10 pages	 21 6
9	For a certificate of judgment or any other certificate	30
10	For filing a certified copy of an order (a) from another registry of the court, except for a Restitution Order made under the *Criminal Code* (b) of an arbitrator under the *Residential Tenancy Act*	 21 21
11	For taking or swearing an affidavit for use in the court, except for taking or swearing an affidavit in the course of a person's duties as a peace officer or as an agent or officer of British Columbia or an affidavit of non-compliance under Rule 7 (20)	31
12	For filing the records required for the issue of a garnishing order	40
13	Repealed. [B.C. Reg. 10/2003, s. 2 (c).]	
14	For resetting a trial or hearing with less than 30 days' notice before the date of the proceeding as set on the trial list, unless the matter must be reset due to the unavailability of a judge	100
	Sheriff Services	
15	For personal service by the sheriff (a) for receiving, filing, personally serving one person, and returning the document together with a certificate or affidavit of service or attempted service (b) for each additional person served at the same address (c) for each additional person served not at the same address	 100 20 30
16	For (a) receiving, filing, serving one person by registered mail and returning the document together with a certificate of service or attempted service (b) each additional person served by registered mail at the same address	 20 10
17	For enforcing orders for seizure and sale (a) for each order (b) for attending, investigating, inventorying, cataloguing, taking possession, preparing for sale, per hour for each sheriff involved (c) as commission on the sum realized, or on the sum settled for, as the case may be, after deducting disbursements properly incurred (d) the amount of the commission payable under paragraph (c) must be reduced by 50% if an auctioneer, broker or other individual sells the goods and chattels for the sheriff and receives a fee or commission for doing so	 70 55 10%
18	In lien and recovery actions, (a) for enforcing a lien other than a repairer's lien, or for recovering goods, if the enforcement or recovery is completely or partly accomplished (b) for attending, investigating, inventorying, cataloguing, taking possession, per hour for each sheriff involved	 75 55
19	In respect of items 17 and 18, for each kilometre travelled	0.50
20	For a search, including a certificate of result	5
21	For taking or swearing an affidavit for use in the court, except for taking or swearing an affidavit in the course of a person's duties as a peace officer or as an agent or officer of British Columbia	30
22	All disbursements properly incurred to carry out items 15 to 21	

In addition to any other fees payable under this Schedule, a further fee of $7.00 must be paid for transmitting a

14

document package to a registry through the electronic filing service of Court Services Online. For the purposes of this provision, a "document package" is any document or, if a group of documents is transmitted at one time in relation to the same court file, that group of documents.

Despite anything in this Schedule, if, after consultation with the Chief Judge, the Crown enters into an agreement with a person under which the person is authorized to access one or both of registry records and specified registry services and is exempted from payment of any or all of the fees provided under Items 6, 6.1, 6.2 and 7 for such access, the person may, on payment of any fee required under the agreement and on compliance with any other terms and conditions imposed by the agreement, access, during the term of the agreement, the registry records and registry services to which the agreement applies without payment of the fees from which the person is exempted under the agreement.

Contents | Rules 1 to 5 | Rules 6 to 10.1 | Rules 11 to 15 | Rules 16 to 22 | Schedule A | Schedule B | Schedules C, D and E

Resources for Provincial (Small Claims) Court

* Prepared by Alison Ward, Barrister and Solicitor, CLAS, November 18, 2011

1. The ***Small Claims Rules*** are found at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/261_93_00b The Small Claims Rules are the legal rules that set out how applications and various steps must be taken in Small Claims court: how to serve documents, how much notice you must give a defendant of an Application to a Judge, how to apply for a payment hearing, etc.

2. The ***Small Claims Act*** is at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96430_01 The Act does not contain much detail. However, section 3 outlines what jurisdiction the Small Claims court has; sections 5 to 15 outline the procedure for appealing a Small Claims court decision.

3. All of the **court forms that are used in Small Claims Court** can be found at http://www.ag.gov.bc.ca/courts/small_claims/info/forms.htm You will need to read the Small Claims rules, or perhaps a Law Centre guide, to figure out which form you need to use for a specific step in a case.

4. The schedule of **court filing fees payable in Small Claims Court** is located in Schedule A to the Small Claims Rules. Schedule A is at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/261_93_05b

   A person who cannot afford to pay court filing fees in Small Claims court can make an application to have filing fees waived, can make an application under Rule 20(1) of the Small Claims rules to be exempted from paying fees. That application is made by filing a application to the Registrar under Rule 16(3) of the Small Claims court

5. The **Law Centre** in Victoria has a set of 20 **extremely useful fact sheets about the Small Claims court process**, including guides to specific applications such as how to apply to set aside a garnishing order, how to apply to cancel a default order, how to apply for a payment hearing or a garnishing order, etc. The fact sheets also include links to the court forms you need to complete for specific applications, and examples of completed court forms.

   The Law Centre fact sheets are at http://www.thelawcentre.ca/self_help/small_claims_factsheets A table of contents listing all the fact sheets on the Law Centre site is attached.

6. The **Ministry of Attorney General**, Court Services Branch, has a very useful **website about Small Claims Court** at http://www.ag.gov.bc.ca/courts/small_claims/info/guides.htm The site includes links to the Small Claims Rules, Small Claims fees, and Small Claims forms. It

also includes 8 guides to the Small Claims court process including, for example, guides to making a claim, replying to a claim, serving documents, etc. The site also has a "small claims filing assistant," which provides some instructions for completing small claims court forms.

7. The UBC Law Students' Legal Advice Program ("**LSLAP") manual** has:

   - A chapter on Creditors' Remedies and Debtors' Assistance (see chapter 10 at http://www.lslap.bc.ca/main/?Manual_download). Pages 9 to 22 about unsecured creditors' options are relevant to enforcing monetary orders in Small Claims Court.

   - a chapter on Small Claims Court Procedure (see chapter 22 at http://www.lslap.bc.ca/main/?Manual_download) The section on enforcement of orders is quite short, from pages 44 to 46 of that chapter.

8. The **Court Order Enforcement Act**, which contains rules regarding garnishing orders and other applications, is at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96078_01

9. **Consumer Law and Credit/Debt Law** (LSS publication) is at http://www.lss.bc.ca/publications/pub.aspx?p_id=17 This is a free publication of over 200 pages dealing with discrete topics related to debt and consumer law. It has several chapters that may help with enforcing judgments in Small Claims Court. See: Chapter 19, Enforcing judgments against Chattels; Chapter 20, Enforcing judgments against land; Chapter 24, Garnishment and Set-off; Chapter 27, Instalment Payment Orders.

10. **Provincial Court Small Claims Handbook** is a legal manual published by Continuing Legal Education BC. It should be available at your Courthouse Library. A copy of the handbook's Chapter 8, "Enforcing the judgment" is included with the course materials.

11. The Justice Education Society has a **public legal education website about Small Claims Court** at http://www.smallclaimsbc.ca/ It includes videos that explain how Small Claims Court works, and what to expect in court. The site has basic information about enforcing court orders at http://www.smallclaimsbc.ca/court-decisions

4. Employment

Legal Services Society
British Columbia
www.legalaid.bc.ca

THE LAW FOUNDATION OF BRITISH COLUMBIA

Community Legal Assistance Society

TO: **Advocates for Unemployed Workers**

FROM: **Jim Sayre**

Re: **Online Research Resources**

Updated: **November 18, 2011**

This is a brief description of the online resources that are available for claimants and advocates to research an EI issue and prepare to present an appeal effectively.

Researching the Law

The jurisprudence on EI (and before 1996, UI) includes more than 70,000 decisions of the Umpires, dating back to 1949, along with another thousand or so decisions of the Federal Court of Appeal and the Supreme Court of Canada. Most of them can be found (and searched for key words) on the Commission's jurisprudence web site, at:

www.ei-ae.gc.ca/en/library/search.shtml

The web site also has an unusually complete collection of other EI material online, including the Commission's policy manual, fact sheets for claimants explaining all aspects of the system, numerous studies and reports, and even a comprehensive year-by-year history describing changes to the UI system from its origins in the 1940's. The home page for EI is:

www.servicecanada.gc.ca/eng/sc/ei/index.shtml

An excellent starting point for understanding the jurisprudence on a particular issue is a special section of the web site designed to help claimants understand the system and prepare for appeals. This site is under active development, with the involvement of a number of independent advocates for unemployed workers. It can be found at:

www.ei-ae.gc.ca/en/home.shtml

Suite 300 - 1140 West Pender Street
Vancouver, British Columbia V6E 4G1

Tel: (604) 685-3425
Fax: (604) 685-7611
Email: jsayre@clasbc.net

This page has links to the legislation, the jurisprudence library, and to the Board of Referees and Umpires sections of the site, which describe the appeal process clearly and comprehensively. The Referees' site has a "Quick Reference Tool", "View From the Courts", and "Judicial Interpretations" section. These lead to useful summaries of the law on key issues, and to summaries of leading decisions by the Federal Court.

Thomson/Carswell's Annotated Employment Insurance Act and Regulations, which is updated every year, is an excellent tool for detailed legal research. It contains the EI Act and Regulations, with extensive annotations after each provision describing the history of the section, and the decisions interpreting and applying it. The commentaries list many Umpires' decisions which can be saved or printed from the Jurisprudence Library.

Under the leadership of the Unemployed Workers Centre in Saskatchewan, the Canadian Labour Congress has distributed a collection of helpful excerpts from key Umpire decisions on the major areas of controversy for the labour appointees to the Boards of Referees. Under an agreement between the Canadian Labour Congress, the HRSDC, and advocates from Movement Action Chômage in Quebec and CLAS in BC, this collection is now publicly available as an online database of jurisprudence favourable to claimants. See:

www.ei-ae.gc.ca/en/board/favourable_jurisprudence/favourable_decisions_introduction.shtml

In addition to all of these resources, Mouvement Action-Chômage de Montréal inc., which is the unemployment action movement (MAC) of Montreal, has now translated its outstanding *Practical Guide to the EI Act* into English. The *Guide* contains many useful tips and examples, along with historical information about the rise and fall of Canada's EI system. It can be consulted online or downloaded in pdf format:

www.macmtl.qc.ca/Conseils_pratiques/en.htm

Sample Pages from the Website

Key pages are attached from some of the main sections of EI's web site, using the issue of alcohol based misconduct as an illustration of how each research tool deals with an issue. It's worthwhile to explore each part of the website. For example, the "Tribunal Proceedings" link on the Board of Referees page (Part 7 of the package) has summaries of the principles of evidence and statutory interpretation that can be persuasive in an appeal, since the material has been developed by the Commission itself for the Referees' training and reference.

Note: The attached sample pages have been checked as of November, 2011, but the website is constantly under revision, and some of the material may be in a different location or may not be available at all. New material may also have been added to the site.

Part 1 is the home page. Nearly all of the links can be useful to an EI advocate. For example, under "Types of Benefits" you'll find clearly written explanations about how each type of special benefit is administered. Under the "Employment Insurance and where you live" link you'll find the official unemployment rate for each region, which determines the number of hours required to qualify for a regular EI claim.

Part 2 is the extended search page for the jurisprudence library, which contains all UI and EI decisions since the appeal system began in 1940. Part 3 is the first page of a search for "misconduct" and "alcohol".

Part 4 is the home page of the independently designed appellants' section of the site. It was structured to provide links to all the main research tools, and is a good starting place for most research projects. Parts 5 and 6 are helpful guides explaining how to appeal to the referees and the umpires respectively.

Part 7 is the home page of the section intended to help the members of the independent Boards of Referees understand their role and conduct research into the issues they will have to decide. Many of the links on this page may be helpful.

Parts 8 and 9 illustrate the Quick Reference Tool for Referees. Note that the Tool, and the website generally, is nicely cross-referenced. Sections numbers and names of leading cases are links to the full text of the case as it appears in the jurisprudence library. Each court case in the library contains a link to the underlying Umpire's decision, which is important since the Court's decisions are sometimes very short.

Parts 10 and 11 illustrate the "View from the Courts" tool. It's organized more systematically than the Referees' Quick Reference Tool, and is a good place to find leading cases on an issue.

Yet another set of summaries appears at the judicial interpretations link on Office of the Umpire's site (Part 12), as illustrated by Parts 13 - 15.

The Commission has created a policy manual for its own staff, which is also accessible online - see Parts 16 - 18. The policies are not binding on the appeal tribunals, and since they frankly represent the Commission's viewpoint, advocates shouldn't be afraid to challenge them if necessary. But if you can find a policy that supports the claimant's position, it can be very persuasive to the Referees.

Parts 19 - 22 consist of excerpts from the Index to Jurisprudence. The summarized decisions in the Index were selected by the Commission because they support its interpretation of the law (see the third paragraph on Part 19).

Parts 23 - 25 illustrate one of the most valuable tools of all: the collection of decisions favourable to workers, selected by independent advocates to help claimants win their appeals. This collection is frequently used by the referees when they prepare for a hearing, and should always be consulted if the cases cited by the Commission make the prospects seem dismal.

Service Canada

Canada

Service Canada

Employment Insurance

Employment Insurance (EI) provides temporary financial assistance to unemployed Canadians who have lost their job through no fault of their own, while they look for work or upgrade their skills.

Canadians who are sick, pregnant, or caring for a newborn or adopted child, as well as those who must care for a family member who is seriously ill with a significant risk of death, may also be assisted by Employment Insurance.

Types of Employment Insurance benefits

There are several types of benefits available to Canadians, depending on their situation.

Employment Insurance Regular Benefits are available to individuals who lose their jobs through no fault of their own (for example, due to shortage of work, seasonal layoffs, or mass layoffs) and who are available for and able to work, but can't find a job.

Employment Insurance Maternity and Parental Benefits provide support to individuals who are pregnant, have recently given birth, are adopting a child, or are caring for a newborn.

Employment Insurance Sickness Benefits are for individuals who are unable to work because of sickness, injury, or quarantine.

Employment Insurance Compassionate Care Benefits are available to people who have to be away from work temporarily to provide care or support to a family member who is gravely ill with a significant risk of death.

Employment Insurance Fishing Benefits provide support to qualifying, self-employed fishers who are actively seeking work.

Employment Insurance Initiatives

- Employment Insurance Benefits for Self-Employed People

Did you know?

With direct deposit, your Employment Insurance payments are deposited automatically into your bank account. To sign up, login to My Service Canada Account and select "View/Change my Direct Deposit". For more information on Employment Insurance, see What's new.

Applying for EI

General information when Applying for Employment Insurance Benefits

Apply in person at your local Service Canada Centre.

Employment Insurance Frequently Asked Questions.

Online services

Start your Employment Insurance Application

Use My Service Canada Account to access your EI information, including electronic Records of Employment and T4E tax slips, and to apply for direct deposit and have your EI payments deposited directly to your bank account.

Submit your EI reports online that demonstrate your continuing entitlement using the Internet Reporting Service.

- Registered and qualified self-employed Canadians can access Employment Insurance (EI) special benefits: maternity, parental, sickness, and compassionate care.

Records of Employment on the Web for employers.

- Extension of EI Regular Benefits for Long-Tenured Workers
  - EI eligible long-tenured workers may be eligible to additional benefits if they have contributed to the Employment Insurance (EI) program for a significant period of time and have previously made limited use of EI regular benefits.
- Extension of Eligibility Period for Employment Insurance Parental Benefits for Military Families
  - If your parental leave has been deferred or interrupted because of an imperative military requirement, the parental eligibility period during which Employment Insurance (EI) parental benefit can be paid may be extended by one week for every week that you are unable to collect EI parental benefits

General Employment Insurance Information

- Employment Insurance A-Z
- Employment Insurance Forms
- Employment Insurance Frequently Asked Questions
- Employment Insurance Publications
- Hours Required to Qualify for Benefits
- While on Employment Insurance

Related information

- Employment Insurance and Workers and/or Residents Outside Canada

  Certain individuals who reside outside Canada may be eligible for EI if their job is insured under Canada's EI program.

- Employment Insurance Family Supplement

  The EI Family Supplement provides additional benefits to low-income families with children.

- Employment Insurance Information for Employers

  Find information about Records of Employment, programs to assist employers, help for employers to protect the EI fund, and more.

- Contact Employment Insurance

  Find answers to frequently asked questions, and how to contact Employment Insurance representatives by telephone, by mail, or in person.

- Appealing an Employment Insurance Decision

  You can appeal a decision concerning your EI claim for benefits. Find information on how to file and prepare for an appeal.

- Employment Insurance Act and Regulations

  Read the *Employment Insurance* Act and Regulations, as well as past amendments.

- Employment Insurance Digest of Benefit Entitlement Principles

  - The Digest of Entitlement Principles contains the principles applied by Human Resources and Skills Development Canada when making decisions on claims for benefits under the EI legislation. See also:
  - Digest Publications and Amendments
  - Index of Jurisprudence
  - Jurisprudence Library

Related programs and services

- Canada Benefits
- Employment Benefits and Support Measures
- Finding a Job
- Job Bank
- Job Creation Partnerships
- Job Futures
- Self-Employment Program
- Social Insurance Number
- Training and Careers

Date Modified: 2011-11-18

Part 2

Service Canada Canada

Home > Jurisprudence Library

Extended Search

Disclaimer

Want to know more about the Jurisprudence Library and how it works?

Note:
A basic search capability limited to the independently selected significant decisions within the collection is also provided.

Search Domains

- ☐ CUB [1]
- ☐ Federal Court [2]
- ☐ Supreme Court [2]
- ☐ Significant Decisions
  - non-departmental selections (independent)
- The Index of Jurisprudence
  (HRSDC Selections)

[1] decisions from 1940 to present
[2] employment insurance related decisions

Search Criteria **Help**

Search terms:
misconduct AND alcohol

Search Options

- Maximum # of items to retrieve:
  25
  50
  100
  250
  500
  Unlimited

Part 2

- Results per page:
  5
  10
  15
  20
  30
  50

- Sort results by:
  Score
  Title

- Search for word variations in:
  Both Official Languages
  English
  French

Search

Date Modified: 2010-10-20

Part 3

Service Canada Canada

Home > Search the Library > Search Results

Jurisprudence Library

700 Results for Query = ((misconduct and alcohol) <AND> (j-SORT))

Showing first 700 page: 1 2 3 4 5 6 7 8 9 10 >>>

80% A-1342-92 *[highlight]*

77.42001% A-875-96 *[highlight]*

79.67% A-582-98 *[highlight]*

79.67% 2001 FCA 375, A-570-00 *[highlight]*

77.42001% 2005 FCA 339, A-538-04 *[highlight]*

80% 2003 FCA 485, A-444-02 *[highlight]*

77.42001% 2008 FCA 159, A-337-07 *[highlight]*

80% 2006 FCA 199, A-315-05 *[highlight]*

80% 2004 FCA 219, A-255-03 *[highlight]*

77.42001% 2007 FCA 107, A-239-06 *[highlight]*

80% 2009 FCA 333, A-213-09 *[highlight]*

77.42001% 2002 FCA 185, A-135-01 *[highlight]*

Part 3

80% 2007 FCA 36, A-85-06 *[highlight]*

79.67% 2009 FCA 91, A-62-08 *[highlight]*

79.67% A-45-96 *[highlight]*

77.42001% 2005 FCA 17, A-30-04 *[highlight]*

60% CUB 75317 *[highlight]*

IN THE MATTER of an appeal to an Umpire by the Commission from the decision of a Board of Referees given on June 17, 2009 at Jonquière, Quebec. DECISION L.-P. LANDRY, Umpire The Commission appeals from the determination of a Board of Referees, ...

60% CUB 75217 *[highlight]*

IN THE MATTER of an appeal to an Umpire by the Commission from the decision of a Board of Referees given on March 17, 2010, at Rimouski, Quebec. DECISION LOUIS de BLOIS, Umpire This is an appeal from the decision of the Board of Referees given on ...

60% CUB 75152 *[highlight]*

IN THE MATTER of an appeal to an Umpire by the claimant from the decision of a Board of Referees given on April 13, 2010 at Brossard, Quebec. DECISION LOUIS S. TANNENBAUM, Umpire The issue in this docket is whether the claimant lost his employment ...

60% CUB 75143 *[highlight]*

IN THE MATTER of an appeal to an Umpire by the Commission from the decision of a Board of Referees given on April 12, 2010 at Rivière-du-Loup, Quebec. DECISION LOUIS de BLOIS, Umpire This is an appeal from the decision of a Board of Referees ...

60% CUB 75013 *[highlight]*

IN THE MATTER of an appeal to an Umpire by the claimant from the decision of a Board of Referees given on July 7, 2008 at Edmundston, New Brunswick. DECISION GUY GOULARD, Umpire The claimant worked for Emera Utility Services Inc. until ...

60% CUB 74953 *[highlight]*

IN THE MATTER of a an appeal an Umpire by the Commission from the decision of a Board of Referees given on January 13, 2010, at Bathurst, New Brunswick. DECISION GUY GOULARD, Umpire The claimant worked for O'Connell-Neilson-EBC until ...

60% CUB 74733 *[highlight]*

Part 4

Service Canada Canada

Home

Welcome!

This site is intended to help anyone who wants information on appeals under the *Employment Insurance Act*.

The Web site was designed to give you **explanations** about the appeal process, allow you to go to other Web sites for **more details**, or to **search** for information you may need or may want to use in **preparing your appeal**.

Don't hesitate to **explore** these links. You will always be able to **come back** to your starting point.

We wish to thank the community Employment Insurance (E.I.) advocates, claimant help groups and external consultants who have greatly helped in the development of this site.

We hope you find this site useful. We are always looking to improve the information available to you. If you have suggestions on how to improve this Website, let us know.

IMPORTANT

Service Canada delivers programs and services, including Employment Insurance (EI), for Human Resources and Social Development Canada, also known as Human Resources and Skills Development Canada (HRSDC).

The Canada Employment Insurance Commission (EI Commission) exercises the powers, duties and functions given to it in the *Employment Insurance Act* and its Regulations, as authorized by section 24 of the *Department of Human Resources and Skills Development Act*. The EI Commission delegates its authority for determining entitlement to, and payment of EI benefits, to EI Commission agents who work in Service Canada Centres.

If you decide to **file an appeal**, please ensure that your Service Canada Centre has your **correct address**, especially if you move during the appeal process. Your Service Canada Centre needs to have your current address on record to be able to send you information both during and after the appeal is processed.

Appeals to the Board of Referees

- What is an appeal?
- What is the Board of Referees?
- Do I need a lawyer?
- How do I file an appeal ?
- Reasons for appealing
- What happens next?
- What is an appeal docket?
- Notice of hearing
- Why is my attendance at the hearing important?
- What happens at the hearing?
- What does the Board of Referees expect from me?
- How can I prepare for the hearing?
- What happens after the hearing?
- Your board of Referees appeal at a glance.

Part 4

Appeals to the Umpire

- Who is the Umpire?
- How do I file an appeal to the Umpire?
- What happens next?
- Why is my attendance at the hearing important?
- What does the Umpire expect from me ?
- How can I prepare?
- What happens after the hearing?
- Appealing beyond the Umpire.
- Your Umpire appeal at a glance.

Date Modified: 2010-05-12

Part 5

Service Canada

Canada

Home

Appeals To The Board Of Referees

What is an appeal?

Claimants may appeal decisions made by the EI Commission, for reasons such as:

- EI benefits have been refused
- Benefits received are to be repaid
- A warning letter has been given or a penalty has been assessed

Employers may appeal decisions made by the EI Commission, for reasons such as:

- Benefits are being paid to an employee who quit or was fired for misconduct
- EI is being paid to employees who refused work or are in a labour dispute
- A warning letter has been given or a penalty has been assessed

If, as a claimant or an employer, you disagree with this EI Commission decision, you have the right to appeal. There is no cost to file an appeal, ***but there is a 30-day time limit for filing the appeal***.

In the first level of the appeal process, the Board of Referees examines the EI Commission decision and makes an independent decision on your case.

This Web site will tell you how and where to file your appeal to the Board of Referees. It will explain what to expect after the appeal is filed and what to do with the appeal docket sent to you. It will also give you the Web sites that have been developed to help you understand the EI Commission decision and prepare for your appeal.

In certain circumstances, there is a second level of appeal, which is an appeal to the Umpire.

What is the Board of Referees?

The Board of Referees is an independent and impartial administrative body comprising three members of the community. The members of the Board of Referees are not government employees. They are knowledgeable about Employment Insurance legislation and are trained to examine your case in a fair manner.

The Board examines your case at a hearing. It examines all evidence that is provided, whether this evidence is in the appeal docket or given at the hearing.

The Board will base its decision on the *Employment Insurance Act* and *Regulations* and its finding of fact in the case before it.

To do this, the Board may rely on previous appealed cases to guide it in its decision.

For more information, consult the Board of Referees website.

Do I need a lawyer?

Part 5

Not necessarily. The most important thing is that you attend the hearing, either in person or by telephone. You can have someone (i.e. a friend, union representative, community legal representative or lawyer) assist and attend with you. It is up to you to decide.

If you decide to hire a representative or a lawyer, you will have to pay any costs yourself.

There are many community groups and claimant help groups that can help you prepare for your appeal. Contact your Service Canada Centre for information on these groups. Service Canada employees can also help and direct you to Web sites useful for your hearing. If you wish, you can refer directly to the working document that EI Commission agents use.

How do I file an appeal?

You must tell your Service Canada Centre **in writing** that you want to appeal. You have **30 days** after you receive the EI Commission decision to do this. If there is more than one decision on your claim, please be sure you identify the specific decision or decisions you want to appeal.

A standard appeal form has been prepared (called the Notice of Appeal to the Board of Referees) that you can use to file your appeal. The appeal forms cannot be filled online. **You must PRINT IT** before it can be filled in. Make sure it is complete, signed and dated, and then send it to your Service Canada Centre.

If you decide not to use the form, Service Canada will need the following information to go ahead with the appeal. If you do not file in time (within the 30-day period), you must provide special reasons for the delay.

Your notice of appeal should contain:

- your name; and or Employer's name
- your Social Insurance Number (SIN); OR Canada Revenue Agency Employer Business Number
- your current address and telephone number;
- the reasons why you are filing an appeal;
- whether you want to attend the hearing;
- whether you want your appeal to be heard in English or French;
- whether you will have someone representing you at the appeal (if so, include their name and address); and
- the date of your appeal and your signature.

Reasons for appealing

Do your best to tell us why you are appealing the decision.

If you do not have specific reasons for appealing, or you are not sure what the reasons should be, you can still appeal. It is important not to delay, as there is a 30-day time limit. Be sure to identify all the decisions you want to appeal.

This way, you will have time to prepare your position or consult someone on the options that are open to you. If you understand your case better, you can better prepare for your appeal.

What happens next?

Once Service Canada receives your appeal, it will send you a letter saying that it was received (*Acknowledgement of Receipt*). It will also tell you which sections of the *Employment Insurance Act* or *Regulations* are involved.

Part 5

Along with the *Acknowledgement of Receipt* that you receive, use the *Notice of Decision* to familiarize yourself with the EI Commission decision that has been made. Look at the following sites:

- A research tool that sets out the views of the Federal Court on EI cases;
- Previous appealed case decisions made by judges
- The complete text of the EI Act and Regulations
- Guidelines used by Service Canada staff to make decisions

These sites will help you understand the decision made and will also help you to prepare for your appeal.

If you are not sure of the decision(s) made, check with your Service Canada Centre or call the Employment Insurance information toll-free number.

Someone from the Service Canada Centre may call you. Please give this person as much information as you can. Based on the facts you present, the EI Commission agent may decide to allow your claim, and an appeal might not be necessary. If the appeal proceeds, the EI Commission agent will then prepare the appeal docket for the Board of Referees.

What is an appeal docket?

The appeal docket contains all the documents that were used to make the decision in your case, such as copies of the claim for benefits and all the evidence that was gathered by the EI Commission.

It also contains the EI Commission's written reasons for the decision on your claim. As well, it explains the previous cases or court decisions it referred to when making this decision.

You should be aware, however, that there may be other court decisions that are relevant and might be favorable to your case.

Approximately 10 days before your hearing date, the appeal docket will be mailed to you and your representative (if you have one) along with an official notice of hearing. In certain circumstances, the appeal docket will be sent to both the claimant and the employer. For example, both may receive the appeal docket when benefits are being paid to an employee who quit for work related reasons or was fired for misconduct, etc. The appeal docket is also given to the Board of Referees before the hearing so that members can review it. The appeal docket you receive is the same as the Board's. Bring this docket with you to the hearing. Do not worry if you do not understand everything in your docket since the Board will go over the contents during your hearing.

IMPORTANT NOTE

If you would like to have someone submit your appeal and/or represent you during the appeal hearing you must provide Service Canada with the name of your representative and indicate in writing that this person is authorized to represent you and in what capacity (for example, during the hearing only, etc.). Service Canada will not release any information to your representative regarding your appeal without your written consent in order to respect your privacy and to comply with the provisions of the *Privacy Act*.

Notice of hearing

The notice of hearing will tell you and your representative (if you have one), when and where the Board will hear your case (in person or by telephone). Service Canada tries to have cases heard within 30 days after you have written that you want an appeal. As soon as your appeal is scheduled, the notice of hearing is sent to you, along with a copy of the appeal docket. Usually, these documents are sent 10 days before the hearing. You will therefore have time to prepare for the hearing. Again, make sure that your Service Canada Centre has your current address on hand.

Part 5

What happens at the hearing and why should I be there?

For everyone's convenience, Board sessions are usually held in government buildings.

Although your attendance at the hearing - in person or by telephone - is voluntary, it is in your best interest to participate in person because you can explain your situation or circumstances to the Board. Also, the Board will likely have questions for you to make sure it has all the facts to reach a decision.

Make sure you are on time because the Board may begin without you.

You will be introduced to the Chairperson and the other two members of the Board. There will be some introductory comments on the nature of the appeal process and the Board's role.

The hearing is held in a casual manner, and the Board will make every possible effort to make you feel at ease. The length of the hearing depends on many factors. The number of documents in the appeal docket, the questions the Board members may have or any other circumstance of the case all have an impact on the length of the hearing. Usually however, appeals are heard within an hour.

You can ask to have the hearing recorded. This provides an audio record of the proceedings. You can ask for a copy of the recording.

You will be asked to present your case. Remember that the Board members have already read the docket but likely will have questions for you so that they can better understand your case. Try to relax as much as possible. You are not expected to give a formal legal presentation. This is not a courtroom. Please remember this is simply your opportunity to explain your case.

In certain cases, your employer is notified of the EI Commission decision (for example, when EI benefits are paid to an employee who quit his/her job, was fired for misconduct, refused work or is involved in a labour dispute). As an interested party, the employer or a representative has the right to attend the hearing if they so choose. In this instance, they will be allowed to present their case and respond to any evidence given.

If your appeal involves harassment and you are uncomfortable providing information regarding the circumstances in front of the other party, the Board Chairperson can proceed to hear the parties separately.

Generally, the EI Commission does not attend the hearing, as it usually relies on the presentation of its written reasons. However, the EI Commission has the right to appear and may decide to be present.

If you cannot attend the hearing in person, a telephone hearing can be arranged for you. If you cannot attend either in person or by telephone on the date set, contact the Board of Referees' assistant immediately. The phone number appears on the notice of hearing you were sent.

If you cannot attend a hearing either in person or via the telephone, you can request the hearing be rescheduled or you can present your arguments in writing. Make sure your arguments are forwarded to the Board of Referees before the hearing; otherwise, the Board members will make their decision based on what is contained in the appeal docket.

What does the Board of Referees expect from me?

The Board expects you to be on time and to come prepared to discuss your case.

Be sure you bring your appeal docket and review it carefully so that you can discuss with the Board any facts or comments you disagree with.

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If you have documents other than your appeal docket that you want to present, try to send them to the Board's assistant before the hearing so that they can be reviewed. If you are unable to send them beforehand, the Board will expect you to have them with you. Also, if you want to present any witnesses, they should attend the hearing with you. If your witness cannot attend, his/her signed statement of events may be accepted by the Board. Again, you should try to inform the Board's assistant that you are bringing witnesses.

If you do not speak either English or French, you should bring somebody with you who can interpret. If there is a fee involved, you will be responsible for the payment.

If you have a hearing or a visual impairment, Service Canada will pay for either a sign language interpreter or for your docket to be sent to you in Braille. Let Service Canada know if these arrangements need to be made.

How can I prepare for the hearing?

- Read the appeal docket sent to you and make sure you are familiar with it. It is your copy and you can write on it.
- Make a checklist of the points you want to raise with the Board, including any errors you have found concerning information in the docket.
- In addition to your appeal docket, bring any new information, documents and evidence (for example, a medical certificate, payroll records, letters from co-workers, etc.) that you want the Board to consider, or send it to the Board's assistant before the hearing date.
- If you plan to bring someone with you, make arrangements with them and try to let the Board's assistant know in advance that they will attend the hearing.
- As mentioned previously, you can also research court decisions that may be relevant to your appeal. To do this, look at the particular section of the *EI Act* and *Regulations* (as described in the *Acknowledgement of Receipt of Appeal*) and then research the previous cases that apply to that subject.

  For example, if section 29 is mentioned (which has to do with voluntarily leaving your job), three tools are available to you: *A View from the Courts*, the *Jurisprudence Library* and the *Employment Insurance Appeal Decisions Favourable to Workers*. If you choose *A View from the Courts*, select "Voluntary Leaving" from the Table of Contents. You could also consult previously appealed case decisions by entering the key phrase "Voluntary Leaving" in the search field of the *Jurisprudence Library* or by selecting "voluntarily leaving employment" from the dropdown menu. The new tool *Employment Insurance Appeal Decisions Favourable to Workers* is a collection of independently selected jurisprudence that is favourable to workers.

  Remember that the cases in your appeal docket are those that the EI Commission used to support its decision. You should be aware that there may be other cases favourable to you.

- You may be able to get help to prepare your appeal from community and claimant help groups who are familiar with the E.I. Act. Your Service Canada Centre may have a list of these groups.

What happens after the hearing?

The Board will not give you a verbal decision on the day of your hearing. You will receive a written decision between 7 and 10 days after the hearing.

If the Board's decision **is not** in your favour, you have the right to file an appeal with the Umpire. Again, there is no charge to file this appeal. Make sure you understand the conditions required to appeal to the Umpire, as this is a very different situation than an appeal to the Board of Referees.

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If the Board's decision is in your favour, the EI Commission or your employer (if involved) may appeal the Board's decision to the Umpire, which is the next level of appeal.

If no appeal is filed by any party, then the Board's decision is final.

More information is available on Appeals to the Umpire.

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Part 6

Service Canada Canada

Home

APPEALS TO THE UMPIRE

Umpire appeal hearings are open to the public. Umpire decisions create case law (jurisprudence) and are a matter of public record. All these decisions are available on the internet for reference by Boards of Referees and to assist appellants and their representatives with their appeals.

Who is the Umpire?

Umpires are generally judges of the Federal Court of Canada. In certain cases, judges or former judges of a superior, county, or district court may sit as Umpires.

The role of the Umpire is to review the Board's decision to make sure that:

- **The Board of Referees gave you an impartial hearing or a reasonable opportunity to present your case or operated within the limits of its jurisdiction;** This generally means that the Board let you present your case and heard you.
- **The Board operated within the limits of its jurisdiction** means that the Board had the authority to decide your case.
- **The Board did not err in law in making its decision** means that the decision of the Board of Referees is in accordance with the EI Act and Regulations.
- **The Board did not base its decision on a misinterpretation of the facts** means that the Board looked at, understood and took into consideration all the evidence submitted.

The Umpire can either change the decision of the Board of Referees or return the appeal to the Board of Referees for a new hearing.

You cannot present new facts before the Umpire unless you prove that these facts could not be discovered before the appeal to the Board of Referees.

How do I file an appeal to the Umpire?

If the decision is not in your favour

If the Board's decision is not in your favour and you want to appeal to the Umpire, you must tell your Service Canada Centre in writing that you want to appeal the Board's decision.

- **You have 60 days after you receive the Board of Referees' decision to appeal to the Umpire**.

A standard appeal form has been prepared (called the Notice of Appeal to the Umpire) that you can use to file your appeal. The appeal forms cannot be filled online. **You must PRINT IT** before it can be filled in. Make sure it is complete, signed and dated, and then send it to your Service Canada Centre.

If the decision is in your favour

If the Board's decision is in your favour, the EI Commission or your employer (if involved) can file an appeal to the Umpire.

- the EI Commission or your employer has 60 days to appeal.

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If the Board's decision grants you benefits, and the EI Commission decides to file an appeal to the Umpire, you will not receive any payments until the matter is resolved. Service Canada will notify you if and when an appeal is filed.

What happens next?

An appeal to the Umpire by any party (you, the EI Commission or your employer) has to prove that:

- The Board of Referees did not give you an impartial hearing or a reasonable opportunity to present your case or did not operate within the limits of its jurisdiction.
- The Board erred in law in making its decision.
- The Board based its decision on a misinterpretation of the facts.

If an appeal is filed at the Umpire level, all interested parties will receive an appeal docket, usually within 60 days. This docket contains all the documents that were originally presented to the Board of Referees and the Board's decision. If the EI Commission appeals, you will receive written reasons explaining why it has decided to appeal to the Umpire. Also included will be any other court decisions that the EI Commission is using to appeal the Board's decision.

Unlike the Board of Referees, Umpire hearings are usually held in a courtroom. However, these hearings are kept as informal as possible. However, as the EI Commission considers this level of appeal to be a formal judicial process, it is always represented by a lawyer.

You may decide to have a representative assist you (i.e. a friend, union representative, community legal representative or lawyer). If you hire a representative, it will be at your own expense.

The Office of the Umpire will tell you when and where your appeal will be heard. These hearings are held in a location best suited both for the person or organization making the appeal and for the Umpire overseeing the hearing. It will not always be possible, however, to hold the hearing in your home town.

The Umpire can review only the evidence that was presented to the Board of Referees and the Board's decision. You cannot present any new evidence or testimony at this stage unless you can show that you were unable to do it for the Board at the time of your hearing.

On the day of the hearing, you should arrive at least 30 minutes before it is scheduled to begin. You will be told about what to expect during a hearing.

Please remember that because the Umpire hears many cases on the same day, you should be prepared to wait your turn to be heard.

Why is my attendance at the hearing important?

It is in your best interest to be there in person before the Umpire so that you may give your explanation to the Umpire as to why you think the Board of Referees made a mistake when it made its decision, if this decision was not favorable to you.

If the EI Commission or your employer is the appellant before the Umpire as a result of a decision favorable to you, then again, it is in your best interest to be there in person so that you may explain to the Umpire why you think that the Board of Referees did not make a mistake when it made its decision.

Being present will also allow you to answer any questions the Umpire might have about your situation.

If you or your representative cannot attend the hearing, you should immediately contact the Registrar of the Office of the Umpire to make other arrangements, or you can request that your

Part 6

case be decided "on the record." This means that a decision will be made by the judge without you having to attend the hearing. In that case, the EI Commission will also not appear in front of the judge.

Unlike Board of Referee hearings, Umpire hearings cannot be held over the telephone.

What does the Umpire expect from me?

The Umpire expects you to be on time and prepared to discuss your case.

If you are appealing a decision from a Board of Referees, the Umpire will expect you to explain why:

- The Board of Referees did not give you an impartial hearing or a reasonable opportunity to present your case, or did not operate within the limits of its jurisdiction.
- The Board erred in law in making its decision.
- The Board based its decision on a misinterpretation of the facts.

Be sure you have your appeal docket with you and have reviewed it carefully so that you can discuss the decision taken by the Board of Referees.

If you do not speak either English or French, you should bring somebody with you who can interpret. You will be responsible for any fees involved. If you have a hearing or a visual impairment, Service Canada will pay for either a sign language interpreter or for your docket to be sent to you in Braille. Let Service Canada know if these arrangements need to be made.

How can I prepare?

- Understand the powers and the limits of the Umpire's authority.
- Read the appeal docket sent to you and make sure you are familiar with it. It is your copy and you can make notes on it.
- Make a checklist of the facts or of previous appealed cases that you want to be sure to present to the Umpire.
- You can research court decisions that may be relevant to your appeal. We have prepared some information on previous appeal cases that will be helpful to you.
- You can also get help from community and claimant help groups which know all about the EI Act.
- Don't forget that, normally, any new evidence or testimony cannot be presented to the Umpire because the proper place to do this is in front of the Board of Referees. However, if you can show the Umpire that you were unable to present it to the Board of Referees at the time of your hearing, the Umpire may accept it.

What happens after the hearing?

You will receive a written decision containing the reasoning of the Umpire once a decision has been made in your case.

This decision will be translated into Canada's other official language and then be made available on this site as EI jurisprudence for reference by the Board of Referees and individuals who file an appeal to the Umpire.

An Umpire judgment is referred to as a "CUB", Canadian Umpire - Benefit, and is numbered. An Umpire decision (CUB) contains the name of the claimant, the name of the appellant, the dates and locations of the Board of Referees and Umpire hearings, the decision under appeal with the related facts and circumstances and the Umpire's judgment in the case.

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Appealing beyond the Umpire

Usually the decisions of the Umpire are final, but there are some situations which can be reviewed by the Federal Court of Appeal. There are certain fees that are involved in appeals at the Federal Court of Appeal level.

For more information on this appeal level, please consult the Federal Court of Appeal website.

Additional tools

There are additional sites you can consult if you wish to conduct further research. These are:
Charter of Rights and Freedoms
Canadian Human Rights Commission
Provincial Ministries of Justice and Attorney Generals offices
Tax Court of Canada

Information is available on the Board of Referees appeal process

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Part 7

Service Canada Canada

Home > Board of Referees

Board of Referees

This site provides Board members and the Public with reference materials and information pertaining to the Employment Insurance appeals system and the structure, role and responsibilities of the Employment Insurance Boards of Referees. To access this information, choose from the selections below and click on the appropriate text.

Board of Referees' Quick Reference Tool

This tool provides you with Employment Insurance legislation and jurisprudence references. Specifically, it provides you with the "questions to answer" for Employment Insurance issues, along with references, legal tests, onus of proof and key case law. Hyperlinks to source documents allow you to quickly research an issue.

Handbook for Employment Insurance Boards of Referees

The purpose of this handbook is to provide an overview of the Employment Insurance appeals system, and the structure, role and responsibilities of the Employment Insurance (EI) Boards of Referees as prescribed by the *Employment Insurance Act* and *Regulations* and existing jurisprudence.

Template of a Board of Referees Decision

This section contains a template for the Board of Referees decision.

Tribunal Proceedings

This work has been written to assist the initial and continuing training of chairpersons and members of boards of referees. The aim of the work is to situate employment insurance procedure within the general framework of Canadian administrative law.

View from the courts

« A View from the Courts » is an independently compiled library of the Federal Court and various other tribunals' interpretation or guiding principles of the Employment Insurance Act.

Judicial Interpretations

The purpose of this site is to provide users with the principles of law - those established by the Federal Court of Appeal and the Supreme Court of Canada regarding the issues that most frequently arise under the *Employment Insurance Act*.

Employment Insurance Appeal Decisions Favourable to Workers

This database is independently selected, summarized and produced by the Unemployed Workers Help Centre of Regina, the Community Legal Assistance Society of Vancouver and the Mouvement Action-Chômage de Montréal. The purpose of the database is to make available to Employment Insurance Boards of Referees and the interested public, a collection of Employment Insurance jurisprudence where the decision was favourable to workers, a collection of Employment Insurance jurisprudence where the decision was favourable to workers.

Boards of Referees' Policy

Financial and Administrative Services
Recording Policy

Service Pledge

Message from the Board of Referees.

Part 7

Employment Insurance – Acts and Regulations

This section contains the current legislation, the archived Acts and past amendments, as well as the archived Regulations and past amendments.

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Part 8

Service Canada Canada

Employment Insurance

The legislation and jurisprudence at a glance

- What are the questions to ask yourself when considering an Employment Insurance issue for which a decision is taken?
- What are the legal references for a given issue?
- What legal test applies?
- With whom does the onus of proof rest?
- What is the key case law pertaining to the issue in question?

You will find the answer to these questions by selecting the issue that interests you from the “drop down” menu below. For the latest updates to the jurisprudence, visit “What's New”?.

Quick Reference

- What's New
- Board of Referees Jurisdiction
- Antedate
- Availability for Work
- Claim Procedure
- Delayed Appeal to the Board of Referees
- Earnings
- Labour Disputes
- Misconduct
- Out of Canada
- Penalties and Violations
- Qualifying Conditions
- Rate of Weekly Benefits
- Reconsideration of Claim
- Refusal of Employment
- Special Benefits
- Special Benefits/Compassionate Care
- Special Benefits/Maternity
- Special Benefits/Parental
- Special Benefits/Sickness
- Teachers
- Undeclared Earnings
- Week of Unemployment
- Voluntary Leaving

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Part 9

Service Canada

Canada

Misconduct

Questions to Answer
1. Did claimant lose employment because of the alleged offence (action or omission)? 2. Did claimant commit the alleged offence? 3. Does the alleged offence constitute misconduct? 4. Should a disqualification?.. or disentitlement apply?
References
Act: sections: 29, 30, 31, 33, 34, subsection 49(2) and section 51
Legal test
The Act does not define "misconduct". The test for misconduct is whether the act complained of was wilful, or at least of such a careless or negligent nature that one could say that the employee wilfully disregarded the effects his or her actions would have on job performance. TUCKER A-381-85 *"... there will be misconduct where the conduct of a claimant was wilful, i.e. in the sense that the acts which led to the dismissal were conscious, deliberate or intentional. Put another way, there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility." MISHIBINIJIMA A-85-06. Also see: HASTINGS A-592-06, LEE A-64-06, CAUL A-441-05, WASYLKA A-255-03, LOCKE A-72-02, LANGLOIS A-94-95 and SECOURS A-352-94.*
Onus of proof

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1. **The employer and the Commission** must show that claimant lost his/her employment due to misconduct decision to be made on the balance of probabilities **LARIVEE A-473-06**, **FALARDEAU A-396-85**.
2. Conflicting evidence should be resolved by accepting the evidence which is reasonable reliable and credible having regard to the circumstances. **CUB 39640**.

Note: If the evidence on each side of the issue is equally balanced, the Commission shall give the benefit of doubt to the claimant subsection 49(2) **CUB 39868**

Key Case Law

TUCKER A-381-85: See Legal test

LARIVEE A-473-06, **GAGNON A-3-96**: Onus of proof

HASTINGS A-592-06: The fact that the claimant acted "on the spur of the moment" and that he immediately regretted his actions and apologized to his employer shortly thereafter is of no relevance to whether his conduct constitutes misconduct.
JOHNSON A-296-03, **MCKAY-EDEN A-402-96**: Considers the element of wilfulness. Refers to TUCKER

COULOMBE A-408-07 : The use of illicit drugs, despite an employer's zero tolerance policy, constitutes misconduct. **WASYLKA A-255-03**: Considers wilfulness of drug consumption.

CLARK A-315-06: Loss of driver's license, which was not an essential condition of the employment that had been performed at the time of dismissal.
PAGANO A-90-07, **THIBAULT A-573-04**, **DESSON A-78-04**, **COOPER A-126-03**, **CHURCHI A-666-02**, **GRANSTROM A-444-02:** Loss of driver's license.

NEVEU A-72-04, **LAVALLÉE A-720-01**, **CARTIER A-168-00:** Failure to pay traffic fines, **MEUNIER A-130-96**, **BRISSETTE A-1342-92**, **NOLET A-517-91**, **GAUDET A-990-96:** Dealing with criminal charges. Definitions of misconduct

LEFEBVRE A-33-03: Falsification of records to hide drug addiction.

LATOUR A-344-03: Total disability falsely claimed.

NGUYEN A-516-99: Harassment of co-worker.

GAULT A-927-96: Refusal to comply with employer's order. Reference to claimant's state of mind.

JOLIN A-200-09, **ROBERGE A-176-09**, **LEE A-64-06** : The role of the Board was not to determine whether the dismissal by the employer was justified or was the appropriate sanction. The Board had to decide whether disconnecting calls with customers before responding to their inquiries amounted to misconduct under section 30 of the Act. **AUCLAIR A-211-06**: It is not for the Board of Referees to consider whether dismissal was the appropriate disciplinary action in view of the alleged misconduct.**McNAMARA A-239-06**, **CAUL A-441-05**, **FLEMING A-274-05**, **LOCKE A-72-02**, **MARION A-135-01**, **LLOYD A-436-95**, **FAKHARI A-732-95**, **EDWARD and LANGLOIS A-94-95 & A-96-95**: Determination of misconduct vs the reasonableness of the employer's decision to dismiss the claimant.

JOSEPH A-636-85, **CHOINIERE A-471-95**, **CRICHLOW A-562-97**: Type of evidence needed to establish misconduct.

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TRAYNOR A-492-94: Indefinite period of disqualification

BERUBE A-82-00: Upholds CUB 47007, in which the Umpire determined the lack of insured hours since the dismissal to establish a new benefit period.

Misconduct vs Voluntary Leaving:

- **DESSON A-78-04, BORDEN A-338-03**: Loss of employment due to imprisonment.
- **EASSON A-1598-92, EPPEL A-3-95**: Considers the appropriateness of finding that either one of the two reasons applies.
- **McDONALD (Glenmoore) A-297-97**: Considers the necessity for the Board of Referees to address the proper issues before them
- **SULAIMAN A-737-93**: Misconduct vs voluntary leaving vs constructive dismissal

PARKS A-321-97, McDONALD A-297-97: Considers the necessity for the Board of Referees to state and explain its findings of fact

HALLÉE A-337-07 : The two previous medication errors ignored by the Board, constituted fundamental evidence that the claimant was dismissed by reason of her own misconduct.

CARON A-416-08 : Repeated absences can constitute misconduct.

LASSONDE A-213-09 , **BIGLER A-62-08** , **MISHIBINIJIMA A-85-06** (leave to appeal dismissed by the Supreme Court [31967]), **PEARSON A-315-05, RICHARD A-538-04, CASEY A-570-00, TURGEON A-582-98**: Alcoholism is not in itself proof there is no misconduct

ARMSTRONG A-81-02: Suspension for refusal to enter alcohol treatment program as previously agreed.

McNAMARA A-239-06, **SMITH (Robert) A-875-96**: Considers misconduct occurring prior to the employment

BUIST et al A-92-01: Participation in an illegal strike constitutes misconduct

GAGNON A-138-01: Failure to report co-worker's fraud.

MURRAY A-245-96: Frequent lateness

MORROW A-170-98, MORRIS A-291-98 Supreme Court [27354]: Determining "misconduct" when employer withdraws the original allegations under terms of a settlement agreement; or when a "no fault" settlement for both parties is reached.

COURCHENE A-294-06, BOULTON A-45-96: Does the settlement agreement nullify earlier evidence of misconduct?
MCDONALD A-152-96: Whether misconduct was the real cause of the claimant's dismissal

LANGLOIS A-94-95, EDWARD A-96-95, GUAY A-1036-96, GAUTHIER A-6-98: Considers the scope and seriousness of the actions/omissions.

AUCLAIR A-211-06: As the claimant acknowledged making abusive remarks concerning his employer, it was clear that his remarks were deliberate and voluntary. **FORGUES A-257-05**: Threats, offensive remarks and inappropriate behaviour at work violate the employer/employee relationship of trust and constitute misconduct.

Part 10

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Home

A View from the Courts

"***A View from the Courts***" is an independently compiled library of the Federal Court and various other tribunals' interpretation or guiding principles of the *Employment Insurance Act*. To use this research tool you do not need a legal background or knowledge of the *Employment Insurance Act*. A more complete version of the Court's and tribunals' guiding principles can be found in the Judicial Interpretations on the Office of the Umpire's Web Site.

SUBJECT INDEX	**Relevant Sections of the Act and Regulations** • EIA - *Employment Insurance Act* • EIR - *Employment Insurance Regulations* • UIA - *Unemployment Insurance Act* • UIR - *Unemployment Insurance Regulation*
Adoption Benefits (see Parental Benefits)	
Amendment of Decision	120 EIA
Antedate	10(4) EIA
Appeal to Board of Referees	24, 25, 114 EIA - 83 EIR - 24, 25, 26 UIA
Appeal to Umpire	115, 116, 117, 118 EIA
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Canadian Charter of Rights and Freedoms	
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Course of Instruction (see Availability)	
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Eligibility for Benefits	5, 7, 8, 11, 90, 103 EIA - 14, 17 EIR
False and Misleading Statements	7.1, 38, 39, 40, 41, 52, 135 EIA
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Interruption of Earnings	2(1), 13, 25, 26, 36 EIA - 52, 53 EIR
Labour Disputes	30, 31, 33, 34, 51 EIA
Misconduct New Facts (see Amendment of Decision)	
Other Late Claims	10(5) EIA - 26 EIR
Parental Benefits	6, 12, 13, 23 EIA
Qualifying Period)	2, 7, 8 EIA - 17 EIR
Reconsideration of Claim and Liability for Overpayment	43, 44, 47, 52, 114 EIA - 56 EIR - 35, 36, 43(1), 79 UIA - 60 UIR
Self-employed	11(1) EIA - 30 EIR
Teachers	54(j) EIA - 33 EIR
Voluntary Leaving	29, 30, 32, 51 EIA

Date Modified: 2010-02-09

Part 11

Service Canada Canada

Home

Misconduct

I. The *Legislation*

A claimant who is fired from his or her job because of misconduct is disqualified from receiving employment insurance benefits.

Sections 30, 31, 33, 34 and 51 *Employment Insurance Act*

II. What is Misconduct

Whether a claimant's actions are misconduct depends on the circumstances of each case. In order for there to be misconduct, it is sufficient that the act or omission complained of by the employer was conscious, deliberate or intentional on the claimant's part. Misconduct means that the claimant consciously disregarded the effects that the conduct would have on job performance.

Gauthier v. Canada (A.G.), A-6-98, **November 10, 1998 (F.C.A.)**
***Canada (A.G.) v. Bedell*, (1985) 60 N.R. 116 (F.C.A.)** A-1716-83
***Canada (A.G.) v. Brissette*, [1994] 1 F.C. 684 (F.C.A.)** A-1342-92
***Canada (A.G.) v. Tucker*, [1986] 2 F.C. 329 (F.C.A.)** A-381-85
Gault v. Canada, A-927-96, **February 4, 1998 (F.C.A.)**
***McKay-Eden v. Canada (A.G.)* (1997), 214 N.R. 156 (F.C.A.)** A-402-96
***Canada (A.G.) v. Secours* (1995), 179 N.R. 132 (F.C.A.)** A-352-94

III. Proving There Was Misconduct

It is up to either the Commission or the employer to prove that there was misconduct by showing that the claimant should not have acted as he or she did. It is not enought just to show that the employer considered the claimant's conduct to be misconduct. It doesn't matter if the employer's opinion is that the claimant was fired for misconduct. A finding of misconduct can only be made on the basis of clear evidence. The Board must assess the evidence and come to its own decision.

Gauthier v. Canada (A.G.), A-6-98, **November 10, 1998 (F.C.A.)**
Meunier v. C.E.I.C. A-130-96 **(1996), 208 N.R. 377 (F.C.A.)**
M.E.I. v. Bartone, A-369-88, **January 18, 1989 (F.C.A.)**
Joseph v. C.E.I.C., A-636-85, **March 11, 1986 (F.C.A.)**
***Davlut v. Canada (A.G.)* (1982), 46 N.R. 518 (F.C.A.)** A-241-82
Canada (A.G.) v. Morris, A-291-98, **April 15, 1999 (F.C.A.)**
Guay v. Canada, A-1036-96,***v. C.E.I.C.* (September 16, 1997) (F.C.A.)**
Canada (A.G.) v. Langlois, A-94-95, **February 21, 1996 (F.C.A.)**
***Fakhari v. Canada (A.G.)* (1996), 197 N.R. 300 (F.C.A.)** A-732-95
***Canada (A.G.) v. Boulton* (1996), 208 N.R. 63 (F.C.A.)** A-45-96
Choinière v. Canada (Employment and Immigration Commission), A-471-95, **May 28, 1996 (F.C.A.)**
***Canada (A.G.) v. Secours* (1995), 179 N.R. 132 (F.C.A.)** A-352-94
Canada (A.G.) v. Summers, A-225-94, **December 1, 1994 (F.C.A.)**
Crichlow v. Canada (A.G.), A-562-97, **September 21, 1998 (F.C.A.)**

IV. Related Topics

- Appeal to Board of Referees
- Appeal to Umpire

Part 12

Service Canada

Canada

Who We Are

The Office of the Umpire is an administrative tribunal that manages the national tribunal proceedings of the Employment Insurance Appeals Program according to Umpires' rules and procedures, the Employment Insurance (E.I.) Act and Regulations, and court practices and procedures. We provide advice and services to Federal Court of Canada Judges and Deputy Umpires, litigants, and lawyers with the aim of ensuring the public's right to justice.

One of our primary functions is to schedule and notify appellants and interested parties of their hearings. We also:

- ensure the completeness of the appeal documents;
- assist Umpires at the hearings;
- issue Umpires' decisions;
- and , handle all other related matters dealing with the court.

If you have any questions concerning your appeal, you can reach us at 1-888-632-3050 from 8:30 a.m. to 4:30 p.m. E.S.T., Monday to Friday. You can also leave a message on the voice message system outside of working hours. You may also send us a fax at (613) 995-5008.

Office of the Umpire
Employment Insurance Act
P.O. Box 8966
Ottawa, Ontario
K1G 3J2

Date Modified: 2009-08-06

Part 13

Service Canada Canada

Introduction to Judicial Interpretations

The purpose of this site is to provide users with the principles of law - those established by the Federal Court of Appeal and the Supreme Court of Canada regarding the issues that most frequently arise under the *Employment Insurance Act*.

This database is designed for easy use. The *subject index* is not exhaustive, but it does provide a list of the issues that are most often considered by the Board of Referees, Umpires and the Federal Court of Appeal. The relevant section of the legislation appears under each subject heading.

Please note that some cases may not be available when selected as they are not posted on the Court's Web site.

Once a topic is selected, the user can read

- the relevant sections of the legislation, by clicking on the highlighted sections;
- a summary of the principles of law established by the *Federal Court of Appeal* and the *Supreme Court of Canada*; and
- the entire text of those cases referred to in the summary, by clicking on the names of the cases that appear in the principles of law

Please note that some cases may not be available when selected as they are not posted on the Court's Web site.

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Part 14

Service Canada Canada

Subject Index

The subject index provides a listing of those issues which are most often considered by Board's of Referees, Umpires and the Federal Court of Appeal. It includes such topics as misconduct, voluntary leaving, availability, false and misleading statements, etc.. The relevant sections of the legislation appear under each heading.

- Adoption Benefits (see Parental Benefits)
- Amendment of Decision
- Antedate
- Appeal to Board of Referees
- Appeal to Umpire
- Availability
- Canadian Charter of Rights and Freedoms
- Claim Procedure and Entitlement Benefits
- Course of Instruction (see Availability)
- Earnings
- Eligibility for Benefits
- False and Misleading Statements
- Insurable Employment
- Interruption of Earnings
- Labour Disputes
- Misconduct
- New Facts (see Amendment of Decision)
- Other Late Claims
- Parental Benefits
- Qualifying Period
- Reconsideration of Claim and Liability for Overpayment
- Self-employed
- Teachers
- Voluntary Leaving

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Part 15

Service Canada Canada

Misconduct

In order to constitute misconduct, the conduct must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects his or her actions would have on job performance. It requires a mental element of wilfulness, or conduct so reckless as to approach wilfulness.

1. **The Legislation**

2. **Principles of Law**

   - (a) Purpose of the Legislation
   - (b) Meaning of the Term "Misconduct"
   - (c) Onus of Proof
   - (d) Minutes of Settlement
   - (e) Which Employment
   - (f) Misconduct vs. Voluntary Leaving

3. **Related Topics**

   - Appeal to Board of Referees
   - Appeal to Umpire
   - Voluntary leaving

Date Modified: 2009-08-05

Part 15

Service Canada Canada

Misconduct

II. Principles of Law

(b) Meaning of the Term "Misconduct"

Whether the conduct of an employee causing loss of his or her employment amounts to "misconduct" depends largely on the circumstances of each individual case. The interpretation of the word "misconduct" is a question of law. Whether a particular act or omission on the part of an employee is of such a nature as to fall within the term misconduct is a question of fact.

***Canada (A.G.) v. Bedell*, [1985] F.C.J. No. 515 (F.C.A.)** A-1716-83
***Gauthier v. Canada (A.G.),* November 10, 1998, F.C.J. No. 1704 (F.C.A.)** A-6-98
***Canada (A.G.) v. Lee,* 2007 FCA 406** A-64-06

In order to constitute misconduct, the conduct must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects his or her actions would have on job performance. It requires a mental element of wilfulness, or conduct so reckless as to approach wilfulness.

***Canada (A.G.) v. Tucker*, [1986] 2 F.C. 329 (F.C.A.)** A-381-85
***Canada (A.G.) v. Brissette*, [1994] 1 F.C. 684 (F.C.A.)** A-1342-92
***Canada (A.G.) v. Johnson,* [2004] F.C.J. No. 432 (F.C.A.)** A-296-03
***Locke v. Canada (A.G.),* [2003] F.C.J. No. 1962 (F.C.A.)** A-72-02

The misconduct referred to in the legislation may include a violation of the law, of a regulation or of an ethical rule, and may mean that an essential condition of the employment ceases to be met, resulting in dismissal. Such a condition may be express or implied and may relate to a concrete or more abstract requirement, such as no longer meeting the standards required of an employee who is in a position of trust. However, there must be a causal relationship between the misconduct and the dismissal. It is not sufficient for the misconduct to be a mere excuse or pretext for the dismissal. It must cause the loss of employment and must be an operative cause.

***Canada (A.G.) v. Nolet,* March 12, 1992 (F.C.A.)** A-517-91
***Canada (A.G.) v. Brissette*, [1994] 1 F.C. 684 (F.C.A.)** A-1342-92
***Smith v. Canada (A.G.),* September 11, 1997, F.C.J. No. 1422 (F.C.A.)** A-875-96
***Canada (A.G.) v. Nguyen,* November 15, 2001, F.C.J. No. 1722 (F.C.A.)** A-516-99
***Canada (A.G.) v. Cartier,* September 19, 2001, F.C.J. No. 1182 (F.C.A)** A-168-00
***Canada (A.G.) v. Granstrom,* [2003] F.C.J. No. 1922 (F.C.A.)** A-444-02

In order for there to be misconduct under the Act it is not necessary that there be a wrongful intent. It is sufficient that the act or omission complained of be made "wilfully", that is, consciously, deliberately or intentionally. In other words, there will be misconduct where the claimant knew or ought to have known that his or her conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility.

***Canada (A.G.) v. Secours [1995], F.C.J. No.210,* (F.C.A.)** A-352-94
***McKay-Eden v. Canada* (A.G.) [1997], F.C.J. No. 718 (F.C.A.)** A-402-96
***Gault v. Canada,* February 4, 1998, F.C.J. No. 147 (F.C.A.)** A-927-96
***Canada (A.G.) v. Wasylka,* [2004] F.C.J. No. 977 (F.C.A.)** A-255-03
***Canada (A.G.) v. Johnson,* [2004] F.C.J. No. 432 (F.C.A.)** A-296-03

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***Mishibinijima v. Canada (A.G.)*, 2007 FCA 36** A-85-06
***Canada (A.G.) v. Lee*, 2007 FCA 406** A-64-06

In cases where an employee suddenly becomes unable to carry on his job it does not matter whether the employer or the employee took the initiative in severing the employment relationship. The employment is terminated by necessity, and if a reprehensible act is to be identified as the real cause of that sudden situation, it is misconduct exclusive of just cause whether you approach it from either of the two branches of subsection 28(1) [Now 30(1)] .

***Smith v. Canada (A.G.),* [1997] F.C.J. No. 1182 (F.C.A.)** A-875-96
***Canada (A.G.) v. Borden,* [2004] F.C.J. No. 781 (F.C.A.)** A-338-03

Where an employee who cannot work because he is incarcerated is dismissed, "the dismissal arises out of the fact that the employee is not available, which is itself an inescapable consequence of the deprivation of liberty lawfully imposed on an employee who has committed a prohibited act. Every incarcerated offender must suffer the consequences that result from being imprisoned, namely loss of employment for unavailability." In this case, the employer declared that the defendant failed to show up for work and that, after his release from prison, no decision had been made about hiring him. It is obvious from this statement that the employer considered the employment contract to be terminated.

***Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Quebec Inc.,* [2003]** 3 S.C.R. 228 (S.C.C.)

There is a long line of authorities stating that where an employee, through his own actions amounting to misconduct, can no longer perform the services required from him under the employment contract and as a result loses his employment, that employee "cannot force others to bear the burden of his unemployment, no more than someone who leaves the employment voluntarily."

***Canada (A.G.) v. Brissette,* [1994] 1 F.C. 684 (F.C.A.)** A-1342-96
***Canada (A.G.) v. Lavallee,* [2003] F.C.J. No. 913 (F.C.A.)** A-720-01
***Canada (A.G.) v. Borden,* [2004] F.C.J. No. 781 (F.C.A.)** A-338-03
***Canada (A.G.) v. Wasylka,* [2004] F.C.J. No. 977 (F.C.A.)** A-255-03

It would be fundamentally altering the nature and principles of the employment insurance scheme and Act if employees, who lose their employment as a result of abusing impairing substances such as alcohol or drugs, could be entitled to receive regular unemployment benefits. The legislation already provides for sickness benefits and the respondent has been a recipient of such benefits. The consumption of these substances by claimants is voluntary, in the sense that the acts are conscious and claimants are aware of the effects of that consumption and the consequences which could or would result.

***Canada (A.G.) v. Turgeon*, [1999] F.C.J. No. 1861 (F.C.A.)**
Casey v. Canada (E.I.C.), 2001 FCA 375 A-570-00
***Canada (A.G.) v. Wasylka,* [2004] F.C.J. No. 977 (F.C.A.)** A-255-03
***Canada (A.G.) v. Neveu*, 2004 FCA 362** A-72-04
***Canada (A.G.) v. Richard*, [2005] F.C.J. No. 1750 (F.C.A.)**
***Canada (A.G.) v. Pearson*, 2005 FCA 199** A-315-05
***Mishibinijima v. Canada (A.G.)*, 2007 FCA 36** A-85-06

However, when an employee has been dismissed for alcoholism-related misconduct, he or she will not be disqualified from receiving unemployment benefits purusuant to subsection 30(1) of the Employment Insurance Act, if both the fact of the alcoholism and the involuntariness of the conduct in question are established.
***Canada (A.G.) v. Bigler*, 2009 FCA 91 (F.C.A.)** A-62-08

The fact that the conduct in question occurred away from the workplace or outside of work hours does not mean that it does not constitute misconduct under the Act, provided the conduct is sufficiently related to the employment so as to necessitate dismissal.

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***Canada (A.G.) v. Brissette*, [1994] 1 F.C. 684 (F.C.A.)** A-1342-92

Being dismissed for cause is not necessarily the same as being dismissed for misconduct. Simple mistakes, incompetence or misunderstandings between an employer and employee may be grounds for dismissal but they do not constitute misconduct under the Act.

***Canada (A.G.) v. St. Laurent*, January 17, 1984, F.C.J. No. 32 (F.C.A.)** A-440-83

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CHAPTER 7

MISCONDUCT

7.3.0 Relating to Actions or Omissions

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7.3.0 RELATING TO ACTIONS OR OMISSIONS

The word "misconduct" is not defined in the legislation. It is, rather, jurisprudence that has, over the years, provided a number of clarifications concerning the interpretation of this word in the legislative context. The same is true with regard to the specific actions or omissions covered by this interpretation. They are not included as such in the legislation, but have been identified in jurisprudence.

One of the two questions which the Commission officer must specifically answer is whether or not the claimant committed the actions or omissions covered by the interpretation given to the word "misconduct" in the jurisprudence. The following sections deal with the most frequent actions or omissions in which elements characteristic of misconduct are found.

7.3.1 Unlawful Union Activities

The various labour laws provide everyone with the right to belong to a labour association, organization or union of their choice and to participate in its formation, lawfulactivities and administration. The loss of employment resulting from the exercise of this right cannot be held to be misconduct[1].

damage, even though some members of the team may share little or none of the blame. There is misconduct only if the person was personally guilty of the breach or for the incidents.

In high-risk sectors, a board is generally appointed to inquire into the circumstances surrounding the violation of a safety regulation. A finding by such a board that a person was negligent is not necessarily indicative of misconduct. It is necessary to carefully analyze the information on which the finding was based and determine whether theactions or omissions attributed to the claimant constitute misconduct within the meaning of the employment insurance legislation.

Finally, there is no misconduct where a person concerned with safety rules refuses to drive a vehicle or use a piece of machinery because of a serious threat to health or safety. Such a conclusion takes for granted that there was a serious motive for the refusal, as opposed to a capriciousness or simple conflict with the union and in the circumstances no other reasonable alternatives existed that could have remedied the situation.

7.3.5.3 Consumption of Alcoholic Beverages

It can generally be said that every contract of employment includes a tacit prohibition against the consumption of alcoholic beverages during working hours, except under special working conditions, as in the case of wine tasting, for example, or in special circumstances, such as representing one's firm at a business meal.

As a general rule, misconduct may exist whenever this prohibition is violated, regardless of whether or not the business had a formal regulation in this respect. This is all the more the case where the nature of the employment is such that any consumption of alcoholic beverages is prohibited or not appropriate, such as for the person who drives a public vehicle or is a police officer.

The situation where the person presents him or herself at work in an inebriated state and cannot adequately carry out his or her duties, could also constitute misconduct.

Numerous incidents can develop in the context of excessive consumption of alcoholic beverages or flow from problems caused by alcoholism which affect a person's relationships at the workplace. The particular offence must be looked at in terms of the principles enunciated in the different sections involved, namely, absence from work, insubordination, hostile behaviour, and breach of rules.

These cases will be dealt with in the same way as those of ordinary workers. Workers have rights under the law, but they also have obligations, one of which is not to deliberately expose themselves to dismissal.

7.3.5.4 Dereliction of Duty

An employment contract can be broadly defined as an agreement between employer and employee assigning payment and other benefits to the employee in exchange for services which, by virtue of this mutual interest, implies respect for rules of conduct agreed to by the parties and sanctioned by professional ethics, common sense, usage or custom.

There are numerous acts and omissions that can be labeled misconduct, in the sense that they are incompatible with the objectives of an employment contract, present a conflict of interest with the employer's activities, or have a negative effect on the relationship of trust between the parties. This would also be the case where it is a violation of a law, a regulation, or of a professional code of ethics that results in no longer meeting the condition of employment and has led to the dismissal[1].

This applies, for example, to sleeping on the job, making long-distance telephone calls at the employer's expense, taking supplies for one's own personal use without authorization, falsifying expense accounts or time sheets, selling articles without authorization, or taking money from the employer's till without authorization, even if intending to later replace it[2].

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Service Canada Canada

The Index of Jurisprudence

A Supplement to the Digest of Benefit Entitlement Principles

Introduction

The Index of Jurisprudence is a supplement to the Digest of Benefit Entitlement Principles. The Digest contains the application policy of the Canada Employment Insurance Commission (CEIC) in regard to entitlement issues under the Employment Insurance (EI) Act and its Regulations such as Antedating, Earnings, Voluntarily Leaving Employment, Availability for Work, etc.

The Digest provides guidance based on jurisprudence whereas the Index is a search tool providing access to a database of summaries of jurisprudential decisions, categorized by issues and sub-issues. The Index is a supplement in that it can be used to find relevant and recent jurisprudence not referred to in the Digest - it does not provide guidance. Service Canada agents must rely on the Digest and periodically issued Bulletins for guidance.

The Index is primarily intended to provide Service Canada agents with significant and relevant decisions that support the entitlement application policy of the CEIC under the EI Act and its Regulations. Two useful features of the Index are the listings, Last 200 CUBS and Last 100 Court Decisions. Here the searcher will find the most recently authored summaries.

Both the Digest and the Index are maintained by Benefit Entitlement of the Policy, Appeals and Quality Directorate (PAQD) of Service Canada.

There are some 7,000 decisions of the Umpire currently in the Index, or CUBs as they are known (CUB standing for Canadian Umpire Benefit). Authors of CUBs currently and generally are judges of the Federal Court of Canada.

There are some 35 decisions of the Federal Court (FC) and some 1,200 decisions of the Federal Court of Appeal (FCA) in the Index. Decisions of the FCA take precedence over Umpire decisions and FC decisions. There are some 15 decisions of the Supreme Court of Canada in the Index.

Other various search capabilities for EI related jurisprudence exist under the Jurisprudence Library, maintained by Appeals Services of the Policy, Appeals and Quality Directorate of Service Canada. All decisions highlighted in the Index are located in the repository of decisions maintained by Appeals Services in both official languages.

The number of CUBs is at the 70,000 mark and the number of FCA decisions has grown significantly in recent years. The Index is in need of housekeeping. Changes will be made over the coming year to improve its efficiency and effectiveness.

Date Modified: 2009-10-13

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Service Canada

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The Index of Jurisprudence

A Supplement to the Digest of Benefit Entitlement Principles

Issues and Sub-Issues - Search and Display

Below is a list of main issues, generally paralleling the titles of chapters in the Digest of Benefit Entitlement Principles.

By clicking on one of the main issues, another screen appears. The main issue is briefly described and linked to the Digest. Below the brief description of the main issue is a table with three columns listing three sets of sub-issues. Sub-issue 1 in the left column lists main topics for the main issue. Sub-issue 2 in the middle column lists sub-topics related to a main topic and sub-issue 3 in the right column lists sub-topics related to sub-issue 2.

- antedate
- availability for work
- basic concepts
- board of referees
- claim procedure
- compassionate care
- courses of instruction or training
- earnings
- federal court
- fishing
- interruption of earnings
- job creation
- labour dispute
- maternity benefits
- misconduct
- parental benefits
- penalties
- proof
- reconsideration of claim
- refusal of work
- self-employment assistance
- sickness benefits
- teaching
- umpires
- voluntarily leaving employment
- week of unemployment
- work sharing

For example, click on Voluntarily Leaving. This will bring forth a screen listing three columns. Clicking on just cause in the left column will bring forth a listing of all decisions in the Index that offer information on just cause. Clicking on definition in the middle column relating to just cause will bring forth all decisions in the Index that offer information on the definition of just cause. Clicking on good faith in the right hand column relating to definition and just cause will bring forth a listing of all decisions in the Index relating to the expression "good faith" when it is used in relation to the "definition" of "just cause".

When you click on a sub-issue in the left column, a listing in rectangular form of all decisions in the Index relating to that sub-issue appears. The top boxes of the rectangle identify the decision, whether a full text of the decision is available (by clicking on Full Text) and the related issues. You will note a Summary within the rectangular box - this briefly describes the content of the decision. When you click on the decision number at the top left hand corner of the rectangular box, another layer appears within the box revealing additional information pertaining to the decision such as the originating language, the date of the decision, the name of the decision's author, the name of the claimant and the identity of the appellant and the result of the decision in regard to the appellant.

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Service Canada

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The Index of Jurisprudence

A Supplement to the Digest of Benefit Entitlement Principles

Sub-Issues

Misconduct:

This main issue parallels chapter 7 of the Digest dealing with entitlement to benefit when a claimant has lost their employment due to personal misconduct. Selected decisions under this main issue reflect relevant jurisprudential interpretations dealing with entitlement issues surrounding misconduct. Refer to chapter 7 of the Digest for detailed guidance.

Issue: misconduct

Sub-Issue 1: Charter	**Sub-Issue 2:**	**Sub-Issue 3:**
absences from work	Alchoholism Alcoholism	
accidents		
acts of violence	Self-defence	
alcohol, drugs and gambling		
applicability		
breach of rules	Kiting smoking prohibited	
bribery		
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criminal acts damages		
definition		
demerit points		
dereliction of duty	Abuse of electronic mail (E-Mail) Accessing e-mail of others Internet misuse airlines railway workers	
dishonesty		
dismissal upon settlement of labour dispute		
document missing		
dress and appearance		
driving permit		
dual reason for dismissal		
duration of disqualification		
elsewhere than at work		
good employment history		
harassment		
improper language		
incompetence		
insubordination		
justification	others misconduct themselves	
labour dispute	absences illegal walkout picket line	alleged illness
lateness		
leave obtained under false pretences		
leave of absence denied		

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leaving early
long distance phone calls

loss of employment definition

merit of dismissal

misconduct prior to employment

misjudgment

missing information

misunderstandings

negligence

nursing licence

oath of employment

obstinance

own misconduct

personal convictions

personality conflict

proof

questions to examine

rationale

real reason for dismissal

refusal to obey orders

refusal to see company doctor

refusal to work overtime

substance abuse

theft

unacceptable behavior sleep during work hours

unexcused absences from work

union activities

vandalism

various reasons

violations of contract

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Service Canada Canada

The Index of Jurisprudence

A Supplement to the Digest of Benefit Entitlement Principles

Summary Search Results...

Decision A0213.09 Full Text

Issue:	Sub-Issue 1:	Sub-Issue 2:	Sub-Issue 3:
misconduct	alcohol, drugs and gambling		

Summary:
The claimant was dismissed due her misconduct (excessive consumption of alcohol in the workplace). The BOR and the Umpire concluded that the actions in question were not wilful given that the claimant attributed her alcohol consumption to her fatigue and that she had never received any previous warning from her employer regarding her work. Looking to the decision in Mishibinijima, the FCA reiterated that there can only be misconduct if the conduct is deliberate, that is, the actions that lead to the dismissal were conscious, wilful and intentional. In other words, there is only misconduct when the claimant knows or should have known that his conduct would impede on his ability to execute his obligations towards his employer and that, as a result, it was possible for him to be dismissed. The FCA stated that the claimant's explanations did not help in answering the issue of misconduct as they did not suffice to supersede the wilful nature of the alcohol consumption. Therefore, the Umpire should have corrected the error of law committed by the BOR. Application for judicial review allowed.

Decision A0408.07 Full Text

Issue:	Sub-Issue 1:	Sub-Issue 2:	Sub-Issue 3:
misconduct	alcohol, drugs and gambling		

Summary:
The claimant was dismissed after she tested positive in a drug test while she was under probation for committing a similar infraction. The Commission determined that the claimant had lost her employment because of her own misconduct. The Board of Referees reversed the Commission's decision. The Umpire refused to intervene on the grounds that the Board of Referees is in the best position to assess the evidence and testimony brought before it, and he thereby upheld the Board's decision. The Federal Court of Appeal determined that the Board of Referees and the Umpire had misinterpreted, in law, the concept of misconduct and that the claimant must be disqualified to benefits by reason of her misconduct.

Decision 70257 Full Text

Issue:	Sub-Issue 1:	Sub-Issue 2:	Sub-Issue 3:
misconduct	alcohol, drugs and gambling		

Summary:
Claimant was fired for testing positive on a drug post-accident test as contemplated in the employer's policy. Although colleagues at work confirmed they observed no sign of physical impairment with the claimant, signs of impairment can manifest itself physically and mentally. The

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Service Canada

Canada

Employment Insurance Appeal Decisions Favourable to Workers

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Introduction

The " Employment Insurance Appeal Decisions Favourable to Workers" decisions database is selected, summarized and produced by the Unemployed Workers Help Centre of Regina, the Community Legal Assistance Society of Vancouver and the Mouvement Action-Chômage de Montréal.

The purpose of the database is to make available to Employment Insurance Boards of Referees and the interested public, a collection of Employment Insurance jurisprudence where the decision was favourable to workers.

The database is divided into subject areas which correspond to the main issues pertaining to a claimant's entitlement to benefits. Each subject is further divided by sub-headings to make it easier to find relevant caselaw on a particular topic or issue. For each decision included in the database, there is a brief description of the facts of the case, and a link to the complete text of the decision.

The Employment Insurance Appeals Division, in collaboration with the Canadian Labour Congress, makes this material available to Employment Insurance Board of Referees and Employment Insurance appellants, in the interest of promoting natural justice, fairness and to ensure universal access in both official languages.

It is recommended that appellants using the " Employment Insurance Appeal Decisions Favourable to Workers" database to prepare for hearings before the Board of Referees or an Umpire read all of the summaries which may apply to their situation. Appellants are also advised to read the complete text of any decision on which they want to rely in order to ensure that the facts and the decision supports the position that they intend to take.

Appellants should also be aware that decisions favourable to the Commission are not included in this database, and should be consulted in order to get a complete understanding of the existing jurisprudence. A complete database of all employment insurance decisions is available at http://www.ei-ae.gc.ca/eng/library/searchxt.shtml. Other research tools to help appellants better understand the procedures and assist them in preparing for their appeal can be found in the appeals Web site http://www.ei-ae.gc.ca/eng/research.shtml.

When participating in an appeal, the appellants should refer the Board or the Umpire to the CUB or FCA decisions that they wish the Board or the Umpire to consider in coming to a decision on their case. "CUB" refers to decisions given by the Umpires on benefit claims and stands for "Canadian Umpire Benefit", and Federal Court of Appeal (FCA) decisions are designated by the claimant's name, the decision number as well as the applicable CUB number.

Disclaimer

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Employment Insurance Appeal Decisions Favourable to Workers

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Date Modified: 2010-04-12

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Misconduct

Absences from Work

CUB 25713/A-647-94 - The claimant was absent from work to attend and comply with a court order. He was found to be disqualified due to misconduct as a result of his own insubordination. The umpire found that the board of referees erred in law. The appeal was allowed.
Appellant: Yvon Launière
Date: 1994

CUB 27485 - Claimant became very ill while on duty, and soiled his clothing. He went home to change his clothing without reporting this to his employer. To have met someone in his state would have caused him embarrassment. To have to explain this situation and to be dismissed for it was found to be excessive punishment. The appeal was allowed.
Appellant: Nirmalan Appadurai
Date: 1995

CUB 37270 - Claimant worked for the employer as a presser. She had the misfortune of injuring one of her toes on a weekend. It gave her considerable pain and distress. She telephoned the employer on a Monday morning to report that she would be late for work. When she prepared to leave for work, she realized that she would have difficulty walking and more important she would be unable to operate the foot pedals on the pressing machine. She then did not show up at all on Monday or the following day. She spoke with the supervisor by telephone on Tuesday and then telephoned the owner on that evening at which time he informed her that her employment was terminated. The claimant stated that she endeavoured to telephone the employer a second time on Monday to explain her problem but she was unable to get through after two attempts as the line was busy and because of her distress she did not try again. The Umpire found that due to the trauma she had suffered her judgement was affected. The appeal was allowed.
Appellant: Gail Frisk
Date: 1997

CUB 38481 -The claimant got into an argument with two men on the sky-train and he, along with the others, were ordered off of the train. He claims to have attempted, without success, to call his employer to say that he would be unable to report for work. The umpire found that an unreasonable act or poor judgement may constitute sufficient cause for the dismissal of an employee but those reasons for dismissal do not meet the test of misconduct. The appeal was allowed.
Appellant: Philomeno Bobadilla
Date: 1997

CUB 38774 - The Claimant was dismissed from his employment for having failed to report for work on three occasions within the period of a week. The Claimant was involved in an electronic monitoring program where he was required to get permission before he was able to leave his residence. On three occasions the claimant attempted but was unable to obtain clearance from the Program and was therefore unable to attend work. The Umpire found that this situation did not involve the element of wilfulness or intent that must be part of disqualification due to misconduct. The appeal was allowed.

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could leave and asked him to send news by leaving a message by telephone or e-mail. The manager did not indicate that the claimant had to provide a document justifying his absence. Once in Algeria, the claimant had not been able to send an electronic message because of the distance to access that service. He added that he left a telephone message a few days before Christmas, advising that his grandfather had died. The Umpire found that in this case, the Board's decision was entirely compatible with the evidence in the docket; the claimant gave his manager the reason for his absence and subsequently left telephone messages as his manager told him to do. The Commission's appeal was dismissed.
Appellant: Commission
Date: 2006

CUB 68400 - The claimant was dismissed because he was absent from work during peak periods. The incident which triggered the dismissal was a 3 day period the employee was alleged to be away from work without the permission of the employer. The employee told the Board that there were problems with the work atmosphere and he had wanted to discuss the situation with the employer. He stated that he had left a note at work to that effect the first day of the absence. The employer stated he was dismissed because he left without notice. Unable to talk to the employer the claimant had notified the receptionist he would be gone for two days and made arrangements with kitchen staff to operate without him. The Board accepted the fact that he had the right to leave as he indicated this is what he had done in the past. The Commission's appeal was dismissed.
Appellant: Commission
Date: 2007

CUB 68522 - The claimant had been sick for three months and had called in every day during that period as the employer required. In the fourth month he had not called in on a daily basis but had made contacts with the employer during that period to indicate he was still ill. The evidence showed that the claimant was suffering from an ulcer and depression. The Umpire determined that even though the employer's policy was to call in every day there can be circumstances where the medical condition would inhibit their ability to call in every day. The claimant was ill during the period in question and the evidence verified it. The appeal was allowed.
Appellant: Tesfu Okbagerial
Date: 2007

Alcoholism

CUB 38274 - In this case, Umpire Lutfy concluded that the grounds which justified dismissal did not constitute misconduct as defined in the Act. His view was as follows:

“In theory, repeated, unexcused absences by an employee can be described as misconduct. In referring to the employee's absences after drinking alcohol, the Board of Referees found that they were “the result of his illness, and were not planned by him.” More specifically, the Board of Referees found that the claimant was not in control of his condition at the time of his dismissal. The grounds for dismissal do not constitute misconduct in themselves. The Board of Referees was not correct to describe the claimant's alcoholism as an illness, and to find that the Commission had not proven the claimant's misconduct. In my view, this finding is reasonable in regard to the circumstances of an employee with 36 years of seniority with the same employer when it is shown that the illness had existed for many years.”

The appeal was dismissed.
Appellant: Commission
Date: 1997

CUB 41470 -The Board noted the claimant's numerous absences from work despite receiving several written warnings. He as well had been suspended 3 days previously and was told that a repeat violation would result in dismissal. The Umpire is this case is quoted as saying:

“In this case, the situation is different, as the Board of Referees had in its possession a report from an expert in alcoholism and drug addiction, Dr. Jean-Pierre Chiasson, MD, ASM, who clearly stated that the claimant's absences are directly attributable to his alcoholism. This recognized expert

examined the claimant after his dismissal and concluded in exhibit 13.22 dated December 14, 1996 that, in this case, the claimant's alcoholism is responsible for his wrongdoing and absences. Dr. Chiasson also concluded in exhibit 13.39 that the claimant would lose control, which meant that he would often be unable to control his drinking at times and thereby prevent behavioural problems. With this uncontested medical evidence, the Board of Referees could not conclude that the claimant's repeated absences and instances where he was late, which were attributable to alcoholism, constituted misconduct as per section 28(1) of the Unemployment Insurance Act...The medical report is clear and shows that the claimant's acts were not voluntary but simply the result of his alcoholism."

The appeal was allowed.
Appellant: Richard Di Donato
Date: 1998

CUB 60421 -The claimant has a clear alcohol addiction and had been warned by his employer about his absences. Then on October 8, 2002 the claimant was absent from work without notifying his employer. The Board did accept the fact the claimant was upset over his mother's health condition, upset to the fact that he drank to the point where he was incapable of phoning his employer. Since that incident, the claimant has actively participated in a recovery program. The medical evidence that was placed before the Board showed that the claimant had a long-standing addictions problem and that the employer knew of the claimant's problems. There was also evidence that the claimant had asked his employer to refer him to a treatment program but the employer had declined to do so. The Board found, by unanimous decision, that the claimant was "incapable", by reason of intoxication, of telephoning his employer. The Umpire felt that the weight of the evidence of how liquor affected him on the occasion in question must have been substantial for three lay human beings to have come to that conclusion. The Board correctly cited the law applicable to this case. The evidence before the Board shows that the claimant was addicted to alcohol and that the news of his mother's illness affected his sobriety. The Board was in the position to determine whether or not taking the first drink could be said to be conduct that was "of such a careless and negligent nature that one could say that the employee wilfully disregarded the effects his or her actions (in taking that drink) would have a job performance." The appeal was dismissed.
Appellant: Commission
Date: 2004

Altercations (Verbal and Physical)

CUB 42559 - The misconduct alleged by the employer arises out of an altercation between the claimant and a co-worker which breached the employer's established policy against altercations and fisticuffs. As the only credible version of events which does not consist of second hand evidence is that of the claimant and in that circumstance her evidence ought to be preferred and accepted. This does not translate into misconduct within the definition of that term to satisfy the statute. The appeal was allowed.
Appellant: Donna Franklin
Date: 1998

CUB 42963 - The claimant was working with a co-worker and an argument broke out between them, this argument resulted in the claimant pushing his co-worker an act for which he apologized later on. The uncontroverted evidence appears to be that the type of conduct in which the claimant was involved would not result in dismissal from employment for misconduct. The Board was not referred to a decision of Canada (Attorney General) v. Langlois (A-94-95) in which Mr. Justice Pratte stated:

The misconduct referred to in s.28...is not a mere breach by the employee of any duty related to his employment; it is a breach of such scope that its author would normally foresee that it would be likely to result in his dismissal.

All evidence would appear to hold that an employee (for this company) who conducted himself in the manner of the claimant would not foresee that such conduct would result in his dismissal. The

Community Legal Assistance Society

FROM: **Jim Sayre**

Re: **Overview of the EI System**

Last Updated: **November 18, 2011**

Introduction

EI is a compulsory social insurance plan which applies to most people who are employed in Canada. It is the oldest part of Canada's social safety net, and until 1996 it provided income support for nearly 80% of Canadian workers who could not find a suitable job. After years of cuts, this has dropped to about 40%, but EI remains the main protection for workers who are not quite poor enough to qualify for welfare.

EI insures the first $44,200 of a worker's annual income. The worker and the employer each pay a premium for each hour of work performed.

Beginning in January 2011, self-employed people were be able to opt into the EI system so as to be eligible to receive maternity, parental, sickness, and compassionate care benefits, but not regular benefits.

Despite the "insurance" nature of EI, the employer is treated as a full party to a worker's claim, with the right to initiate and take part in appeals, and to receive full disclosure of the worker's EI file.

The decisions and conduct of the EI Commission are subject to the Canadian Human Rights Act and to the Privacy Act, which entitles a person to copies of all EI documents held by the Commission or Canada Revenue Agency (CRA).

Proceedings involving the EI system are supposed to be informal, so that claimants won't need legal representation. However, the complexity of the legislation and the volume of jurisprudence - including more than 70,000 decisions by the Umpires, who are Federal Court judges acting as an appeal tribunal - make EI law a daunting subject even for trained advocates.

Despite its complexity and importance, however, only Quebec has anything like an

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adequate network of advocates to assist workers who come into conflict with the Commission. Hence there is a real need for community advocates, union reps, law students and others to assist people with deserving EI appeals.

Basic EI concepts and principles

EI is (mostly) based on calendar weeks

The EI system is generally based on calendar weeks (Sunday to Saturday). A claim starts on the Sunday of the week in which the application is filed. Qualifying and benefit periods are also based on calendar weeks, and benefits are claimed and paid by the week. However, EI eligibility is based on hours of insurable work, and availability for work is determined on a daily basis.

How to qualify?

To qualify for EI benefits, a worker must have worked the required number of hours in "insurable employment" and must have had an "interruption of earnings" (7 days with no work and no earnings).

Regional Rate of Unemployment	Required Number of Hours of Insurable Employment in Qualifying Period
6% and under	700
more than 6% but not more than 7%	665
more than 7% but not more than 8%	630
more than 8% but not more than 9%	595
more than 9% but not more than 10%	560
more than 10% but not more than 11%	525
more than 11% but not more than 12%	490
more than 12% but not more than 13%	455
more than 13%	420

The insurable hours and interruption of earnings must have occurred during the "qualifying period", which is usually the 52 weeks prior to the week the claim is filed.

However, the qualifying period can be shorter than 52 weeks, since it can't extend beyond the date when a previous EI claim began. It can also be longer than 52 weeks, if certain circumstances such as illness, pregnancy or imprisonment prevent a claimant from engaging in insurable employment during that time.

If a claimant is considered to be a "new entrant" or "re-entrant" to the Canadian labour force, 910 hours of insurable employment are needed to qualify for a claim. This equates to 26 weeks at full time work at 35 hours per week, and it applies regardless of the regional rate of unemployment.

The test for whether someone is a new entrant or re-entrant is whether the person had 490 hours (14 weeks) of attachment to the labour force in the year **before** the qualifying period - which would usually be the period between one year and two years before the claim is filed. Attachment to labour force includes working, of course, but it also includes receipt of EI benefits from a previous claim and certain other situations prescribed by regulation. Oddly (and unfairly) it does **not** include self-employment.

A claimant who has been penalized in the past 5 years for giving EI false information may have been issued a "notice of violation", which means that he or she must work hundreds of extra hours of insurable employment (as many as 1400 in total) to qualify for a new claim. See s. 7.1 of the Act. Violations are now appealable; see the discussion below about "overpayments and penalties" for additional details.

Benefit period and weeks of benefits

If the applicant is eligible, EI will establish a "benefit period". This is the period during which any benefits under the claim must be claimed. It is normally 52 weeks from when the claim begins. A benefit period can end earlier, however, if the claimant uses up all of the weeks of entitlement, voluntarily cancels the claim or qualifies for a new one.

Claimants who qualify for special benefits (sickness, pregnancy, parental and compassionate care benefits) are allowed a longer benefit period if necessary to enable them to collect the maximum weeks of each type for which they qualify.

A benefit period can also be extended to as much as 104 weeks where circumstances make it impossible for the claimant to receive benefits for part of the original 52 weeks. Such circumstances could include a work injury for which WCB benefits are payable, and vacation pay, severance pay, or most other types of payments received from the employer due to the termination of the previous job. Such payments are regarded as earnings and must be used up at the claimant's usual rate of pay before any EI benefits will be paid, and the benefit period is extended for an equivalent period.

The claimant will be entitled to a certain maximum number of weeks of regular EI benefits during the benefit period, which varies according to the number of hours of insurable employment used to establish the claim, and the regional rate of unemployment. Due to the 2008/9 economic crisis, the government increased the number of weeks of benefits in a given claim by 5, to a maximum of 50 in many regions. However, that increase expired on September 11, 2010, and any claim filed after that date will end after a maximum of 45 weeks.

In almost all cases, the claimant must serve a two week waiting period before receiving any benefits under a new claim. This is like a deductible amount in private insurance plans. During the waiting period, the claimant must meet all the usual requirements for receiving benefits, such as being unemployed and available for work, and any earnings received during the week will be deducted from future benefits.

The number of hours of insurable employment needed to qualify for a regular EI claim and the number of weeks of regular benefits a claimant may receive depend on the regional rate of unemployment: the higher the unemployment rate, the easier it is to qualify and the more weeks of benefits a claimant receives. This illustrates the social insurance nature of EI, and is the opposite of private insurance, where higher risks lead to greater costs and/or reduced benefits. See the following link for the updated unemployment rate for your region:
http://srv129.services.gc.ca/eiregions/eng/rates_cur.aspx

Special benefits (pregnancy, parental, sickness, and compassionate care) work differently. To be eligibility, a claimant must have worked at least 600 hours, regardless of their regional rate of unemployment. The length of special benefits is determined differently as well, and is based on the type of benefit and not the number of hours worked or the rate of unemployment. The maximums are 15 weeks for pregnancy, 35 weeks for parental (which can be shared by the two parents), 15 weeks for sickness, and 6 weeks for compassionate care.

Starting in January, 2011, self-employed people will be able to opt in to the EI system, and once they've paid a specified amount of premiums, they will be able to receive special benefits, but not regular ones. Once a person has opted in, he or she cannot opt out again. There doesn't appear to be any way to combine the eligibility based on self-employment with insurable hours from employment, which means that many people who work part-time and also carry on a business may not be able to qualify for EI under either the existing system or the new one. The details are not clear yet, however, and anyone with questions about this should be referred to the Commission or the website.

Amount of benefits

The basic rate of benefits is 55% of the claimant's average earnings, up to the maximum of $468 per week. People with low family incomes (less than can receive up to 80% of their average earnings under the family supplement provisions.

The average earnings are determined by a complex formula: The total earnings during the 26 weeks in the qualifying period immediately prior to the last interruption of earnings are divided by a **"divisor"** which is at least 2 weeks more than the minimum weeks of work required to establish a claim (weeks in this case being calculated by dividing the required number of hours by 35). For people with an irregular earnings history, the result can be complicated (and unfair). For further details, see:
http://www.servicecanada.gc.ca/eng/ei/types/regular.shtml#calculate

Types of benefits

All claimants who have worked the number of hours required in their region for the week when the claim was filed qualify for regular EI benefits, unless they have been disqualified or disentitled. Claimants who have a major attachment to the work force (which means that they have worked 600 or more insurable hours in their qualifying period) may also qualify for special benefits, which include sickness, pregnancy, parental and compassionate care benefits. The *Act* also provides the commission with discretion to grant a claimant other types of benefits, including training, self-employment, and work sharing benefits. Unlike regular and special benefits, there is no right of appeal against the denial of these discretionary benefits.

Entitlement: unemployed and available

Once a claim has been established, the basic requirements for receiving regular benefits are that the claimant be unemployed and "available for work". A claimant who is considered to be employed cannot receive benefits for that period of time. A claimant who works part-time may qualify for full or partial benefits, however, as he or she is allowed to earn $75 or 40% of the benefit rate, whichever is greater, before EI benefits start to be deducted. If a claimant receives any benefits in a given week, the week counts toward the maximum number of weeks that can be paid under that claim. It may therefore be in a claimant's interest not to claim benefits for a week in which only a small amount would be paid.

Claimants who are trying to start a business are generally considered to be working full-time, regardless of whether they are receiving any income from the business. They are therefore not eligible for any benefits. The only escape for such claimants is to convince the Commission, or the Referees in an appeal, that the self-employment was so minor in extent that a person wouldn't normally rely upon it as a principal means of livelihood. To make matters worse for self-employed people, they are not

regarded as being part of the Canadian labour force for EI purposes. This means that if they return to paid employment, they may be treated as "re-entrants" and be required to work 910 hours or more to qualify for a claim. It doesn't appear that the new scheme that allows self-employed people to opt in for special benefits will change this unfair rule.

To be "available" for work, a claimant must be searching for work by taking such reasonable steps to find a job as is customary for the person's occupation. Being passively willing to accept a job is usually not sufficient, unless the person has a reasonable expectation of being recalled shortly.

The claimant must also avoid circumstances which would prevent him or her from accepting a job if it were offered. Claimants who have no transportation, no childcare arrangements, etc. may be considered to be unavailable. So are claimants who are too sick or disabled to work, if they do not qualify for sickness benefits or have already received the maximum 15 weeks payable under the claim.

A disentitlement can also be imposed on claimants who indicate in the application that they will only accept relatively highly paid jobs, if few such jobs exist in the community, even though they may have held such a job before being laid off. The longer an EI claim lasts, the more flexible a claimant's job search is expected to be.

Temporary foreign workers must overcome additional hurdles to receive regular benefits. If their work permit is limited to their original employer, and they are laid off, they may be disentitled from all regular benefits because they cannot legally work for anyone else. Such workers still pay full EI premiums, although they may only be eligible to receive special benefits. Such workers should appeal any denials, as the Commission's approach is changing in some regions, and the tribunal may find that they do in fact qualify.

Despite the social insurance nature of the EI system, some principles of private insurance law do apply, including the rule that an insured must not take steps that increase the risk of loss. This principle results in the Commission cutting off claimants after a short trial period if they move from an area which has many job opportunities to one where there are very few opportunities, unless the claimant's spouse has moved and the claimant must follow to keep the family together. Temporary foreign workers have reportedly been treated in the same way in some areas, even though they have done nothing to reduce their chances of finding new employment.

The legislation contains other entitlement rules. For example, a person usually can't receive EI benefits while outside of Canada, unless they are in a jurisdiction (usually a reciprocating US state) where there is an agreement in place. EI and Customs compare each other's computer records to identify claimants who leave the country without telling the Commission. If benefits were claimed during such absences, the

claimant will usually have to repay them, and a penalty may be imposed if they made false statements in the weekly report when the benefits were claimed.

Disqualifications and consequences

A **disentitlement**, as described above, simply means that for various reasons the claimant isn't eligible for benefits for the time being. The claimant can become entitled once again at any time by correcting the condition that caused the disentitlement. For example, if a person is disentitled because of unrealistic wage expectations, he or she can begin applying for lower paying jobs.

Unlike a disentitlement, a **disqualification** is a kind of punishment imposed on a claimant who is at fault for losing a job during the qualifying period, or for unreasonably failing to accept a job offer or pursue a job opportunity.

The most common disqualifications - for voluntarily leaving a job without just cause or for losing a job due to the claimant's own misconduct - deprive the claimant of all right to regular benefits throughout the entire claim period. Hours of insurable employment earned before the job loss can still be used to claim special benefits, however. The hours can be used to increase the length of benefits if the claimant finds a new job and works the number of hours required in that region (see the table on page 2).

A disqualification can be imposed for any job lost during the qualifying period. Since the disqualification is based on the claimant's past conduct - quitting without just cause or being fired for misconduct - it cannot be "fixed" by anything the claimant can do afterward. The Act only allows a disqualification to be removed if the claimant requalifies for EI by working the required number of hours after quitting or being fired. Otherwise, the only way to reverse a disqualification is to appeal it, and win.

Overpayments and Penalties

If EI believes that a claimant has made a false statement or provided false information, usually on the initial application or a weekly claim for benefits, it can redetermine the benefits and impose a penalty. If the claimant received benefits to which he or she was not entitled, an overpayment will be created.

If EI believes that the claimant **knowingly** misrepresented the facts, it can impose a penalty on the claimant, or issue a **"warning"**. The "knowingly" requirement is often the key to appealing such penalties; the court and tribunals have said that it requires actual, subjective knowledge by the claimant that the information in question is untrue. It's not enough to say that the claimant could or should have known the information was false, or should have asked someone.

A penalty can be as much as three times the claimant's rate of benefits. The Commission is required to consider all relevant circumstances, including the claimant's ability to pay, in setting the amount of a penalty. However, it doesn't always do so. The failure to consider ability to pay and other mitigating circumstances is a good basis for appeal.

Penalties and warnings can lead to a **"violation"** if the Commission issues a "notice of violation" to the claimant. This means that for the next 5 years the worker will be required to accumulate more hours of employment than other claimants to establish a new claim. The number of hours required is based on the amount of benefits wrongfully received by the claimant. If that amount is $5,000 or more, the claimant will need more the double the usual number, to maximum of 1400 hours, which is equal to 40 weeks of 35 hours each. See section 7.1 of the Act.

Prior to 2006, the Federal Court of Appeal accepted the Commission's argument that a violation is an automatic result of being penalized, which could only be overturned by successfully appealing the penalty decision itself. In the 2006 *Savard* decision, however, the Court reconsidered its previous rulings and said that the Commission has a discretion (which is appealable) at almost every stage of the penalty and violation process: whether there should be a monetary penalty, if so, how much it should be, whether to issue a "warning" if no monetary penalty is imposed, and whether to issue a notice of violation under s. 7.1. The Commission refused to follow this decision until July, 2010, when the Court's decision in the *Zora Gill* case reaffirmed the principles in *Savard*. It is now absolutely clear that the referees can overturn a violation if they feel that the monetary penalty was a sufficient punishment for the misrepresentation. The only thing the referees cannot do is to reduce the number of additional hours required **if** the violation is upheld, as that number is determined by s. 7.1, and is based on the amount of the overpayment resulting from the false statements in question.

Decision-making by the Commission

Establishing an EI claim

In deciding whether to accept the claim and start a benefit period, the Commission checks the claimant's hours of insurable earnings during the qualifying period. It usually does this by reviewing the records of employment (ROEs) for all jobs which the claimant held during the qualifying period. A claim can be filed without all the ROEs. If an employer refuses or neglects to provide an ROE, the claimant should file anyway, and ask the Commission's assistance to obtain it.

EI applications are now filed online. Claimants who don't have access to a computer or need help using one can go to a Service Canada office and obtain assistance from the staff.

Antedating or delaying a claim

A claim can be back-dated (technically called an "antedate") if the claimant can show a good cause for the delay in filing. Claims are automatically antedated if the person files within 4 weeks of being laid off. If the delay is longer than that, the person must have acted as a reasonable person in trying to find out about their EI rights and requirements. Merely not knowing the rules is not good cause. Neither is intentionally delaying a claim in the hope of finding a new job.

A claimant's right to receive benefits will also be delayed while he or she uses up money received upon separation, such as severance pay or vacation pay. If this happens, the benefit period will be extended an equivalent length of time. Such claimants must file their claims immediately, however, and not wait until their separation monies are exhausted.

Disqualifications: determining just cause or misconduct

In addition to the claimant's dates of employment, and hours and earnings during the past year, the record of employment will state the reason for the separation from employment. If the ROE says that the claimant was laid off because of a shortage of work, there will usually be no problem, although the Commission could still investigate by contacting the employer. However, if the ROE says that the claimant was fired or quit, EI will always contact the claimant and employer to decide whether the claimant should be disqualified. Claimants who are found to have voluntarily quit a job without just cause or to have been fired for their own misconduct will be disqualified, as noted above.

The Act defines "just cause" (see s. 29), but not "misconduct", and there are thousands of decisions by the Umpires and Federal Court of Appeal addressing just cause and misconduct issues. Such decisions require the Commission to determine the facts and then to apply legal principles established by the Act and jurisprudence. For example, the Federal Court of Appeal has consistently said that leaving a job to pursue further education is never just cause, no matter what the circumstances. These decisions are not supported by the legislation, but the Court has dug itself in too deeply to climb out on its own, and its unreasonable approach can only changed by an amendment to the legislation or a change in the Commission's policy.

Claimants who feel that they had no reasonable alternative to quitting or that they were fired without committing intentional misconduct should always appeal the decision and present their evidence to the Commission and the Referees. A disqualification is like capital punishment, and the claimant has nothing more to lose by appealing.

Claiming weekly benefits

Beginning with the waiting period, a claimant must complete and submit weekly reports to the Commission. At one time, this was done by completing and mailing in cards which were processed by computer. Now the reports are usually filed by an automated telephone system using a PIN number, or by computer. The reports automatically generate benefit cheques, if the claimant appears to be eligible. The questions are pretty basic: “Did you work?” etc.

To prevent abuse of the system, EI officers can call a claimant or ask the claimant to attend an interview, in order to investigate any of the circumstances, such as the person’s availability, job search, work activities, or income. False statements in weekly reports and interviews (if any) can lead EI to declare an overpayment and impose a penalty and perhaps a violation on the claimant.

Appeals to Boards of Referees and Umpires

Boards of Referees

Most decisions by the Commission can be appealed by the worker or employer within 30 days to an informal 3-person tribunal called the Board of Referees. However, some decisions cannot be appealed to the Referees, including:

- decisions about certain discretionary benefits, such as training, self-employment, work-sharing, etc.;
- decisions about writing off an overpayment or penalty owed to the Commission;
- decisions about insurability issues, which are subject to a separate decision-making and appeal system described below.

Appeals to the Referees are conducted informally, and are usually heard within a few weeks of being filed, and decided on the day of the hearing. In smaller communities, most appeals are heard by telephone, unless the worker is willing to travel to the nearest city where the Referees hold hearings.

Before the hearing, the Commission prepares a collection of the documents from the file which it considers to be relevant, called a “Docket”. The docket includes the Commission’s “Representations to the Referees”, a document which summarizes the Commission’s view of the law and includes its argument in favour of its decision. The worker has the right to request a complete copy of the current or past EI files (or any other federal file containing personal information) under the Privacy Act.

At the hearing, the worker can submit written arguments and evidence, as well as giving evidence orally and sometimes calling witnesses. The employer can take part

in (or even initiate) an appeal, and has the same right to present evidence and make arguments as the worker.

After the hearing, which usually lasts 30 minutes or less, the Referees make findings of fact and allow or dismiss the appeal. They are required by law to state their material findings of fact in their written decision. If the claimant expects to need more than 30 minutes to present the appeal, additional time should be requested when filing the appeal, or when the hearing date is set.

Generally, the Referees must consider any relevant evidence offered by the parties. If they decide that the Commission's decision was wrong, they can make their own decision rather than just referring the matter back for reconsideration. However, when certain discretionary decisions are appealed, such as the amount of a penalty, or whether a worker's time for appeal should be extended, the Referees can only intervene if they find that the Commission ignored relevant evidence or otherwise acted improperly, or if they receive new evidence the Commission wasn't aware of. In such cases it's especially important to present evidence to the Referees that the Commission doesn't mention in the docket, or that wasn't presented to the Commission at all. That can be the key that opens the door so that the Referees can make the decision they feel is fair.

Umpires

Decisions of the Referees can be appealed to an Umpire within 60 days, but only on grounds of jurisdiction, natural justice (unfair procedure), error of law, or a finding of fact completely unsupported by the evidence. Umpires are usually Federal Court judges, and appeals are conducted by oral or written argument. The Commission will be represented by a lawyer. Umpires can hear new evidence, but rarely do so, since they can't allow an appeal merely because they would have made a different decision on the facts. (See, however, the next section on Reconsiderations.) If the Umpire finds that the Referees erred, the Umpire has the power to make the decision the Referees should have made, or to order a new hearing.

Reconsideration Based on "New Facts"

Section 120 of the *Act*, which is separate from the appeal provisions, allows the Commission, Referees or Umpire to rescind or amend a decision if new facts are presented or if they are satisfied that the decision was made without knowledge of a material fact. In one recent decision of the Federal Court of Appeal, this power was exercised by the Umpire in the course of deciding a penalty appeal from the Referees, on the basis of evidence of financial hardship that the Referees and Commission did not know about. Thus the power to reconsider can be exercised by an appeal tribunal without the claimant first presenting the new facts to the Commission for its determination.

Federal Court of Appeal

There are no further appeals, but the decision of an Umpire can be judicially reviewed by the Federal Court of Appeal, on restricted grounds related to jurisdiction, interpretation of law, or unfair procedure. These are similar to the grounds for an appeal to an Umpire. The deadline for starting a judicial review is 30 days. Since the Federal Court Rules require an applicant to prepare lengthy documents, including a formal legal argument, a lawyer is virtually a necessity. Also, recent practice has been to award court costs against the losing party even in EI proceedings, so the chances of success should be carefully weighed before proceeding.

Insurability Issues: Decision-making by the CRA and Related Appeals

To make the EI system even more complicated, Parliament created a completely separate system of decision-making and appeals for matters involving insurability:

- whether a worker was employed, and whether the employment is insurable,
- how long the employment lasts,
- how much insurable earnings a worker received (which may involve placing a value on room and board, a company car, and other non-monetary compensation),
- how many hours of insurable employment a worker has,
- the amount of a premium,
- the identity of the employer.

The worker, employer, and Commission can ask that the Canada Revenue Agency (CRA) rule on any such insurability question. The worker and employer must make such a request by June 30 of the year following the one in question. The Commission can do so at any time.

If the worker, employer, or Commission disagree with the CRA's decision, any of them can appeal to the Minister of National Revenue. The worker and employer must do so within 90 days. The appeal division of the CRA decides such appeals. For further details, see www.cra-arc.gc.ca/E/pub/tg/p133/p133-11e.pdf.

The worker, employer, or Commission may appeal the Minister's decision to the Tax Court of Canada within 90 days of that decision. The Tax Court (which also hears appeals under the Income Tax Act) conducts a trial before reaching its decision. A decision of the Tax Court can be appealed to the Federal Court of Appeal, but only on limited grounds similar to a judicial review of an Umpire's decision.

Since the Referees and Umpire have no jurisdiction over insurability issues, it is crucial to appeal them to proper body - the CRA, the Minister, etc. However, the Referees

and Umpire do have jurisdiction over the consequences of an insurability ruling. For example, if the ruling reduces the claimant's hours, and therefore the number of weeks of benefits that are payable, the Commission will issue an overpayment decision. If the Commission thinks that the claimant was aware of the incorrect information on the record of employment that led to the overpayment, the claimant may also be penalized and declared to be a violator. In such a case, the insurability decision itself must be appealed to the CRA, and potentially to the Minister and eventually the Tax Court. However, the overpayment, penalty and violation decisions must still be appealed to the Referees. Filing such an appeal will protect the claimant from the consequences of those decisions until the insurability appeal is decided. If it succeeds, the overpayment, penalty and violation will be cancelled. If the claimant loses the insurability appeal, he or she can still have their appeal regarding the penalty and violation heard by the referees. Such an appeal may well succeed if the Referees agree that the person didn't know the information was false at time it was given.

Researching the Law

The jurisprudence on EI (and before 1996, UI) includes more than 75,000 decisions of the Umpires, dating back to 1949, along with another thousand or so decisions of the Federal Court of Appeal and the Supreme Court of Canada. Most of them can be found (and searched for key words) on the Commission's jurisprudence web site, at:

www.ei-ae.gc.ca/en/library/search.shtml

The web site also has an unusually complete collection of other EI material online, including the Commission's policy manual, fact sheets for claimants explaining all aspects of the system, numerous studies and reports, and even a comprehensive year-by-year history describing changes to the UI system from its origins in the 1940's. The home page for EI is:

www.servicecanada.gc.ca/eng/sc/ei/index.shtml

An excellent starting point for understanding the jurisprudence on a particular issue is a special section of the web site designed to help claimants file and prepare for an appeal. This site is under active development, with the involvement of a number of independent advocates for unemployed workers. It can be found at:

www.ei-ae.gc.ca/en/home.shtml

This page has links to the legislation, the jurisprudence library, and to the Board of Referees and Umpires sections of the site, which describe the appeal process clearly and comprehensively. The Referees' site has a "Quick Reference Tool", "View From the Courts", and "Judicial Interpretations" section. These lead to useful summaries of

the law on key issues, and to summaries of leading decisions by the Federal Court.

Thomson/Carswell's Annotated Employment Insurance Act and Regulations, which is updated every year, is an excellent tool for detailed legal research. It contains the EI Act and Regulations, with extensive annotations after each provision describing the history of the section, and the decisions interpreting and applying it. The commentaries list many Umpires' decisions which can be saved or printed from the Jurisprudence Library.

Under the leadership of the Unemployed Workers Centre in Saskatchewan, the Canadian Labour Congress developed a collection of helpful excerpts from decisions of Umpires for the labour appointees to the Boards of Referees. Under an agreement between the Canadian Labour Congress, the HRSDC, and advocates from Movement Action Chômage in Quebec and CLAS, this collection is now publicly available as an online database of jurisprudence favourable to claimants. See:

www.ei-ae.gc.ca/en/board/favourable_jurisprudence/favourable_decisions_introduction.shtml

In addition to all of these resources, Mouvement Action-Chômage de Montréal inc., which is the unemployment action movement (MAC) of Montreal, has now translated its outstanding *Practical Guide to the EI Act* into English. The *Guide* contains many useful tips and examples, along with historical information about the rise and fall of Canada's EI system. It can be consulted online or downloaded in pdf format:

www.macmtl.qc.ca/Conseils_pratiques/en.htm

5. Family

Legal Services Society
British Columbia
www.legalaid.bc.ca

THE LAW FOUNDATION OF BRITISH COLUMBIA

BRITISH COLUMBIA
The Best Place on Earth

ARCS: 292-30
File: AGT-2011-00056

May 19, 2011

Sent via email: avollans@ywcavan.org

Andrea Vollans
YWCA Vancouver
535 Hornby St
Vancouver BC V6C 2E8

Dear Andrea Vollans:

Re: Request for Access to Records
***Freedom of Information and Protection of Privacy Act* (FOIPPA)**

I am writing further to your request received by the Ministry of Attorney General. You requested:

"We have heard that FMEP is no longer enforcing FMEP in areas of the province where there is no staff lawyer to take up appropriate remedies in court. We heard that it was made policy, so we are seeking a copy of the specific policy, a list of the places where enforcement will occur and any discussions or memos regarding enforcement for those that are outside of the places that don't have staff lawyers, how to remedy complaints and how many complaints have occurred because of this policy."

Please find enclosed a copy of the records in response to your request. Some information has been withheld pursuant to sections 15 (Disclosure harmful to law enforcement) and 21 (Disclosure harmful to business interests of a third party) of FOIPPA. Copies of these sections of FOIPPA are provided for your reference. A complete copy of FOIPPA is available online at:

http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/96165_00

Additionally, portions of the records have been marked as "non responsive" as they do not relate to the wording of your request.

.../2

Ministry of Labour, Citizens' Services and Open Government
Shared Services BC
Information Access Operations
Mailing Address:
PO Box 9569 Stn Prov Govt
Victoria BC V8W 9K1
Website:
http://www.gov.bc.ca/citz/iao/
Telephone: 250-387-1321
Fax: 250-387-9843

Your file is now closed.

If you have any questions regarding your request, please contact Samara Fisher, the analyst assigned to your request, at 250-356-5285. This number can be reached toll-free by calling from Vancouver, 604-660-7867, or from elsewhere in BC, 1-800-663-7867 and asking to be transferred to 250-356-5285.

You have the right to ask the Information and Privacy Commissioner to review this decision. I have enclosed information on the review and complaint process.

Sincerely,

for: Vicki Hudson, Manager
Justice / Social Team
Information Access Operations

Enclosures

How to Request a Review with the Office of the Information and Privacy Commissioner

If you have any questions regarding your request please contact the analyst assigned to your file. The analyst's name and telephone number are listed in the attached letter.

Pursuant to section 52 of the *Freedom of Information and Protection of Privacy Act* (FOIPPA), you may ask the Office of the Information and Privacy Commissioner to review any decision, act, or failure to act with regard to your request under FOIPPA.

Please note that you have 30 business days to file your review with the Office of the Information and Privacy Commissioner. In order to request a review please write to:

Information and Privacy Commissioner
PO Box 9038 Stn Prov Govt
4th Floor, 947 Fort Street
Victoria BC V8W 9A4
Telephone 250-387-5629 Fax 250-387-1696

If you request a review, please provide the Commissioner's Office with:

1. A copy of your original request;
2. A copy of our response; and
3. The reasons or grounds upon which you are requesting the review.

Freedom of Information and Protection of Privacy Act

[RSBC 1996] Chapter 165

Disclosure harmful to law enforcement

15 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm a law enforcement matter,

(b) prejudice the defence of Canada or of any foreign state allied to or associated with Canada or harm the detection, prevention or suppression of espionage, sabotage or terrorism,

(c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,

(d) reveal the identity of a confidential source of law enforcement information,

(e) reveal criminal intelligence that has a reasonable connection with the detection, prevention or suppression of organized criminal activities or of serious and repetitive criminal activities,

(f) endanger the life or physical safety of a law enforcement officer or any other person,

(g) reveal any information relating to or used in the exercise of prosecutorial discretion,

(h) deprive a person of the right to a fair trial or impartial adjudication,

(i) reveal a record that has been confiscated from a person by a peace officer in accordance with an enactment,

(j) facilitate the escape from custody of a person who is under lawful detention,

(k) facilitate the commission of an offence under an enactment of British Columbia or Canada, or

(l) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

(2) The head of a public body may refuse to disclose information to an applicant if the information

(a) is in a law enforcement record and the disclosure would be an offence under an Act of Parliament,

(b) is in a law enforcement record and the disclosure could reasonably be expected to expose to civil liability the author of the record or a person who has been quoted or paraphrased in the record, or

(c) is about the history, supervision or release of a person who is in custody or under supervision and the disclosure could reasonably be expected to harm the proper custody or supervision of that person.

(3) The head of a public body must not refuse to disclose under this section

(a) a report prepared in the course of routine inspections by an agency that is authorized to enforce compliance with an Act,

(b) a report, including statistical analysis, on the degree of success achieved in a law enforcement program unless disclosure of the report could reasonably be expected to interfere with or harm any of the matters referred to in subsection (1) or (2), or

(c) statistical information on decisions under the Crown Counsel Act to approve or not to approve prosecutions.

(4) The head of a public body must not refuse, after a police investigation is completed, to disclose under this section the reasons for a decision not to prosecute

(a) to a person who knew of and was significantly interested in the investigation, including a victim or a relative or friend of a victim, or

(b) to any other member of the public, if the fact of the investigation was made public.

Disclosure harmful to business interests of a third party

21 (1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of or about a third party,

(b) that is supplied, implicitly or explicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

(2) The head of a public body must refuse to disclose to an applicant information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

(3) Subsections (1) and (2) do not apply if

(a) the third party consents to the disclosure, or

(b) the information is in a record that is in the custody or control of the archives of the government of British Columbia or the archives of a public body and that has been in existence for 50 or more years.

The attached documents are provided based on the belief that the requestor wants information concerning changes to the Family Maintenance Enforcement Program (FMEP) use of retained counsel for court. To supplement the documents, an explanation of the range of maintenance enforcement actions, beyond those involving retained counsel, is provided here.

Administrative Enforcement

The Family Maintenance Enforcement Program (FMEP) issues a wide range of enforcement actions throughout BC as provided for in the Family Maintenance Enforcement Act (FMEA). FMEP has focused its resources on administrative enforcement since it was established in 1988.

The most frequently used administrative actions include the issuance of Notices of Attachment to collect funds from payor bank accounts, wages from employers, and income from other sources. The Family Orders and Agreements Enforcement Assistance Act (FOAEA) provides FMEP with the ability to attach federal monies owing to payors, such as income tax returns and Employment Insurance benefits, and suspend and prevent the issuance of federal licences and passports. FMEP has the authority to register maintenance orders against land and personal property and, where there is more than $3,000 in arrears owing, FMEP can instruct ICBC to refuse to issue driver's licences and motor vehicle licences. In addition, cases over $2,000 in arrears are reported to credit reporting agencies. All of these actions are taken wherever in BC the payor or recipient may reside.

Enforcement measures initiated through the Court process are only initiated by the FMEP on cases where administrative action has proven ineffective or where court enforcement is likely to result in the more effective payment of the maintenance. The percentage of cases where Court enforcement occurs is very low; in 2009 – 2010 only 3.8 percent of FMEP cases involved Court enforcement.

Court hearings

As a result of budget pressures, legal services delivered by contracted legal counsel were reduced in the 2010-2011 fiscal year. The decision was made to continue to utilise retained counsel for existing cases until concluded and to continue to retain counsel in areas not served by FMEP counsel to defend applications brought against the FMEP. FMEP staff lawyers continue to provide a wide range of legal services, including defending administrative enforcement actions that have been implemented and, where appropriate, seeking court-based enforcement through default applications and, if necessary, committal applications. Staff lawyers sometimes attend hearings outside their usual service areas (the lower mainland, Kamloops, and Victoria).

The decision to approve the initiation and attendance at hearings remains with FMEP Managers and is made on a case by case basis. There has been no change to the existing policy but a procedural directive was sent out in the email provided, dated April 6, 2010. Key messages were distributed to FMEP staff for the purpose of addressing situations where court enforcement is not made available.

Complaints process

The complaint resolution process for FMEP is outlined on the FMEP website (http://www.fmep.gov.bc.ca/) under Information and Forms in the information for the payors and recipients who are enrolled and in the Lawyer's Guide.

Anecdotally, Program staff is aware of 2 complaints relating to the retained counsel budget restrictions from April to November 2010.

Hannah Roots

From: Hannah Roots
Sent: Tuesday, April 06, 2010 2:33 PM
To: s.15(1)I
Subject: Our plan for 2010 - 2011

Good afternoon everyone,

Non Responsive

Legal Services

In the area of legal services, although there will be no reduction in the legal services staffing component of the FMEP, we will be making a significant cut in our retained counsel budget. We will now only use retained counsel in cases where we are defending applications brought against the FMEP. We will not be initiating any new Court applications in areas served by retained counsel, although existing cases will be continued until they are concluded.

We appreciate that this will mean a different level of service for cases that require legal services in areas not served by FMEP counsel, however this course of action preserves our legal resources as best we can, given the lack of sustained funding for the Program. We will have more information for you shortly about how we will manage cases affected by this reduction in services.

Non Responsive

Reduction in Retained Counsel – Key Messages for Recipients

I was told the next step would be taking the payor to court – why hasn't that been done?

We will not be proceeding with court action on your case at this time as currently all of our resources are being put into administrative enforcement.

Please be assured that the Enforcement Officer continues to review your case at regular intervals and at any time we receive new information for any possible administrative enforcement action to collect the maintenance that is owed to you. If at any time you have any new information concerning the payor's employment, assets or income, please let us know as this may help us better enforce your order.

Why don't you just take the payor to court?

We have very limited resources for court enforcement and it is our experience that the best results come from administrative enforcement. The Program will generally only consider court action against the payor if we are confident that the court process will be successful in recovering funds in a timely manner. Court action can take a very long time and there is no guarantee it will work.

Please be assured that the Enforcement Officer continues to review your case at regular intervals and at any time we receive new information for any possible administrative enforcement action to collect the maintenance that is owed to you. If at any time you have any new information concerning the payor's employment, assets or income, please let us know, as this may help us enforce your order.

VICTORIA ADMINISTRATION OFFICE
Box 5600, Victoria BC V8R 6S4 (250) 220-4034 • Fax (250) 220-4036

Family Maintenance Enforcement Program

Memorandum

Date: November 3, 2010

To: Chris Beresford

From: Hannah Roots

Subject: Interim Report – Impact of Staffing Reductions

BACKGROUND

Non Responsive

In addition Non Responsive and the FMEP has placed a moratorium on the initiation of all new court actions requiring the use of retained (contract) counsel. Non Responsive

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EVALUATING THE IMPACT OF THE 2010 CUTS

At the time that these latest cuts were implemented, the FMEP management team took a number of steps to make sure that data was being carefully collected to assist in the evaluation of the cuts. Both quantitative and qualitative information was recorded, with a view to enabling a thorough review of those impacts at regular intervals.

For this initial six month review, the FMEP reviewed the following areas:

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Court Enforcement – Retained Counsel Areas
- Number of cases affected by retained counsel moratorium;
- Case impact of retained counsel moratorium.

Court Enforcement – Non-Retained Counsel
- Number of cases where court enforcement initiated.

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SUMMARY OF FINDINGS

Non Responsive

Most notably, after six months, we are now seeing the following impacts:

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- A total of 115 cases where court action was not initiated due to the retained counsel moratorium with an estimated loss in collections on those files of over $449,000 in the first year of the moratorium;

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- A slight decrease in initiation of court enforcement in areas served by FMEP counsel, due to preparation time involved;

Non Responsive

COURT ENFORCEMENT

The area of enforcement where the impact of the cuts has been most evident is with respect to court enforcement. The number of new default hearings initiated has been significantly reduced (137 this year; 243 last year) as has the number of committal hearings (60 this year; 122 last year).

The moratorium on the use of retained counsel for new court enforcement is the most significant factor underlying this decrease. There has been a small decrease in new court work in areas served by FMEP counsel as well.

Impact of Retained Counsel Cutbacks
The moratorium on the use of retained counsel was initiated in early February, as, given time lags in court, process for cases going to court in April would normally be issued a number of months prior to that date.

Since that time, there have been 41 files identified by the s.15(1)a office where court process would normally have been started, had it not been for the moratorium. The s.15(1)a office identified 74 similar cases, for a total of 115 cases.

The FMEP has reviewed these cases, and has attempted to determine the long range impact of this measure.

The impact on collections in these cases can be measured by looking at the funds received on cases after an order to pay (OTP) is made by the Court. Currently, the average monthly payment on cases that pay is $430 - $460 per month. Payments may also be received prior to the case being heard, although this amount is harder to measure. On some cases the arrears, or a portion of the arrears are paid in order to avoid the hearing; on other cases a few hundred dollars may be paid as a condition of adjourning the case. For the purposes of this analysis, we have assumed that $500 would be received on each case.

Using this approach, we have estimated the forgone collections on these files as follows:

- $57,500 in pre-hearing collections (one-time loss for period leading up to hearing);
- $391,644 per year in lost OTP funds – assuming 2/3 of cases have an OTP that is being complied with.

Total forgone collections from these 115 cases therefore would amount to $449,144 over the first year of the moratorium.

In terms of the characteristics of these cases:

- Average arrears were $25,000;

- 1 in 4 cases had either never received a payment or received a payment of $1000 or less;
- s.15(1)a (20 cases), s.15(1)a (14 cases) and s.15(1)a (15 cases), are the Registries most affected by the moratorium;
- Most of these cases involve children under the age of majority;
- One-third of the cases are assigned cases.

In addition to the reduction in the number of new court actions in areas served by retained counsel, there is some evidence from the s.15(1)a office only that there may be a reduction in the number of cases being initiated in areas served by FMEP counsel. Because the number of court actions in many areas of the Province is influenced by factors such as a lack of court time, or the inability of the court bailiffs to effect service, it is too early to tell whether there will be a sustained decrease in this area.

There is, however, anecdotal evidence from all of the offices to suggest that enforcement officers are, at the very least, delaying the initiation of court enforcement since the amount of work required to prepare a file for court is significant.

This is another area that we will be monitoring closely.

Non Responsive

Non Responsive

CONCLUSIONS

Non Responsive

Many of the measures we looked at showed little or no change from last year. These included:

Non Responsive

However, as the paper has pointed out, in other areas, particularly with respect to administrative and court enforcement, the impact has been more noticeable. Court enforcement has been reduced as a result of the retained counsel moratorium and for the maintenance recipients affected, this may have a significant effect on the maintenance received.

Non Responsive

Changes to FMEP & Court Enforcement

- As of April 2010 there is a moratorium by FMEP on cases outside of Lower Mainland, Victoria & Kamloops on initiating new court cases
- Only for enforcement, will still go to court to defend actions
- Affects about 3.8% of cases in BC
- FOI with all this information is in the package

Moratorium Does Not Affect Administrative Enforcement

- This only affects taking payors to court for non-payment (the threat of jail)
- Enforcement will continue through:
  - attaching income tax returns,
  - EI payments,
  - suspension of federal licenses,
  - Passports,
  - drivers license's,
  - credit rating, and
  - registering liens against land and property

Collection Since Moratorium

- In 6 months after the moratorium 115 cases were not initiated,
  - Estimated loss of $449,000 not collected on behalf of recipients in the first year.
  - Average monthly payment is $430-460/monthly (payor is earning $45000-50000 with one child).
  - Average arrears were $25000.
  - 1 in 4 cases only 1 payment or no payment
  - Most cases involved still dependent children.
  - 1/3 of cases involved a payee on income assistance.
  - Only 2 complaints regarding lack of enforcement

Mothers Without Legal Status

- The YWCA has been advocating on Mothers without Status for about two years now.
- Minister of Education saying that children who are otherwise entitled to attend school, should not be prevented or made to pay international fees if their mother is without status, but leaving abuse

Mothers Without Status & Income Assistance

- Molly Harrington (Assistant Deputy Minister, MSD) stated that income assistance will be provided to Mothers Without Status if

1. She is leaving an abusive relationship;
2. She has documentation that she cannot remove child from Canada; and
3. She has applied to stay on Humanitarian & Compassionate Grounds

- Not yet a formal regulation

Nothing is in Writing… Yet

- Agreement was made between Ottawa and MSD that receipt of income assistance by women in this situation would not count against them with H&C applications.

- Immigration lawyers are (rightfully) very concerned with their clients collecting income assistance in these situations.

- One lawyer is following up with FOI's

Working with LSS Intake

February 2, 2012

Sherilyn Thompson
Provincial Supervisor, Legal Aid Applications
Tel: 604-601-6093

How to apply for legal representation?

- **Call** LSS Provincial Call Centre at 604-408-2172 in Greater Vancouver or 1-866-577-2525 (call no charge)

- **Come** into one of our Legal Aid offices (contact info available on our website www.legalaid.bc.ca.)

Our clients

Who qualifies?

A client qualifies for legal aid when:

1. The legal problem is covered by LSS; and
2. The client meets financial guidelines

Approved

What legal problems are eligible for coverage?

- **Criminal** – where charges are serious and jail is likely

Family Law

Child removal

Immigration

Financial Eligibility

Income chart(All case types)

Household Size	Monthly Net Income
1	$1,450
2	$2,030
3	$2,600
4	$3,170
5	$3,750
6	$4,330
7 or more	$4,920

Financial Eligibility
Personal Property (All case types)

Household Size	Exemption
1	$2,000
2	$4,000
3	$4,500
4	$5,000
5	$5,500
6 or more	$6,000

Appealing a refusal

- Client has right to appeal a refusal

- Coverage and financial eligibility reviews must be submitted within 30 days of being refused legal aid to:

Provincial Supervisor
Vancouver Regional Centre
400 – 510 Burrard Street
Vancouver, BC V6C 3A8
Fax: 604-682-0787

Working Together

You can help your clients:

- Understand the intake process
- Prepare for the interview
- Organize documentation
- Make sure they follow up and provide intake with requested info

More information

- Legal Services Society www.legalaid.bc.ca.
- Family Law in BC www.familylaw.lss.bc.ca

Presenter: Sherilyn Thompson
Provincial Supervisor, Legal Aid Applications

- Phone: 604-601-6093
- Fax: 604-682-0787
- Email: sherilyn.thompson@lss.bc.ca

Note: This is a draft that needs further review by a lawyer. Please do not rely on these materials as an accurate summation of the law without further review by a lawyer.

Date: October 24, 2011

MEMO: INDIGENT STATUS APPLICATIONS IN FAMILY LAW

By: Andrea Ryer on August 26, 2010, updated by Anna Cooper May 30, 2011, updated/edited by Amber Prince on November 15, 2011[1]

Introduction

The purpose of this memo is to examine the law relating to the granting of indigent status, especially with respect to divorce proceedings in British Columbia. This memo is prepared for Atira Women's Resource Society's legal advocacy program for use in assisting clients.

Women accessing the legal advocacy program often are representing themselves in family law matters, including family matters (such as divorce) in BC Supreme Court. The women accessing the legal advocacy program are primarily low-income women, impacted by violence and are often marginalized in other ways. Clients accessing the legal advocacy program, generally, cannot afford the filing fees associated with family matters in BC Supreme Court.[2]

The memo should not be relied on as legal advice by the program or clients accessing it, but as a general guideline on indigency law in BC. This is a general memo and cannot contemplate all eventualities. It is based on the law of British Columbia, as researched by authors in their respective capacities as of November, 2011.

Indigent Status

Indigent Status is the general terminology used to seek an order in court waiving certain court fees. While there are different processes for applying for indigency depending on the court in question, precedent interpreting the general meaning of indigency has been applied by Courts across these contexts.

The standard for indigence depends on the type of proceedings at issue. A rigid standard has applied in criminal cases (see *Director v. L.,* 2009 BCPC 293, para 11) [*Director*], for example in *R. v. Malik, 2003 BCSC 1439*, whereas the standard in civil cases is more flexible. In a recent decision (*British Columbia (Attorney General) v. T. L.,* 2010 BCSC 10*)*, the British Columbia Supreme Court approved a relaxed standard of indigence for the purposes of determining entitlement to state-funded counsel in child protection proceedings.

[1] At the time Andrea Ryer was a law student with Pro Bono Students Canada (UBC) volunteering her time with Atira. Anna Cooper was a law student with Pro Bono Students Canada (Toronto) with Atira through a Fellowship. Amber Prince is a legal advocate with Atira.

[2] At this time in BC there are no court filing fees in family provincial court.

An indigent status order is granted through an informal two part test, determining the financial situation of the applicant and the likelihood of the success of the appeal (discussed in detail below).

Where the Supreme Court Family Rules and the Supreme Court Civil Rules apply, an indigent status order may cover fees relating to all or part of the proceedings, a specific time period, or one or more particular steps in a proceeding. Furthermore, indigent status orders may be reviewed, varied or rescinded on application or on the court's own motion.

When and How to Apply

In order to avoid paying fees, it is advisable to file an indigent status application at the same time as filing the initial court forms such as a Notice of Family Claim. However, an application can be brought after proceedings have commenced. In such a case if indigency is found it will apply proactively; there will be no retroactive reimbursement for fees already paid. The necessary forms are available at the court registry, and there is no fee associated with filing for indigent status. In order to establish indigence, it is usually sufficient to provide evidence of income received through provincial social assistance, employment insurance, retirement or pension benefits, or disability benefits. Copies of income assistance statements, EI statements or other proof of income are generally required.

Applicable Legislation

As of July, 2010 the Supreme Court Rules were divided in to the Supreme Court Civil Rules and the Supreme Court Family Rules. Indigent Status Applications are made pursuant to Rule 20-5 in either set of Rules. While substantively similar there are differences between Rule 20-5 in the Supreme Court Civil Rules and the Supreme Court Family Rules so it is important to use the Rules appropriate to the case in question.

Types of Fees Waived

Rule 20-5 of the BC Supreme Court Family Rules provides that a person declared indigent by the court may not be required to pay the court fees as set out in Appendix B, Schedule 1 of the BC Supreme Court Rules. Schedule 1 fees (that can be waived) include:

> Correspondence, conferences, instructions, investigations or negotiations and preparation, filing and service of notice of family claim, response to family claim, counterclaim or response to counterclaim.[3]

[3] See BC Supreme Court Rules, Appendix B, Schedule 1, available online at: <http://www.bclaws.ca/EPLibraries/bclaws_new/document/LOC/freeside/--%20C%20--/Court%20Rules%20Act%20RSBC%201996%20c.%2080/05_Regulations/20_169_2009%20Supreme%20Court%20Family%20Rules/169_2009_05.xml#AppendixB—Costs>.

Fees payable under any other Schedule, i.e. under Schedule 2, 3 or 4 are not waived. Therefore even a person declared indigent by the courts cannot waive:

- The costs associated with the process for discovery and inspection of documents;
- The costs associated with preparation for and attendance at each examination for discovery;
- The costs associated with preparation for and attendance at each contested application;
- The costs associated with preparation for and attendance at each judicial case conference or settlement conference;
- The costs associated with preparation for and attendance at each uncontested application or trial management conference;
- The costs associated with preparation for and attendance at trial of family law case or of an issue in a family law case;
- The costs associated with preparation for and attendance at each examination in aid of execution and subpoena to debtor; and
- The costs associated with preparation for all process not otherwise provided for relating to execution on or enforcement of an order.[4]

These fees can be significant and can amount to a significant bar to access to the courts. This limitation was considered in *Pavlis v. HSBC Bank Canada* (2009 BCCA 309, para 17), where the court held that indigent status only permits an appellant to avoid paying court fees. The appellant must still pay the cost of ordering transcripts and preparing an appeal book and appeal record.

A finding of indigent status has been held to mean an appellant cannot be required to post security for costs (*J. (J.) v. Coquitlam School Distict No. 43,* 2010 BCCA 182, para 5). However, this is premised on the Court deeming that the claim is not bound to fail. If the original judge did not rule on the merits, or a later court deems the appeal is bound to fail, then indigent status does not preclude an order to post security for costs. (*Stewart v. Vancouver Police Department,* 2010 BCCA 432*, para 12*; *Toch v. Grove,* 2010 BCCA 351, para 26)

Varying an Existing Order

The Court has broad discretion under Rule 20-5 (1) of the BC Supreme Court Family Rules to grant or deny indigent status applications, making them difficult to appeal. Rule 20-5(4) also gives the court discretion to review, vary or rescind any order for indigent status, either on application or on its own motion. In *Loos v. Loos* (2007 BCSC 1317), the Court held that this discretion shall only be exercised rarely and only in the interest of justice. For example, an order might be varied if the original granting or refusal of indigent status was based on incorrect facts (para 3).

Two-Part Test for Determining Indigent Status

The court examines two criteria in determining whether to grant indigent status:

[4] See Schedules 2-9 of Appendix B to the BC Supreme Court Rules, *supra* note 2.

1. the financial position of the appellant; and
2. the likelihood of success of the appeal.
   (*Duszynska v. Duszynski* 2001 BCCA 155, affirmed in *Rapton v. British Columbia (Motor Vehicles)* 2011 BCCA 71 [*Rapton*]).

The key concern of the Court is ensuring "that no arguably meritorious case is prevented from securing a hearing merely because a person is without the financial resources to carry on with the litigation" *(Mahmoodi v. Irankhah*, 2008 BCCA 512, para 11 [*Mahmoodi*]).

Part One: Financial Position of the Appellant

The first part of the test relates to the financial circumstances of the applicant. The key question here is "whether the applicant's financial situation is such that requiring him to pay the fees would deprive him of the necessaries of life or effectively deny him [or her] access to the courts" (*Ancheta v. Ready*, 2003 BCCA 374 at para 7; *Rapton; Director*, para 27)). In other words, is indigent status necessary for the applicant to continue with court proceedings?

Rule 20-5 (3)(c) asks the applicant to provide one of two forms of evidence regarding their financial status. Firstly, the applicant can provide proof they receive benefits under the *Employment and Assistance Act* or the *Employment and Assistance for Persons with Disabilities Act*. This alone is typically sufficient to pass part one of the test. Similarly when parties meet the test for legal aid coverage they will generally meet the definition for indigence (*Director,* para 19). Otherwise, the applicant must submit an affidavit in support of their application for indigency status (Form F86). The following factors have been taken in to account in determining whether an applicant is, in fact, "indigent":

> An applicant need not be "destitute or homeless" to successfully make an application. An indigent person does not have to be without means, but "of such scanty means that he [or she] is needy and poor" (*National Sanitarium Association v. Town of Mattawa,* 1925, O.J. No. 153 (C.A.) (QL); *Griffith v. House*, 2000 BCCA 371, paras 3-4; *Mahmoodi* at para 15, *Jenson v. Jackman*, 2010 BCCA 6, para 15, *Director,* para 27).
>
> Not qualifying for legal aid does not necessarily mean a party is not indigent (*British Columbia (Attorney General) v. T.L.,* 2010 BCSC 105).
>
> A person with regular employment can be considered indigent if, for example, other obligations such as spousal or child support make it impossible to afford the court fees. (*De Fehr v. De Fehr,* 2001 BCCA 485, para 16; *Mahmoodi* at para 16).
>
> If unemployed, the court may take in to account the person's ability to find employment (*M.J.D. v J.P.D.* 2001 BCCA 155 (Canlii), paras 9-11 and *Mahmoudi* at para 17).

An intention to proceed with the appeal whether granted indigent status or not may hurt the application for indigency. Specifically, "[a] low likelihood of success plus, intent to proceed whether granted indigent status or not, can equal no indigent status" (*Calf v. British Columbia (Securities Commission),* 2000 BCCA 64 at para. 5; *Mahmoudi* at para 17)

The courts may refuse an indigent status application if they feel a full and complete disclosure of financial circumstances has not been made, as was the case in *Mahmoodi v. Irankhan* (para 21).

It is important to have concrete evidence regarding financial circumstances, for example regarding earning capacity, or the way in which health issues make an applicant unemployable (*Mahmoudi* at para 19).

Part Two: The Merit of the Case

The second part of the test, the likelihood of success of the appeal, relates to the merit of the case. Even when an applicant is indigent, the Court may refuse to grant indigent status where it considers a claim or defence:

(1) discloses no reasonable claim,
(2) is scandalous, frivolous or vexatious, or
(3) is otherwise an abuse of the process of the court.
(Rule 20-5 (1))

The following cases illuminate the meaning of these terms in an application for indigency:

Disclosing no reasonable claim:

If an appeal is "bound to fail" or is without reasonable basis or reasonable prospect of success, indigent status will not be granted (*Kohlmaier v.* Campbell 2003 BCCA 61, *Mahmoodi* para 5, *Jenson* para 18). This means it is necessary for the Court to make some judgment about the merits of an appeal, although this is to be avoided where possible (*Weber v. British Columbia (Ministry of Social Services)*, 1997, 86 BCCA 70, para 5). For this reason, it will likely be more difficult to secure indigent status in cases that are unusual or without solid precedent.

Vexatious:

Section 18 of the BC *Supreme Court Act* defines a vexatious proceeding as one where the court is satisfied that a person has habitually, persistently and without reasonable grounds, instituted vexatious legal proceedings in the Supreme Court or in the Provincial Court against the same or different persons. Also in such a case the court may, after hearing that person or giving him or her an opportunity to be heard, order that a legal proceeding must not, without leave of the court, be instituted by that person in any court.

The BC Supreme Court Family Rules (Rule 11-2) also provides that a court may strike out any petition, pleading or other document from court if deemed "unnecessary, scandalous, frivolous or vexatious." The court may additionally dismiss the application entirely and order costs, including special costs against the applicant.

Abuse of Process:

The concept of "abuse of process" is not set out explicitly in the BC *Supreme Court Act* but is set out in Rule 11-2 of the BC Supreme Court Family Rules. Per Rule 11-2 the court has the same powers as in vexatious pleadings to strike a pleading or document, or dismiss an application entirely. Abuse of process has also been discussed at common law in a variety of cases.

In *Jensen v. Jackman*, *2010 BCCA 6*, the Court denied an individual indigent status on the basis that her application for leave amounted to an abuse of process as it did not meet the minimum requirements for pleadings. While willing to give some leniency on account of the applicant being self-represented, the Court deemed that the applicant had failed to "satisfy the function of pleadings at all" (para 26).

In *British Columbia Mental Health Society (c.o.b. Riverview Hospital) v. Louis, 1998 BCJ No.* 1286) [*Louis*] the Court found that the complex history of the proceedings amounted to an abuse of process and denied indigent status. They felt that the defendant "refuse[s] to participate in our court process on anyone's terms but his own" (para 27).

Cases with a long procedural history:

In cases with a long procedural history the Court may look at that history in order to determine whether the current action is scandalous, frivolous, vexatious or otherwise an abuse of the process of the court (*Louis*).

Indigency and Family Law

Indigency in Child Protection Cases

In a recent decision (*British Columbia (Attorney General) v. T. L., 2010 BCSC 10)*, the British Columbia Supreme Court approved a relaxed standard of indigence for the purposes of determining entitlement to state-funded counsel in child protection proceedings. In this case the fact there was no reasonable way for the parents to afford counsel factored in to the indigency determination despite the fact they did not qualify for legal aid. The parents had some assets, although they also had some significant debts. The Court held that the term indigence connotes a level of poverty in which significant hardship and deprivation exists, but it does not require the lowest level of poverty.

The key indicia are whether there exists any reasonable means for the applicant to meet the expense. The meaning given to indigence here is consistent with that applied in other civil cases, including divorce cases. The decision in *T. L*. applies directly to child protection cases and has significant constitutional support, since the Supreme Court held that legal representation in child protection proceedings is a constitutional right. See e.g. N*ew Brunswick (Minister of Health and Community Services) v. G.(J.)* (1999), 177 D.L.R. (4th) 124 (S.C.C.).

While legal representation and access to the courts in child protection cases is considered a constitutional right, the law with respect to other family law matters is less clear. Recently the Canadian Bar Association challenged the constitutionality of lack of legal aid and access to the courts in civil matters including family law (*Canadian Bar Assn v. British Columbia* (2006) BCSC 1342 (Canlii)). Clarity was not obtained as the case was dismissed for lack of standing. The BC Court of Appeal upheld the decision (2008 BCCA 92 (Canlii)).

Indigence in Family Law cases

As indicated earlier, the rule provides that if, on application before or after the commencement of family law proceedings, the court finds that a person is indigent, then it *may* order that no Schedule 1 fee is payable to the Crown by the applicant. The use of the word *may* suggests the Courts, per Rule 20-5 have fairly broad discretion to refuse an indigent status application.

A factor relevant to the granting of indigent status in family law proceedings is whether the granting of status will give one party an unfair advantage. In *Mahmoodi* the British Columbia Court of Appeal held that a rigid approach to indigent status applications is unwarranted, but cited *Trautmann v. Baker* (*1997, B.C.J. No. 452 (C.A.)*) in stating that the court "should be mindful of the possibility that indigent status might give one party an unfair advantage" (para 11). They reiterated an access to justice standard, noting that "no arguably meritorious case should be prevented from securing a hearing merely because a person is without the financial resources to carry on with the litigation" (para 11).

Assuming that a family law litigant meets the financial test for indigent status. The question becomes: What is an arguably meritorious case?

In *Jong v. Jong* (2002) BCCA 322 (Canlii) the court denied indigent status on the basis that the appellant's pleadings were "vague and unhelpful" suggesting she was simply unhappy with the result of her family law case rather than having a meritorious case. Interestingly, the court in this case also took into account the fact that indigent status is limited in scope, and that the appellant would still be unable to pay costs associated with case even if indigent status were granted:

> She would still be required to prepare and file an appeal record, transcripts, and appeal books, which, for a twelve-day trial, would represent a substantial expense far beyond her means as disclosed on the evidence filed on this application (para 11).

The inability of a litigant to bear the expenses of a case, even if granted indigent status was a factor in the court's determination that the appellant's case was "bound to fail."

In *De Fehr* the court was satisfied that evidence in the form of email exchanges between the trial judge and court staff was sufficient to indicate the case had merit on appeal.

Divorce Proceedings

The case law on indigent status on family law matters generally pertains to appeals of family law decisions. In those cases the courts are conducting a preliminary assessment to determine whether, on appeal, the case has merit or is bound to fail. What is not clear from a review of these cases is whether a litigant who meets the financial criteria for legal aid, ought to be granted indigent status in order to obtain a divorce.

Obtaining a divorce is generally a matter of course so long as the requisite amount of time has passed, and the proper court forms/pleadings are made, filed and served. Therefore it would be unlikely that a divorce would be without merit or bound to fail. Yet anecdotal evidence from advocates is that self-represented litigants have been denied indigent status in divorce cases even where it is clear that the litigants meet the financial criteria.[5]

Violence

Whether violence in relationships is a factor to be considered in indigent status applications, has not been considered in the cases searched and reviewed. It would appear that whether the threat of violence is considered a relevant factor in favor of granting indigent status is yet to be determined.

Violence in relationships has been considered a relevant factor in the provision of state-funded counsel in some family law matters in British Columbia. For example, the BC Legal Services Society (legal aid) provides limited assistance to low-income individuals in circumstances where the applicant is a victim of relationship violence or is at risk of violence and likely needs a physical restraining order to protect her safety.[6] However, it remains to be seen how the courts would consider an indigent applicant in a family law matter where violence is an issue and the matter is not covered by legal aid.

Costs

[5] For example, this has been the experience of the Legal Advocacy Program at Atira as well as other advocates throughout BC as discussed in advocate forums such as Povnet, www.povnet.org

[6] The vast majority of violence in relationships is perpetrated by men against their women partners. See e.g. Department of Justice Canada, "Family Violence Initiative (2008), online: http://www.justice.gc.ca/eng/pi/fv-vf/about-aprop/.; Statistics Canada, "Family Violence: A Statistical Profile" (2009), online: http://www.statcan.gc.ca/pub/85-224-x/2009000/aftertoc-aprestdm2-eng.htm

Where indigent status has already been obtained the other party/their counsel may still attempt to seek court costs from the indigent litigant. This issue was recently considered in *H.D. v. P.D.* 2009 BCSC 1218 (Canlii). In this case opposing counsel sought costs from the indigent litigant, P.D. While P.D. had counsel assisting her that day, she was self-represented. Opposing counsel argued that P.D. should have been ordered to pay costs for making an inappropriate application.

In considered costs, the court considered it significant that P.D. was indigent, as well as well as self-represented:

> … we are in the unfortunate situation where legal aid, I am advised, has been discontinued for a broad class of people who will now be denied access to legal counsel. That is unfortunate in the extreme. The reality is that Ms. [D] is indigent and I'm not prepared to make an order of costs against her under these circumstances (para 14).

It remains to be seen whether factors such as cuts to legal aid – especially in family law matters will continue to play a role in indigency applications/status. It also remains to be seen whether the decision in *H.D. v. P.D.* would support the consideration of other social context factors – such as violence – in indigency applications/status in family law cases.

Search History for Memo

Search History, conducted by Andrea Ryer, August 2010:

Westlaw:
indigen! & divorce, BC, <3 years, 14 results.
indigen! & divorce, SCC. 8 results.
indigen!, BC, <3years, 99 results.
indigen! %indigenous, BC, <3 years, 73 results.
indigen! & abuse, 374 results
indigen! & violence, 216 results
indigen! %indigenous & violence, 104
indigen! %indigenous & violence, BC, <3 years, 99
indigen! %indigenous & violence & divorce, BC, 1
indigen! %indigenous & violence & divorce, 6

Search History, conducted by Amber Prince, November, 2011

Canlii:
"Indigent Status" and divorce = 44 results
"Indigent Status" and family = 115 results

Google:
"Indigent Status" and family law and BC = 873 results (top 15 results reviewed)

JP Boyd's Family Law Resource
www.bcfamilylawresource.com

How do I

apply for indigent status in the Supreme Court?

"Indigent" means being broke, *flat* broke.

The court registry charges certain fees for a whole host of common court activities, such as for filing court materials (like pleadings and applications), photocopying and making applications to a judge. Some of these fees can be quite high and become a barrier to someone seeking justice. These fees are set out in Appendix C of the Supreme Court Family Rules.

Rule 20-5, however, allows the court to waive all or some of these fees for all or some of a court action on proof that you are indigent. You must make application for a finding that you are indigent.

Making the Application

Most people seek indigent status at the same time that they're filing a Notice of Family Claim, or a Response to Family Claim and Counterclaim. The point, of course, is to avoid the associated filing fees.

The court registry will have blanks of the forms you need to fill out. You will need a **Requisition** in Form F17 and an **Affidavit** in Form F86. The Affidavit will require you to describe the amount and sources of your income, your monthly expenses, your job skills and your eduction.

Since this application falls outside of Schedule 1, no fees are payable. If you file before 10:00am, the registry will likely send you before a judge that morning, otherwise you may have to wait for the next day chambers is held. You do not have to give notice to the other side of your intention to make this application.

When your application is called, you'll have to make your pitch to the master or judge, supported by your Affidavit, about why it is that you can't afford the court fees. Living on welfare, Employment Insurance, Old Age Security or CPP benefits is usually enough; it will be helpful if you can provide copies of your welfare statements, EI statements or other evidence to prove your income.

If the court grants your application, you can then go back

to the registry and file your pleadings — and all future materials — free of charge. If the court doesn't allow your application, well, you'll have to pay and that's that.

Exceptions to the Rule

It is important to know that the court has an unlimited discretion to grant or refuse applications for indigent status. More importantly, even if you are broke, Rule 20-5(1) sets out three specific grounds for the court to refuse your application:

1. if your claim is unreasonable, or if your defence to the Claimant's claim is unreasonable;
2. if your claim is "scandalous, frivolous or vexatious;" or,
3. if your claim or defence is, for any other reason, an "abuse of the process of the court."

In other words, if you're one of those people who spends their time suing the Queen, the Prime Minister, the Premier, the Attornies General, and all and sundry, you can expect that your application will be turfed. If your claim is legitimate and well-founded, and you meet the general criteria for indigency, you should expect to be awarded indigent status.

This information is provided by
JP Boyd's BC Family Law Resource
www.bcfamilylawresource.com

Supreme Court — If you can't afford to pay court fees

How to get an indigency order

Intro

Before you begin applying for an indigency order

What does an indigency order cover?

Do I need an indigency order?

What is indigency?

What is the law about indigency?

How do I prove to the court that I'm indigent?

What else does the judge or master consider in deciding whether to make an indigency order?

What will the order cover?

Do I have to pay filing fees to apply for an indigency order?

Who can help me prepare my application?

What does an indigency order cover?

An indigency order allows you to file court documents and to attend hearings without paying court filing fees. Exempted fees include *only* those listed in Appendix C of the Supreme Court Family Rules.

An indigency order doesn't cover any other costs, such as court transcripts or lawyers' fees.

Do I need an indigency order?

Before you begin this application, make sure you really need an indigency order. For some procedures, the court filing fees may be minimal. For example, the fee for filing a response is $25.

To find out if you need to pay a fee to the court registry for filing a document, see Appendix C of the Supreme Court Family Rules for a list of all court fees or telephone your local court registry.

What is indigency?

A BC case called *Munro v. Stewart* defines the meaning of "indigency." In that case, the judge said the word *indigent*" doesn't mean a person without means, namely a pauper, but a person possessed of some means but such scanty means that he is needy and poor." In other words, an "indigent" is someone with a low income.

What is the law about indigency?

Governments have long recognized that a person shouldn't be denied access to court because he or she can't afford court fees. The law about applying to court to allow you to file court documents without paying fees is found in the Supreme Court Family Rule 20-5. The law says:

a. "(1) If the court, on application made in accordance with subrule (3) before or after the start of a family law case, finds that a person receives benefits under the *Employment and Assistance Act* or the *Employment and Assistance for Persons with Disabilities Act* or is otherwise indigent, the court may order that no fee is payable by the person to the government under Appendix C in relation to the family law case unless the court considers that the claim or defence

(a) discloses no reasonable claim or defence, as the case may be,

(b) is scandalous, frivolous or vexatious, or

(c) is otherwise an abuse of the process of the court."

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How do I prove to the court that I'm indigent?

There are two ways to show a judge or master of the court that you're indigent. If you receive benefits under the Employment and Assistance Act or the Employment and Assistance for Persons with Disabilities Act, you just need to file documents that prove you're receiving those benefits.

If you're not receiving those benefits, you must file an Affidavit in Support of Indigent Application (Form F86). This form sets out information about your income, expenses, assets, and debts, as well as about your past or future employment, education status, and workplace skills. You can follow the step-by-step instructions in this guide when filling out an Affidavit in Support of Indigent Application (Form F86).

What else does the judge or master consider when deciding whether to make an indigency order?

If you're indigent, the judge/master will consider whether the claim or response you want to file is reasonable or whether it's frivolous, vexatious, or an abuse of the court process.

To decide this, the judge/master must see a copy of the document(s) you want to file without paying fees. Usually this includes one or more of the following:

- a Notice of Family Claim (Form F3),
- a Response to Family Claim (Form F4),
- a Counterclaim (Form F5), or
- a Notice of Application (Form F31) with supporting affidavits.

In deciding whether a claim or response is **reasonable**, the judge/master will apply what is called the "plain and obvious" test. All the facts contained in your document(s) are assumed to be true. The judge/master then decides whether those facts show a reasonable basis for a claim or response. That is, does your claim or response have some chance of success? If you have no chance of success, the judge/master won't grant you indigent status.

The judge/master will also consider whether your claim or response is **frivolous** or **vexatious**. A court has said that a lawsuit is frivolous when the party who started it's said to be trifling with the court or wasting the court's time, or when the lawsuit can't be won by a reasonable legal argument.

A lawsuit is vexatious if the party starting it isn't acting in good faith, and wants to embarrass and annoy the other party. For example, someone who keeps bringing the same lawsuit to court over and over again without success may be doing so just to annoy the other side. If that person applied to the court for indigent status, he or she might be denied the indigency order.

If a judge/master decides that your claim or defence involves an **abuse of process**, he or she will deny your application for indigent status. An abuse of process happens when someone:

- deceives the court;
- doesn't use the court process fairly and honestly, or uses it for an improper purpose;
- starts a proceeding that has no foundation or serves no useful purpose; or
- starts multiple or repeated proceedings that cause "vexation or oppression."

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What will the order cover?

You can ask the court for an order that will excuse you from paying court fees:

- for the whole case (this will cover filing, hearing, and other fees listed in Schedule C);

- for certain steps of the case (for example, to file a particular document);
- for a certain period of time; or
- for any part of the case.

Do I have to pay filing fees to apply for an indigency order?

You don't have to pay any filing fees to apply for an indigency order.

The judge/master can order that you don't have to pay filing fees for the whole case, for a single step, for certain steps, or for a set amount of time.

If your financial circumstances change, the judge/master can revoke an order granting indigent status. If that happens, you'll have to pay filing fees for any new documents that need to be filed.

So, unless an order is made to revoke your indigent status or the indigency order is limited in some way, you won't need to apply to court again to avoid paying filing fees every time you have to file a new document.

Who can help me prepare my application?

If you can't afford a lawyer, there are other ways to get legal help, including the Lawyer Referral Service, pro bono (free) clinics, family duty counsel, or advice lawyers.

In Vancouver, the Justice Access Centre's Self-Help and Information Services can also answer your questions and help you fill out forms. See Who can help? for more information.

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A document that contains facts that you swear under oath or affirm to be true. A lawyer, notary public, or commissioner of oaths must witness your signature and sign your affidavit.
The document that starts a family law case. It sets out information about the claimant and respondent, their relationship, and the final orders the claimant wants. If you are applying jointly with your spouse for a divorce, you would use a Notice of Joint Family Claim (Form F1). Under the old Supreme Court Rules, the documents used to start an action were the Writ of Summons and Statement of Claim.
In Supreme Court proceedings, a document that the respondent must complete and file if he or she wants to respond to the claimant's Notice of Family Claim (Form F3). Under the old Supreme Court Rules, this was called the Statement of Defence.
The form a respondent can use to start his or her own claim when responding to a Notice of Family Claim (Form F3) in Supreme Court. It provides information about the parties, details of the marriage (relationship) and separation, and details of the order the respondent/counterclaimant wants. In Provincial Court, the Counterclaim and the Reply are part of the same form. In Supreme Court, the Counterclaim (Form F5) and Response to Counterclaim (Form F6) are separate forms.

A document that tells the judge/master and the other party what type of non-final or change order an applicant is asking for, what evidence he or she will use to support the application, what the legal basis is for the order being requested, and how long the applicant thinks the hearing will take. Under the old Supreme Court Rules, this was called a Notice of Motion.

INDIGENCY APPLICATIONS

A party who alleges he or she is unable to pay court fees may apply for an order relieving them of the obligation to pay the fees to the government. The court must find that the person is "indigent" according to the law and that the claim proposed to be made is a reasonable one. An indigency order covers the fees set out in Schedule 1 of Appendix C to the Supreme Court Civil and Supreme Court Family Rules. An indigency order does not cover the costs of transcripts as those fees are payable to the private company that you choose to prepare the transcript.

Supreme Court Civil Rule 20-5 and Supreme Court Family Rule 20-5 are the rules specific to applications for indigent status.

Included in this package are;

1) Supreme Court Civil Rule 20-5 – Persons Who are Indigent
2) Civil Form 17 – Requisition
3) Civil Form 79 – Order for Indigent Status
4) Civil Form 80 – Affidavit in Support of Indigent Application
5) Supreme Court Family Rule 20-5 – Persons Who are Indigent
6) Family Form F17 – Requisition
7) Family Form F85 – Order for Indigent Status
8) Family Form F86 – Affidavit in Support of Indigent Application

Rule 20-5 — Persons Who Are Indigent

Court may determine indigent status

(1) If the court, on application made in accordance with subrule (3) before or after the start of a proceeding, finds that a person receives benefits under the *Employment and Assistance Act* or the *Employment and Assistance for Persons with Disabilities Act* or is otherwise indigent, the court may order that no fee is payable by the person to the government under Schedule 1 of Appendix C in relation to the proceeding unless the court considers that the claim or defence

(a) discloses no reasonable claim or defence, as the case may be,

(b) is scandalous, frivolous or vexatious, or

(c) is otherwise an abuse of the process of the court.

[am. B.C. Reg. 119/2010, Sch. A, s. 34 (a).]

Application of order

(2) An order under subrule (1) may apply to one or more of the following:

(a) a proceeding generally;

(b) any part of a proceeding;

(c) a specific period of time;

(d) one or more particular steps in a proceeding.

How to apply

(3) An application under subrule (1) may be made by filing

(a) a requisition in Form 17,

(b) a draft of the proposed order in Form 79, and

(c) an affidavit in Form 80.

[am. B.C. Reg. 95/2011, Sch. A, s. 10.]

Review, variation or rescission of order

(4) On application or on the court's own motion, the court may review, vary or rescind any order made under subrule (1) or (2).

No fee payable

(5) Despite anything in this rule, if the court makes an order in relation to a person under this rule, no fee is payable by the person to the government under Schedule 1 of Appendix C in relation to

(a) the proceeding,

(b) the part of the proceeding,

(c) the period of time, or

(d) the steps

to which the order applies.

[am. B.C. Reg. 119/2010, Sch. A, s. 34 (b).]

Form 17

No. .....
..... Registry

In the Supreme Court of British Columbia

Between

Plaintiff(s)

and

Defendant(s)

REQUISITION – GENERAL

Filed by: .....
[party(ies)]

Required: Order for indigency

This requisition is supported by the following:

[Include a description of supporting document(s). Each affidavit included on the list must be identified as follows: "Affidavit # ...*[sequential number, if any, recorded in the top right hand corner of the affidavit]*... of .....*[name]*....., made .....*[dd/mmm/yyyy]*....."*.]*

1. Form 79 – Order for Indigent Status

2. Form 80 – Affidavit in Support of Indigent Application, Affidavit #..... of

....., made .....

Date: .....

.....
Signature of
☐ filing party ☐ lawyer for filing party(ies)

.....
[type or print name].

Form 79

No. .....
..... Registry

In the Supreme Court of British Columbia

Between

Plaintiff(s)

and

Defendant(s)

ORDER FOR INDIGENT STATUS

BEFORE	) THE HONOURABLE JUSTICE .....)) or)) MASTER .....)	.....day, the ..... day of ....., 20.....

ON THE APPLICATION of .....
[name]

[add, if applicable, coming on before me on ..... and on
[dd/mmm/yyyy]

hearing ..... and
[name of party/lawyer]

.....*]*;
[name of party/lawyer]

THIS COURT ORDERS that no fee is payable by .....
[name of person]

to the government under Schedule 1 of Appendix C in relation to this proceeding subject to the following:

.....

.....;

[OR]

THIS COURT ORDERS that no fee is payable by .....
[name of person]

to the government under Schedule 1 of Appendix C in relation to

- ☐ this proceeding
- ☐ the following part(s) of this proceeding: .....

  .....
- ☐ this proceeding during the following period(s): .....

  .....
- ☐ the following steps in this proceeding: .....

  .....

subject to the following: .....

.....

..... .

By the court

.....
Registrar

Form 80

This is the ..... affidavit
of ..... in this case
and was made on .....

No. .....
..... Registry

In the Supreme Court of British Columbia

Between

Plaintiff(s)

and

Defendant(s)

AFFIDAVIT IN SUPPORT OF INDIGENT APPLICATION

I, ..., of .....,
[name] *[address]*

....., SWEAR (OR AFFIRM) THAT:
[occupation]

1. I am the ..... in this proceeding.
[party]

2. I make this affidavit in support of my application for an order that I be declared indigent with respect to the payment of fees set out in Schedule 1 of Appendix C of the Supreme Court Civil Rules.

3. I am ..... years old.

4. I have the following dependants: *[List all the dependants in the household.]*

.....

.....

.....

5. The following persons contribute to my household expenses: *[List all in the household who contribute to expenses.]*

   .....

6. I am ☐ employed ☐ unemployed.

7. Attached as Exhibit A is *[Check whichever one of the following boxes is correct and attach the required exhibit.]*

   ☐ a financial statement that accurately sets out the monthly income, expenses and assets of my household.

   ☐ proof that I receive benefits under the *Employment and Assistance Act* or the *Employment and Assistance for Persons with Disabilities Act.*

8. Attached as Exhibit B is an accurate description of my educational and employment history.

9. Attached as Exhibit C is an accurate description of my workplace skills.

10. Attached as Exhibit D is a copy of the document I wish to file or with which I wish to proceed.

SWORN (OR AFFIRMED) BEFORE)
ME at ....., British Columbia)
on ..... .) .....
)
)
.....)
A commissioner for taking)
Affidavits for British Columbia)

..*[print name or affix stamp of commissioner]*..

This is Exhibit A referred to in the affidavit of ....., sworn (or affirmed) before me on .....

.....
A commissioner for taking affidavits for British Columbia

FINANCIAL STATEMENT

ESTIMATE NET MONTHLY INCOME

[Attach proof – i.e. most recent pay stubs or payment advice, etc., if available.]

Estimated net monthly income from all sources:

Employment	$.....
Pension	$.....
Dividends	$.....
Interest	$.....
Other	$.....
TOTAL (Estimated net monthly income)	$.....

ESTIMATED MONTHLY EXPENSES

[Attach receipts for the following, if available.]

Estimated monthly expenses related to housing	$.....
Estimated monthly expenses related to transportation	$.....
Estimated monthly expenses related to household expenses	$.....
Estimated monthly expenses related to medical and dental expenses	$.....
Estimated monthly expenses related not included in above, related To dependent children	$.....
Estimated monthly debt payment *[specify]*.....	$.....
Estimate of other monthly expenses *[specify]*.....	$.....
TOTAL (Estimated monthly expenses)	$.....

ASSETS

[Specify assets and set out their estimated value.]

.....	$.....
.....	$.....
.....	$.....
.....	$.....
.....	$.....
TOTAL (Estimated asset values)	$.....

This is Exhibit B referred to in the affidavit of ....., sworn (or affirmed) before me on .....

.....
A commissioner for taking affidavits for British Columbia

EDUCATIONAL AND EMPLOYMENT HISTORY

[Set out details of education and employment history.]

1. Highest level of education attained and date completed:

.....

.....

.....

2. Employment history:

Employer	Dates	Position
.....	.....	.....
.....	.....	.....
.....	.....	.....

This is Exhibit C referred to in the affidavit of ....., sworn (or affirmed) before me on .....

.....
A commissioner for taking affidavits for British Columbia

WORKPLACE SKILLS

[specify]

.....

.....

.....

Rule 20-5 — Persons Who Are Indigent

Court may determine indigent status

(1) If the court, on application made in accordance with subrule (3) before or after the start of a family law case, finds that a person receives benefits under the *Employment and Assistance Act* or the *Employment and Assistance for Persons with Disabilities Act* or is otherwise indigent, the court may order that no fee is payable by the person to the government under Schedule 1 of Appendix C in relation to the family law case unless the court considers that the claim or defence

(a) discloses no reasonable claim or defence, as the case may be,

(b) is scandalous, frivolous or vexatious, or

(c) is otherwise an abuse of the process of the court.

[am. B.C. Reg. 119/2010, Sch. B, s. 24 (a).]

Application of order

(2) An order under subrule (1) may apply to one or more of the following:

(a) a family law case generally:

(b) any part of a family law case;

(c) a specific period of time;

(d) one or more particular steps in a family law case.

How to apply

(3) An application under subrule (1) may be made by filing

(a) a requisition in Form F17,

(b) a draft of the proposed order in Form F85, and

(c) an affidavit in Form F86.

[am. B.C. Reg. 95/2011, Sch. B, s. 5.]

Review, variation or rescission of order

(4) On application or on the court's own motion, the court may review, vary or rescind any order made under subrule (1) or (2).

No fee payable

(5) Despite anything in this rule, if the court makes an order in relation to a person under this rule, no fee is payable by the person to the government under Schedule 1 of Appendix C in relation to

(a) the family law case,

(b) the part of the family law case,

(c) the period of time, or

(d) the steps

to which the order applies.

[am. B.C. Reg. 119/2010, Sch. B, s. 24 (b).]

Form F17

Court File No.: .....
Court Registry: .....

In the Supreme Court of British Columbia

Claimant:

Respondent:

REQUISITION

Filed by: .....
[party(ies)]

Required: Order for indigency

This requisition is supported by the following:

[Include a description of supporting document(s). Each affidavit included on the list must be identified as follows: "Affidavit # ...*[sequential number, if any, recorded in the top right hand corner of the affidavit]*... of .....*[name]*....., made .....*[dd/mmm/yyyy]*....."*.]*

1. Form 79 – Order for Indigent Status

2. Form 86 – Affidavit in Support of Indigent Application, Affidavit #..... of

   ....., made .....

Date: .....

.....
Signature of
☐ filing party ☐ lawyer for filing party(ies)

.....
[type or print name]

Court File No.: .....
Court Registry: .....

In the Supreme Court of British Columbia

Claimant:

Respondent:

ORDER FOR INDIGENT STATUS

	) THE HONOURABLE JUSTICE .....)	.....day, the
BEFORE	) or)	..... day of
	) MASTER .....)	....., 2010

ON THE APPLICATION of .....
[name]

[add, if applicable, coming on before me on ..... and on hearing
[dd/mmm/yyyy]

..... and
[name of party/lawyer]

.....*]*;
[name of party/lawyer]

THIS COURT ORDERS that no fee is payable by .....
[name of person]

to the government under Schedule 1 of Appendix C of the Supreme Court Family Rules in relation to this family law case subject to the following:

.....

.....;

[OR]

THIS COURT ORDERS that no fee is payable by .....
[name of person]

to the government under Schedule 1 of Appendix C of the Supreme Court Family Rules in relation to

☐ this family law case

- ☐ the following part(s) of this family law case: .....
- ☐ this family law case during the following period(s): .....
- ☐ the following steps in this family law case: .....

subject to the following: .....

.....

.....

By the court

.....
Registrar

Form F86

This is the ..... affidavit
of ..... in this case
and was made on .....

Court File No.: .....
Court Registry: .....

In the Supreme Court of British Columbia

Claimant:

Respondent:

AFFIDAVIT IN SUPPORT OF INDIGENT APPLICATION

I, ..., of .....,
[name] *[address]*

...., SWEAR (OR AFFIRM) THAT:
[occupation]

1. I am the ..... in this family law case.
[party]

2. I make this affidavit in support of my application for an order that I be declared indigent with respect to the payment of fees set out in Schedule 1 of Appendix C of the Supreme Court Family Rules.

3. I am ..... years old.

4. I have the following dependants: *[List all the dependants in the household.]*

.....

.....

.....

5. The following persons contribute to my household expenses: *[List all in the household who contribute to expenses.]*

.....

6. I am ☐ employed ☐ unemployed.

7. Attached as Exhibit A is *[Check whichever one of the following boxes is correct and attach the required exhibit.]*

    ☐ a financial statement that accurately sets out the monthly income, expenses and assets of my household.

    ☐ proof that I receive benefits under the *Employment and Assistance Act* or the *Employment and Assistance for Persons with Disabilities Act.*

8. Attached as Exhibit B is an accurate description of my educational and employment history.

9. Attached as Exhibit C is an accurate description of my workplace skills.

10. Attached as Exhibit D is a copy of the document I wish to file or with which I wish to proceed.

SWORN (OR AFFIRMED) BEFORE)
ME at ....., British Columbia)
on ..... .) .....
)
)
.....)
A commissioner for taking)
Affidavits for British Columbia)

..*[print name or affix stamp of commissioner]*..

This is Exhibit A referred to in the affidavit of ....., sworn (or affirmed) before me on .....

.....
A commissioner for taking affidavits for British Columbia

FINANCIAL STATEMENT

ESTIMATE NET MONTHLY INCOME

[Attach proof – i.e. most recent pay stubs or payment advice, etc., if available.]

Estimated net monthly income from all sources:

Employment	$.....
Pension	$.....
Dividends	$.....
Interest	$.....
Other	$.....
TOTAL (Estimated net monthly income)	$.....

ESTIMATED MONTHLY EXPENSES

[Attach receipts for the following, if available.]

Estimated monthly expenses related to housing	$.....
Estimated monthly expenses related to transportation	$.....
Estimated monthly expenses related to household expenses	$.....
Estimated monthly expenses related to medical and dental expenses	$.....
Estimated monthly expenses related not included in above, related To dependent children	$.....
Estimated monthly debt payment *[specify]*.....	$.....
Estimate of other monthly expenses *[specify]*.....	$.....
TOTAL (Estimated monthly expenses)	$.....

ASSETS

[Specify assets and set out their estimated value.]

.....	$.....
.....	$.....
.....	$.....
.....	$.....
.....	$.....
TOTAL (Estimated asset values)	$.....

This is Exhibit B referred to in the affidavit of ....., sworn (or affirmed) before me on .....

.....
A commissioner for taking affidavits for British Columbia

EDUCATIONAL AND EMPLOYMENT HISTORY

[Set out details of education and employment history.]

1. Highest level of education attained and date completed:

.....

.....

.....

2. Employment history:

Employer	Dates	Position
.....	.....	.....
.....	.....	.....
.....	.....	.....

This is Exhibit C referred to in the affidavit of ....., sworn (or affirmed) before me on .....

.....
A commissioner for taking affidavits for British Columbia

WORKPLACE SKILLS

[specify]

.....

.....

.....

This is the 2nd affidavit
of Don Smith in this case and
was made on July 5, 2010

No. _____
Vancouver Registry

In the Supreme Court of British Columbia

Between:

Don Smith, Claimant

And:

Betty Jones, Respondent

AFFIDAVIT FOR INDIGENT STATUS

I, Don Smith, of 1234 ABC Street, Vancouver, British Columbia, a dish washer/cashier, SWEAR (OR AFFIRM) THAT:

1. I am the claimant in this proceeding.

2. I make this affidavit in support of my application for an order that I be declared indigent with respect to the payment of fees set out in Schedule 1 of Appendix C of the Supreme Court Family Rules.

3. I am 34 years old.

4. I have the following dependants:

   None

5. The following persons contribute to my household expenses:

   Only myself

6. I am (check which applies) [X] employed [ ] unemployed.

7. Exhibit A to this affidavit is a financial statement that accurately sets out the monthly income, expenses and assets of my household.

8. Exhibit B to this affidavit is an accurate description of my educational and employment history.

9. Exhibit C to this affidavit is an accurate description of my workplace skills.

10. Exhibit D to this affidavit is a copy of the document I wish to file or with which I wish to proceed.

SWORN (OR AFFIRMED) BEFORE ME at Vancouver, British Columbia on July 5, 2010.	)	_____ Don Smith
_____ A commissioner for taking affidavits for British Columbia	)	

This is Exhibit A referred to in the affidavit of Don Smith, sworn (or affirmed) before me on July 5, 2010

_____

A commissioner for taking affidavits for British Columbia

FINANCIAL STATEMENT

ESTIMATED NET MONTHLY INCOME

Estimated net monthly income from all sources:

Employment	$.1400.....
Pension	$.....
Interest and Dividends	$.....
Other	$.....
TOTAL (Estimated net monthly income)	$..1400.....

ESTIMATED MONTHLY EXPENSES

Estimated monthly expenses related to housing	$.575.....
Estimated monthly expenses for transportation	$.250.....
Estimated monthly household expenses including utilities	$.225.....
Estimated monthly medical and dental expenses	$.125.....
Estimated monthly expenses related to dependent children	$.....
Estimated monthly debt payments [*specify*]	$.150 (VISA)..
Estimate of other monthly expenses [*specify*]	$.....
TOTAL (Estimated monthly expenses)	$..1325.....

ASSETS

.....	$.....
.....No significant assets	$.....
.....	$.....
.....	$.....
.....	$.....
.....	$.....

TOTAL (Estimated asset value) $...0.....

This is Exhibit B referred to in the affidavit of Don Smith sworn (or affirmed) before me on July 5, 2010

_____

A commissioner for taking affidavits for British Columbia

EDUCATIONAL AND EMPLOYMENT HISTORY

Highest level of education attained and date completed:

.....Grade 12 completed in 1995 .....

.....

Most recent employer: Munchees Snack Bar
Dates: 2005-present
Position: Cashier

Previous employer: Joe's Deli
Dates: 2003-2005
Position: Dishwasher/bus person

Previous employer: The Kwatchi Grill
Dates: 1997-2003
Position: Dishwasher/bus person

This is Exhibit C referred to in the affidavit of Don Smith sworn (or affirmed) before me on July 5, 2010

_____

A commissioner for taking affidavits for British Columbia

WORKPLACE SKILLS

.....Handling cash, operating cash register, serving, busing tables.....

.....

.....

This is the 2nd affidavit
of Don Smith in this case and
was made on July 5, 2010

No. _____
Vancouver Registry

In the Supreme Court of British Columbia

Between:

Don Smith, Claimant

And:

Betty Jones, Respondent

AFFIDAVIT FOR INDIGENT STATUS
(INCOME ASSISTANCE)

I, Don Smith, of 1234 ABC Street, Vancouver, British Columbia, on disability benefits, SWEAR (OR AFFIRM) THAT:

1. I am the claimant in this proceeding.

2. I make this affidavit in support of my application for an order that I be declared indigent with respect to the payment of fees set out in Schedule 1 of Appendix C of the Supreme Court Family Rules.

3. I currently receive income assistance benefits under the *Employment and Assistance for Persons with Disabilities Act.*

4. Exhibit A to this affidavit is a copy of my most recent income assistance stub.

5. Exhibit B to this affidavit is a copy of the document I wish to file or with which I wish to proceed.

SWORN (OR AFFIRMED) BEFORE ME)
at Vancouver, British Columbia)
on July 5, 2010.) _____
) Don Smith
)
_____)
A commissioner for taking affidavits)
for British Columbia)

This is Exhibit A referred to in the affidavit of
Don Smith, sworn (or affirmed)
before me on July 5, 2010

_____
A commissioner for taking affidavits for
British Columbia

MINISTRY OF HOUSING AND SOCIAL DEVELOPMENT
Don Smith GA 987654321
Benefit month: July 2010
SHELTER: $375.00
SUPPORT: $531.42
TOTAL: ***$906.42***
DATED June 23, 2010

No: _____
Vancouver Registry

In the Supreme Court of British Columbia

Between:

Don Smith, Claimant

And:

Betty Jones, Respondent

REQUISITION
FOR INDIGENT STATUS

Filed by: Don Smith

Required: an order pursuant to Rule 20-5 that Don Smith, the claimant, be declared indigent with respect to the fees set forth in Appendix C, Schedule 1, of the Supreme Court Family Rules, as they apply to this application and the within proceedings generally.

This requisition is supported by the following:

1. Affidavit #2 of Don Smith made July 5, 2010.

Date: July 5, 2010

Signature of
[X] filing party [ ] lawyer for filing party

Don Smith

No. _____
Vancouver Registry

In the Supreme Court of British Columbia

Between:

Don Smith, Claimant

And:

Betty Jones, Respondent

ORDER FOR INDIGENT STATUS

ORDER

BEFORE THE HONOURABLE	)	
JUSTICE_____	)	July 5, 2010
or	)	
MASTER_____	)	

ON THE APPLICATION of Don Smith coming on before me on July 5, 2010 and on hearing Don Smith;

THIS COURT ORDERS that no fee is payable by Done Smith under Appendix C of the Supreme Court Family Rules in relation to:

[X] this proceeding;

[ ] the following part(s) of this proceeding:_____[describe part(s)]

[ ] this proceeding during the following period(s):_____[describe period(s)]

[ ] the following step(s) in this proceeding:_____[describe step(s)]

BY THE COURT

_____
Registrar

Immigration Issues for Family Law Advocates

Deanna Okun-Nachoff, Lawyer
Chi Lee, Advocate

McCrea & Associates
102-1012 Beach Avenue
Vancouver BC V6E 1T7
Tel: 604.662.8200 Fax: 604.662.8225
deanna@mccrealaw.ca chi@mccrealaw.ca

Overview of Issues

- How does one define marital status in the context of an immigration application, and how does this differ from the family law context?
- What is the meaning of "dependent child" in the immigration context?
- What are the consequences of failure by a foreign national to declare all family members on his/her application for landing?
- What is the impact of a non-compliant family member on a foreign national's application for permanent residence?
- What are the consequences to an applicant for permanent residence of having an inadmissible family member?
- What unique immigration issues face victims of domestic violence?
- What is the impact of marriage breakdown on a pending spousal sponsorship application for permanent residence?
- What changes are on the horizon for family class applicants?

How does one define marital status in the context of an immigration application?

Canadian immigration forms ask applicants to define their family status in one of the following ways:

Married

- the marriage must be valid both according to the laws of the country where it was contracted and in Canadian law.

- In Canada: in order for a marriage to be valid, spouses must, among other things, be unmarried, competent to enter into a marriage, and over a certain age. They must be married by a person properly licensed to conduct marriage, either a civil marriage commissioner or authorized religious official.

How does one define marital status in the context of an immigration application?

COMMON-LAW

Immigration:

– **Common-Law**: a conjugal relationship in which two persons of either sex have cohabited for **at least one year**. Once the common-law relationship has been established, there may be a break in continuity of cohabitation by reason of armed conflict, illness, employment, etc. (s.5.36 of OP2: www.cic.gc.ca/english/resources/manuals/op/op02-eng.pdf)

Family:

- the purposes of the provincial Family Relations Act ("FRA") common-law is a relationship is not specifically defined in the FRA.
- The Act does however define "spouse" as someone who has lived in marriage-like relationship with someone for a period of **at least two years**.

How does one define marital status in the context of an immigration application?

SEPARATED:

Family:

- In the family law context, a couple is considered separated as soon as one of the parties formulates an intention to discontinue the relationship, whether you are married or in a common-law relationship.
- A couple is never required to "legalize" their separation in order to be considered separated in the family law context, however some couples choose to formalize their separation through separation agreements.

Immigration:

- **"Legally Separated"**: In the immigration context, officers will routinely request some documentary evidence of separation (e.g. a separation agreement or divorce order) before agreeing to exempt that ex-spouse from examination.

How does one define marital status in the context of an immigration application?

DIVORCED:

Immigration:

– the divorce must be legally valid in Canada. If there is a subsequent re-marriage, the divorce must also be legally valid in the place where it occurred.

Family:

- Couples who were married legally both inside and outside Canada can obtain a Canadian divorce after having resided in B.C. for more than one year.

How does one define marital status in the context of an immigration application?

- **Never Married/Single**: foreign nationals must be counseled against declaring themselves as "never married" solely to avoid examination of a former spouse or a non-compliant spouse. Such a false declaration could prevent any future sponsorship of that spouse, and could also lead to a finding of inadmissibility (and potential removal from Canada) for misrepresentation.

- **Widowed**

Defining Marital Status (continued)

- Canadian or permanent residents may apply to sponsor their spouse or common-law partner. In certain circumstances, they may also apply to sponsor a "conjugal partner" – i.e. a person who resides outside Canada and has in a conjugal relationship with his/her Canadian sponsor for a minimum of one year.
- For further information about the definition of conjugal relationships, see s.5.25 of OP 2: (www.cic.gc.ca/english/resources/manuals/op/op02-eng.pdf)
- CIC will only accept sponsorship of a conjugal partner in limited situations – i.e. where the parties are not able to marry or cohabit. This option is not advisable where an engaged couple wants to reunite before their wedding, but may be a viable option for a same-sex couple that cannot marry because same-sex marriage is prohibited in their country of origin, and where the couple is unable to cohabit because they are not authorized to live/work in the same country.

What is the meaning of "dependent child" in the immigration context?

- Section 2 of the *Immigration and Refugee Protection Regulations* (IRPR) defines "dependent child" in the following terms:

"dependent child", in respect of a parent, means a child who

(a) has one of the following relationships with the parent, namely,

(i) is the biological child of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent, or

(ii) is the adopted child of the parent; and

(b) is in one of the following situations of dependency, namely,

(i) is less than 22 years of age and not a spouse or common-law partner,

(ii) has depended substantially on the financial support of the parent since before the age of 22 — or if the child became a spouse or common-law partner before the age of 22, since becoming a spouse or common-law partner — and, since before the age of 22 or since becoming a spouse or common-law partner, as the case may be, has been a student

(A) continuously enrolled in and attending a post-secondary institution that is accredited by the relevant government authority, and

(B) actively pursuing a course of academic, professional or vocational training on a full-time basis, or

(iii) is 22 years of age or older and has depended substantially on the financial support of the parent since before the age of 22 and is unable to be financially self-supporting due to a physical or mental condition.

- This definition is important in that a non-dependent child cannot be included in a permanent residence application advanced by his/her parent, nor can a non-dependent child be sponsored by a parent who is a Canadian citizen or permanent resident.

What is the definition of "dependent child" in the family context?

- **Divorce Act** "child of the marriage" in s. 2(1) and (2) of the Act:
  - **2. (1)** …"child of the marriage" means a child of two spouses or former spouses who, at the material time,

    (a) is under the age of majority (in B.C. 19 years old) and who has not withdrawn from their charge, or

    (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life

- **Family Relations Act** Section 1(1) of the Act defines a "child" as "a person who is under the age of 19 years".
  - The definition of "child" for the purposes of support includes:
    - "a person who is 19 years of age or older and, in relation to the parents of the person, is unable, because of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life" (s. 87).

What are the consequences of failure by a foreign national to declare all family members on his/her application for landing?

- On an application for permanent residence, foreign nationals are required to declare all family members, including:
  - Spouse (by marriage or at common-law);
  - All adopted or biological "dependent children"; and
  - All adopted or biological "dependent children" of the applicant's spouse
- Failure by the applicant to disclose all of these family members could cause refusal of the application for "misrepresentation" per s.40 of the *Immigration and Refugee Protection Act* (IRPA), even if the non-inclusion was due to a misunderstanding of Canadian immigration law.
- If the applicant is found inadmissible for misrepresentation, he/she could be denied landing, or ordered to leave Canada. The inadmissibility for misrepresentation continues for a two year period following removal.
- Even if the applicant is not found inadmissible for misrepresentation and is granted landing, he/she will not be entitled to sponsor the excluded family member at a later date (s.117(9)(d), *IRPR*).

What is the impact of a non-compliant family member on a foreign national's application for permanent residence?

•An applicant for permanent residence and *all of his/her family members* (i.e. spouse, children, and all children of his/her spouse) must be examined by immigration officials. A non-compliant family member could cause refusal of that application.

• What are the options for an applicant whose family member refuses to comply?

- If the non-compliant family member is a spouse, and if the relationship has broken down, the applicant may wish to provide evidence of that marriage breakdown (i.e. separation agreement or divorce order) and request non-examination of the spouse. This will typically involve acknowledging in writing that the applicant will not be able to sponsor that spouse at any time in the future.
- If the non-compliant family member is a child, CIC will attempt (rather tenaciously) to have that child examined, even if he/she is living in the exclusive custody of another person. If CIC agrees to non-examination of the child, the applicant will not be eligible to sponsor in future (s.117(9)(d), IRPR).

What are the consequences to an applicant for permanent residence of having an inadmissible family member?

- If the foreign national is the principal applicant for permanent residence, and if one of his/her family members is inadmissible to Canada for security reasons (s.34, IRPA), human rights violations (s.35 IRPA), criminality (ss. 36-37, IRPA), on medical grounds (s.38 IRPA), or for misrepresentation (s.40 IRPA), the principle applicant is also inadmissible for having an inadmissible family member (s.42, IRPA).
- By contrast, if a Canadian/PR spouse applies to sponsor a spouse or dependent child that might impose excess demand on Canada's health or social services (s.38(1)(a), IRPA), this will not prohibit a successful family class sponsorship of that person (s. 38(2), IRPA).

What unique immigration issues face victims of domestic violence?

- The Canadian immigration scheme – particularly the provisions of the "family class" – can cause a number of serious consequences for victims of domestic violence:
  - ***The "broken sponsorship undertaking"***: Canadian sponsors sign an undertaking of support to the Canadian government and may be held liable for re-payment of social services that are collected by a sponsored spouses. The existence of sponsorship debt or the threat of sponsorship debt may be used by an abusive spouse as a means to perpetuate abuse.
  - ***The threat of a withdrawn sponsorship***: Foreign nationals who are sponsored by abusive spouses are often reluctant to leave those spouses for fear that their status in Canada will be jeopardized.
  - ***The promise of a spousal sponsorship***: Women are sometimes persuaded to abandon their own independent immigration plans in favour of sponsorship applications. This can have severe consequences if the foreign national is or becomes a victim of domestic violence.

What changes are on the horizon for family class applicants?

- Proposal # 1: Conditional Permanent Residence for sponsored spouses:
  - On March 26, 2011 the government proposed a change to the IRPR that would subject spouses that have been in a relationship with their sponsor for two years or less at the time of the sponsorship application to a two year period of conditional permanent residence (see http://canadagazette.gc.ca/rp-pr/p1/2011/2011-03-26/html/notice-avis-eng.html).
  - If accepted, the condition would require that sponsored spouses remain in a *bona fide* relationship for a two year period following their landing. Failure to meet this condition could cause revocation of permanent residence.
  - The Notice of Intent states that "only cases targeted for fraud" would be reviewed during the initial two year period, and that the condition would be automatically lifted at the end of the two-year period if no breach of conditions has been found.

What changes are on the horizon for family class applicants? (continued)

- Proposal # 2: Five year sponsorship ban for sponsored spouses:
  - On April 2, 2011 the government proposed amendments to s. 130 of the IRPR that would bar a sponsor who became a permanent resident after being sponsored as a spouse from sponsoring a subsequent spouse for a five year period following their landing (see http://gazette.gc.ca/rp-pr/p1/2011/2011-04-02/html/reg2-eng.html).

Questions?

6. Housing

Legal Services Society
British Columbia
www.legalaid.bc.ca

THE LAW FOUNDATION OF BRITISH COLUMBIA

BRITISH
COLUMBIA

RESIDENTIAL TENANCY BRANCH

RTB Vision and Mission

Vision

- Successful tenancies

Mission:

- We work with our partners to provide:
- Public education and information
- Dispute resolution (formal and informal)

RTB Services

Authority

- Residential Tenancy Act and Regulations
- Manufactured Home Park Tenancy Act and Regulations

Public Education

- Landlord and tenant workshops delivered on our own and with our stakeholders, YouTube Videos for first time renters, presentations, displays, news articles etc.

RTB Programs

Offices:

- Victoria, Burnaby, Kelowna and two outreach offices in downtown Vancouver
- Partnered with Service BC in 60 other BC communities

Personnel:

- Approximately 100 staff consisting of; the Executive, Policy Analysts, Coordinator of Education & Training, Information Officers (IOs), and decision makers called Dispute Resolution Officers (DROs)

RTB Programs (cont'd)

Demand:

- 600,000 tenancies in BC
- 1.35 million website visits per year
- 265,000 contacts by telephone, fax, e-mail and in-person per year
- 22,000 applications for dispute resolution per year (mail, fax, in-person, on-line)
- 21,000 Dispute Resolution Hearings per year

Decisions and Orders

- Decisions are based on the evidence, the merits of the case, and the law
- Jurisdiction is up to $25K, same as the BC Provincial Court
- Decisions and orders are final and binding and may be only overturned by the Supreme Court of BC.

Decisions and Orders (cont'd)

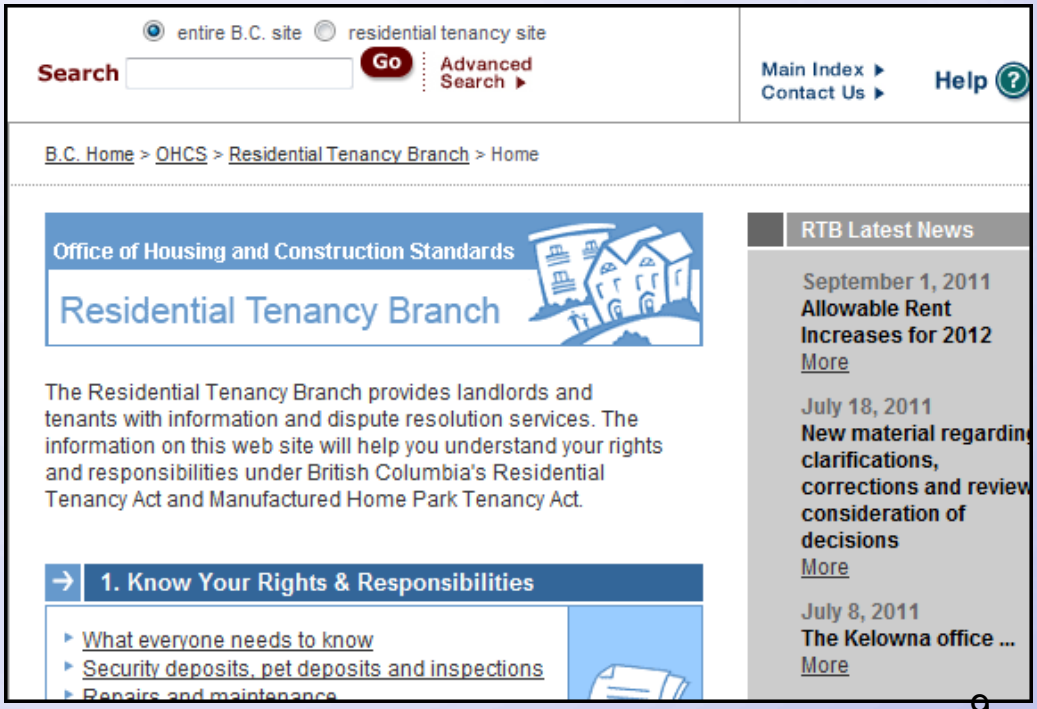
Enforcement of Orders

Participants must use the courts for enforcement, the RTB does not enforce orders

RTB Website

www.rto.gov.bc.ca

- Legislation
- Fact sheets
- Guides
- Policy guidelines
- Approved forms
- Latest news
- E-service application
- Examples of hearing decisions



Any questions?

Updated Policy Guidelines

Policy Guideline # 2 – Ending a Tenancy Agreement: Good Faith Requirement

Now states that if a landlord's motive for ending a tenancy is something other than the reason stated on the Notice to End Tenancy, the landlord may be found to have not acted in good faith, and the Notice to End Tenancy may be quashed *(Previously the wording was: if the Primary Motive was suspect)*

Policy Guideline # 8 – Unconscionable and Material Terms

Updated to clarify "Unconscionable Terms".

Updated Policy Guidelines (cont'd)

Policy Guideline #24 – Grounds for Review of an Arbitrator's Decision

Renamed **Review Consideration**; broadened to address the entire spectrum of decisions while considering a request for a review of a decision.

Policy Guideline # 25 – Request for Clarification of Orders and Decisions

Renamed **Requests for Clarification or Correction of Orders and Decisions**; broadened to address the entire spectrum of decisions relating to clarifications and corrections.

Policy Guideline # 39 – Direct Requests - NEW

Addresses the spectrum of decisions relating to direct requests (seeking an Order of Possession for unpaid rent or utilities).

RTB Contact Information

www.rto.gov.bc.ca

Telephone: 250.387.1602

1-800-665-8779

Email: HSRTO@gov.bc.ca

Thank you...any questions?

HOW TO FRAME A SUCCESSFUL DAMAGE CLAIM AT THE RESIDENTIAL TENANCY BRANCH

Presented by Kendra Milne
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604-685-3425
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In this session, I hope to teach you:

- an overview of the types of losses that can be compensated through the RTB;
- the different ways a claim for damages can be framed; and
- how your claims can be structured within the test(s) for damages used by most DROs.

Material contents

The basics 2

What are damages meant to compensate your client for? 3

Why is the landlord liable for the damages? 5

Proving the claim 7

Exercise 10

The basics

Before starting to prepare a claim for damages under either the Residential Tenancy Act or the Manufactured Home Park Tenancy Act, it's important to think about how and why your client is making the specific claim. To do this, ask yourself two questions:

(1) What are the damages meant to compensate your client for?

(2) Why is *the landlord* liable for these particular damages?

You need the answer to both of these questions to frame the claim. It is crucial to think through how you intend to legally frame your claim so that you know what test your client will need to meet and what evidence will be required.

Larger policy picture

When thinking about a damage claim, it's also important to keep in mind that damages through the RTB are essentially a means to balance risk should something go wrong. Who should take the risk in a situation and why? Should landlords always take all the risk if something goes wrong just because they entered into a business venture of rental housing? Or should tenants take the risk because they choose to rent a living space? In the end, the law tries to strike a balance between the competing interests of tenants and landlords.

What are damages meant to compensate your client for?

There are different types of legal damages, and you need to know which type(s) your client is asking for so that you know:

- Whether a DRO has jurisdiction to award the damages in the first place; and
- Assuming the DRO does have jurisdiction, the legal test that your client will have to meet to be successful in her claim.

Think about why the client wants compensation. Be specific. Was some of her property damaged? Has she lost physical access to part of the rental unit? Does she feel harassed by the landlord? Has the landlord just behaved badly?

There are three basic types of damages that you may run into:

(i) damages to compensate your client for "pecuniary losses";

(ii) damages to compensate your client for intangible "non-pecuniary losses"; and

(iii) damages intended to punish the landlord instead of compensate your client.

In some cases, it is very easy to tell what type of damages you're dealing with. In others, it can be very difficult and the different types of damages can overlap with each other.

Below is an explanation of each type of damage and how to tell them apart.

Pecuniary damages

These are damages intended to compensate for losses that can be quantified in terms of money.

They are for tangible losses that can easily be given a specific and objective monetary value. An easy way to tell whether something is a "pecuniary loss" is to think about how you would value the amount the tenant is asking for. For example, it might be quite easy to prove the amount of damages for a ruined couch (receipts from the couch purchase, advertisements for comparable furniture, etc.), but it is quite difficult to prove the amount of damages your client might be entitled to for stress or anxiety.

Non-pecuniary damages

These damages are intended to compensate for intangible losses that are hard to quantify in terms of money.

As the example above indicates, non-pecuniary losses are usually much harder to value. They often include more subjective harm like mental distress, anxiety, or emotional trauma. You can often tell when something is a non-pecuniary loss because it will be hard to think of evidence of the amount of damage your client should request and it will often be based on at least partially subjective evidence from your client.

Aggravated damages are a type of non-pecuniary damages. They are intended to be used to compensate your client when the conduct of the landlord was particularly high-handed or led to another cause of action and your client is not adequately compensated without them. They are not intended to duplicate the damages your client may already be awarded or to punish the landlord.[1]

Punitive damages

These damages are intended to punish the wrongdoer for exceptionally bad conduct. They are not intended to compensate the claimant.

Punitive damages are **not** available under the Residential Tenancy Act or the Manufactured Home Park Tenancy Act and DROs do **not** have the jurisdiction to award them.

[1] Note: The RTB policy guide on "Claims in Damages" has a section on aggravated damages, but it is quite confusing and unclear because it suggests that "wilful or recklessly indifferent behaviour" is required. The case law states that "high-handed" conduct or a second cause of action (like negligence) can lead to aggravated damages. When framing your case, if you have evidence that can support "wilful and recklessly indifferent behaviour", put it in because chances are the DRO will apply what is in the guideline. That being said, I think that the guideline sets a higher bar than the case law requires. For example, see *Sahota v. BC*, 2010 BCSC 750.

Why is the *landlord* liable for the damages?

Just because your client has experienced a loss that could fit into one of the types of damages explained above, it doesn't necessarily mean that the landlord is responsible (or legally liable) to pay for those losses. It's not enough for your client to have losses related to her tenancy and to say the landlord should be responsible for them. Instead, you need to think carefully about why the landlord is liable for the specific losses the tenant wants to claim.

There are two general ways to get damages under the Residential Tenancy Act and the Manufactured Home Park Tenancy Act:

- breach of contract; or
- negligence.

A breach of contract claim is based on the violation of the tenancy agreement, while a negligence claim is based on the landlord failing to comply with its legal obligations and reasonable standards of care. The two types of claims may overlap in some cases, and the damages available under the different types of claims may be different.

Breach of the tenancy agreement

A claim based on a breach of a tenancy agreement is similar to any breach of contract case. When two parties enter into a contract, it is expected that they'll hold up their end of the bargain. Tenants are expected to pay their rent on time, and landlords are expected to provide the rental unit in accordance with the specifics of the contract. Remember that, under the Residential Tenancy Act and Manufactured Home Park Tenancy Act, there are also implied terms in every tenancy agreement. Even if a term is not included in the actual contract, it may be an implied term as a result of the legislation.

Damages for breach of a contract are generally designed to put the harmed party in the position they'd be in if the contract had been performed. They are forward looking in that respect because they look to what benefits would have been available if the contract had been completed.

That being said, damages for breach of contract are limited to those that are within the contemplations of the parties when they entered into the tenancy contract. In other words, damages are limited to losses that both parties should have thought about before entering into the contract.

Negligence

A claim based on negligence is based on the idea that there are some reasonable standards expected of all parties, and if they breach that standard and it leads to losses, then they may be responsible for those losses. In other words, society expects a landlord to meet some basic standards in how they conduct themselves. If they fail to meet those standards, they may have to pay for the consequences.

In tenancy cases, the standard of case for a party will generally be based on what is in the legislation. The Residential Tenancy Act and the Manufactured Home Park Tenancy Act set out many standards like keeping the rental unit in a state suitable for occupation, providing reasonable access to the rental unit, or handling the tenant's abandoned possessions with a reasonable amount of care.

These statutory duties do not, on their own, lead to a successful claim in damages.[2] Instead, you can use the statutory standard of care to show that the landlord was negligent. To show negligence, you would need to show that the damages would not have occurred but for the breach, and that the damages were reasonably foreseeable (the parties could have reasonably expected the losses to flow from the breach).

Damages for negligence are designed to put the harmed party in the position they would have been in had the wrong not occurred.

When deciding how to frame your claim, think about what the tenancy agreement (including implied terms) covers and what the statute covers. Some types of losses will clearly lead to one type of claim or another, but more complicated claims often overlap and may be able to be framed in both ways.

[2] Note: it may be possible to challenge this requirement based on the fact that the RTA and the MHPTA expressly state that a party that breaches the statute will be liable for the damages that result, but for now, the case law in BC is clear that you cannot rely only on a breach of the statute. You must prove negligence.

If you have a RTB decision that expressly states that a statutory breach on its own cannot lead to damages, please contact CLAS.

Proving the claim

The most commonly applied test for damages, as set out by DROs, seems to be the following:

The claimant must prove:

(1) That a loss or damage exists;

(2) The loss or damage results from a violation of the Act, regulation or tenancy agreement;

(3) Evidence that establishes the value of the loss or damage; and

(4) The steps taken by the applicant to mitigate any loss or damage.[3]

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[3] Note: DROs do set out slight variations on this test, including the following:

(1) That the damage or loss exists;
(2) That the damage or loss exists as a result of the landlord's **failure to comply** with the Act or tenancy agreement;
(3) The **actual amount required to compensate** the tenant for the damages or loss; and
(4) **What efforts the claiming party made** to mitigate, or reduce such damage.

OR

(1) That the Respondent violated the Act, Regulation, or tenancy agreement;
(2) The violation resulted in damage or loss to the Applicant;
(3) **Verification of the actual amount required to compensate for the loss or to rectify the damage**; and
(4) The Applicant did **whatever was reasonable** to minimize the damage or loss.

OR

(1) Proof that the damage exists;
(2) Proof that this damage or loss happened **solely because of the actions or neglect** of the Respondent in violation of the Act or agreement;
(3) **Verification of the actual amount required to compensate for the claimed loss or to rectify the damage**; and
(4) Proof that the **claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage**.

OR

(1) That a loss or damage exists;
(2) That this loss or damage results from a violation of the Act, regulation or tenancy agreement;
(3) **The value of that loss or damage**; and
(4) **The steps taken, if any, to mitigate the loss or damage**.

Given the variation in the tests applied, the best way to approach a damage claim, regardless of the type of damages or how you're framing the claim, is to make sure that you provide evidence of the following:

Element 1: Your client experienced a loss

At this stage, you need to prove that your client did experience a loss or damage. This might be lost personal property, lost quiet enjoyment, or lack of heat in the rental unit.

Whatever the loss your client experienced, you need to prove it here. Don't worry about how the loss came about at this point; instead, focus on what objective and persuasive evidence you can come up with to prove the loss. If property was lost, are there photos? Confirmation from repair people? Witnesses?

If there was a loss of quiet enjoyment due to noise, is there anything to confirm the noise? Records? Witnesses?

What about for a loss of heat? Thermometer readings? Witnesses?

Get creative about how you can prove your client's losses.

Element 2: Your client's loss was a direct result of the landlord's violation of the Act, Regulation or tenancy agreement

At this stage, focus on *why the landlord* is liable for the losses. This is where you think about how to frame your claim: breach of contract or negligence? Thinking about the balance of risk, ask yourself why the landlord should take the risk and be responsible for the loss in this case?

At this stage, you also need to think about how you can prove that, not only did the landlord either breach the tenancy agreement or act negligently, but that the landlord's actions caused your client's losses.

If you plan to ask for aggravated damages, why was the landlord's conduct so high handed? Why do regular damages not fully compensate your client?

At this stage, also address why the losses were within the reasonable contemplation of the parties or were reasonably foreseeable? In other words, why should the landlord have known that the losses would result from the breach or negligence?

Element 3: Objective proof of the actual value of the loss.

At this stage, focus on objective evidence of the value of the losses. If your client lost property, how can you prove the value? Craigslist ads? Repair estimates? Professional

opinion about value? Remember that your client will generally only be entitled to the replacement value of the lost property (not the brand new value if the property was not new) so if you are using new values to prove the loss, think about proposing a reduction given that your client's property was likely used.

If your client has lost quiet enjoyment or use of their rental unit, how can you value that loss and prove it? Will percentage of rental unit = percentage of rent work? Or was the use that was lost worth more than that?

If you are asking for aggravated damages, think about how to value them. Is there any case law similar to your case that might give you a range of reasonable amounts?

Unless there are special circumstances why the evidence cannot be obtained, your client needs objective evidence. Generally, her word about the price of property or estimate of value is not going to be enough.

Element 4: Your client took all reasonable steps to mitigate her losses.

At this stage, think about whither there were any opportunities for your client to minimize her losses. If there were, think about why she didn't take those opportunities. Remember that your client is only obligated to take reasonable steps to mitigate, so if there are reasons why mitigation was not reasonable given her specific circumstances, put in evidence of that.

Summary

When you're preparing a damage claim, the most important elements to think about are:

- Whether you client is able to get the damages she is claiming through the RTB;
- Why the landlord is legally responsible for those damages; and
- **PROOF**! Go through the four elements of damage claim in the last section and make sure you put in evidence on every point.

Exercise

Facts:

Rudolph rents a basement suite unit from Blitzen. Rudolph failed to pay his rent in September, 2011 and Blitzen issued a 10 day notice to end tenancy. After 10 days, Rudolph had not moved out of the unit, so Blitzen cut off the hydro and cable to the rental suite (Rudolph saw him physically cut the wires). Rudolph called the RCMP and they advised him to leave the unit if he felt unsafe there, so on September 12th, Rudolph packed a small backpack of belongings and went to stay with a friend.

Rudolph returned to the unit several times over the next four days but the door to the rental unit was barricaded shut. There was a sign posted on the door indicating that he should go to Blitzen's and pay the outstanding rent (upstairs) to avoid having his possessions thrown out. Rudolph went upstairs on three separate days, but there was no one home.

On September 18th, Blitzen loaded all of Rudolph's possessions from the rental unit into a truck and took it to the dump. Blitzen did not keep a record of the property. Rudolph drove by on the afternoon of September 18th and saw Blitzen loading his property into a truck, but he just continued driving.

On September 22nd, Rudolph was served with an application for dispute resolution from Blitzen. Blitzen was asking for a monetary order for September's rent, the cost of cleaning the unit, and the cost of disposing the property at the dump. Blitzen says that the tenancy was over when the 10 day notice expired and the rental unit was abandoned when Rudolph left on September 12th.

Blitzen would like to make a cross application for damages for his lost property. He does not think he abandoned the rental unit.

Exercise:

Using the four elements of a damage claim, put together an argument for a damage claim for your client. Make sure you cover:

- what damages you're asking for and why they are available;
- why the landlord is responsible for the damages;
- what evidence you would gather to support your claim; and
- mitigation.

Also be prepared to briefly counter why the other party should not get the damages he is claiming.

7. Immigration

Legal Services Society
British Columbia
www.legalaid.bc.ca

THE LAW FOUNDATION OF BRITISH COLUMBIA

Immigration:
Changes to Immigration Processing and Legal Aid

Law Foundation Advocates Training
November 24, 2011
Rochelle Appleby, Contract Lawyer
Legal Services Society

Overview

- Overview of current refugee claims process in Canada
- Changes as a result of Bill C-11 (BRRA) to refugee claims process
- Legal Services Society Response
- Pre-Removal Risk Assessment applications (PRRA)
- Humanitarian and Compassionate applications

Current refugee process

- Arrival in Canada at a border (CBSA)
- Refugee claim made inland (CIC)
- Personal Information Form
- Refugee Hearing – Convention Refugee (s. 96) or Person in Need of Protection (s. 97)
- leave application for Judicial Review (Federal Court)
- Pre-Removal Risk Assessment application

Convention Refugee definition

- **96.** A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
- (*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or
- (*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in Need of Protection definition

- S97 ……subject them personally
- (*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
- (*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
  - (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
  - (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
  - (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
  - (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Inland Refugee Claims

- Claimant goes to CIC office
- Claimant given a form to fill out (IMM 5611)
- Appointment to return for eligibility interview
- Form asks basic personal information and why the claimant is making a refugee claim
- If eligible to make a claim referred to the Immigration and Refugee Board and given a PIF
- Must submit PIF within 28 days – includes basic data and chronological narrative outlining claim
- Claimant can apply for legal aid

Detention

- Claimants may be detained if:
  - they are seen as a danger to the public
  - Pose a flight risk or
  - Their identity has not been established
- LSS provides duty counsel lawyers to conduct detention hearings and reviews

Refugee Hearings

- Scheduled at the IRB- Refugee Protection Division
- RPD determines whether person meets definition of Convention Refugee or Person in Need of Protection
- Both definitions are forward looking
- Key Issues:
  - Risk of Persecution or other s 97 harm
  - Personalized
  - Unable to obtain state protection
  - No internal flight alternative

Judicial Review

- Claimants may apply to Federal Court to Judicially Review a negative RPD decision
- Leave application
- Apply to legal aid for funding

Bill C- 11 changes

- No changes to eligibility process
- Definition of Convention Refugee and Person in Need of Protection remains the same
- After CIC/CBSA interview referred to IRB interview (no earlier than 15 days)
- No longer have to submit a PIF – RPD interview replaces the PIF
- Time limits prescribed

New IRB-RPD interview

- Interview questions are set out in the Rules (schedule 2)
- Role of counsel at interview is restricted
- Interview is recorded
- Claimant will receive an interview record
- Claimant can amend interview record before refugee hearing

Refugee Protection Hearing

- Decision maker is not governor in council appointment
- Members of RPD are Public Service employees
- Minister can create a list of designated countries (based on volumes and acceptance rates)
- Hearings within 60 days-designated countries
- Hearings within 90 days- all other countries
- Disclosure of documents 20 days before hearing (current rule)

Evidence at hearings

- Identity documents
- Documents to support events in narrative
  - Photographs,
  - police reports,
  - hospital records,
  - witness statements
  - Country conditions human rights reports
  - What has happened since person left the country

Refugee Appeal Division- RAD

- New appeal process within IRB
- Members are governor in council appointees
- 15 days to file and perfect an appeal
- Claimant can only file new evidence
- Most appeals will be based on written submissions
- Oral hearings available in some circumstances

LSS response to BRRA

- LSS considered two models:
  - Duty counsel advice model (pre interview) followed by referral if merit
  - Early referral to private bar lawyers
- Merit screening of cases (depends on volumes)
- Lawyers given # of hours to prepare case and attendance time at hearing – no extra hours to attend interview
- Disbursements covered by legal aid include interpretation and translation
- Some RAD hearings

Pre- Removal Risk Assessment

- A person may not apply for a PRRA unless it has been more than 12 months after a final negative decision from the IRB
- One year after BRRA comes into force PRRA decision making moves from CIC to IRB
- Can only file NEW evidence
- Oral interviews in limited cases

Humanitarian and Compassionate Applications

- As of June 29th 2010 when BRRA received royal assent risk that falls under section 96 or 97 (IRPA) will not be considered
- Must show “unusual, undeserved or disproportionate hardship”
- Would it be a hardship to leave Canada and apply from abroad?
- Cont’d

H&C (cont'd)

- H&C factors:
  - Establishment and ties to Canada
  - Best interest of children
  - Factors in country of origin –e.g.. discrimination
  - Health
  - Family violence
  - Inability to leave Canada due to a situation beyond the person's control
  - CIC Manual IP5 provides details

Working together

- Make early referrals to LSS – LSS specialized intake
- Use of PLEI materials
- Orientation sessions for claimants
- Advocates can:
  - explain process
  - help prepare narrative
  - help gather documents
  - make appropriate referrals

8. Skills

Legal Services Society
British Columbia
www.legalaid.bc.ca

THE LAW FOUNDATION OF BRITISH COLUMBIA

Making Effective Referrals

LF/LSS Provincial Training Conference

November 22, 2011

Allan A. Parker QC

PURPOSE OF THIS SESSION

- Consider the when / where / how / why's for making referrals
- Opportunity to share experiences in good / not so good referral making
- Consider why making good referrals is so important
- Brainstorming about resources

Definition of Referral

- Connecting your client with another service or individual:
  1. as an ***alternative*** to your service; OR
  2. as a ***complement*** to your service

Importance of effective referrals

- Fundamental Principles:
  - Act in the best interests of the client
  - Get the client to the highest level of service
  - Get that service as efficiently as possible
  - If you're not sure you can make an effective referral …. DON'T

Who needs to be part of effective referrals?

- ANSWER: Everyone!
- Reception / Intake staff – your front line
  - Training and updating is crucial
- Advocates – best services for the client
- Management staff and boards – assessing priorities for your organization

TOP FIVE TIPS FOR MAKING EFFECTIVE REFERALS - #1

- Good referrals start with good fact gathering
  - ✓ Develop / nurture good interviewing skills
  - ✓ Use checklists
  - ✓ Develop good paper and/or database systems for recording information efficiently
  - ✓ **AND** assume every client has tried someone else before you (ASK: “Who else have you spoken to about this issue …”)

TOP FIVE TIPS FOR MAKING EFFECTIVE REFERALS - #2

- Track your referrals
  - ✓ EVERY intake system should have some form of “referrals in” tracking (“How did you hear about our services …”)
  - ✓ EVERY client file should have a record of where clients have been referred (e.g. record on File Closing form and review periodically)

TOP FIVE TIPS FOR MAKING EFFECTIVE REFERALS - #3

- Develop good referral resources systematically
  - ✓ Develop and update your own list based on your service area, coverage, and alternate resources
  - ✓ Use web lists, but with care
  - ✓ Network Network Network
    - Call colleagues
    - PovNet
    - Join or start a community advocacy network

TOP FIVE TIPS FOR MAKING EFFECTIVE REFERALS - #4

- Make ONE good referral
  - ✓ Multiple referrals will probably confuse the client
  - ✓ Multiple referrals will probably cause service inefficiency

TOP FIVE TIPS FOR MAKING EFFECTIVE REFERALS - #5

- Hand the client off with a plan
  - ✓ Understate rather than overstate expectations
  - ✓ Offer the client a “lifeline” – “You’re welcome to call me back if this doesn’t work out …”
  - ✓ Hand off as thoroughly as time allows
    - Call the referee for the client
    - Give the client a contact name
    - Accompany the client to the referee

When NOT to make a referral

- Bad #1: Referrals to get rid of the unhappy client (“You could always try …..”)
- Bad #2: Referrals when a case is clearly non-meritorious (Philosophy should be “the referral stops here…”

Ethical issues in making referrals

- What to say – or not say – to the referral agency
- Dealing with mental health issues

Tips for Navigating MSD's Online Resource

Alison Ward, Barrister and Solicitor, Community Legal Assistance Society, November 15, 2011

The Online Resource ("OLR") is the Ministry of Social Development's policy manual. Policy is not law. The OLR is simply the Ministry's interpretation of the *Employment and Assistance*, and *Employment and Assistance for Persons with Disabilities,* Acts and Regulations. The OLR itself is not law.

Still, it is important to know how to navigate the OLR to find Ministry policy. Ministry policy may support your client. Or you may be able to argue that the Ministry's policy is not a reasonable interpretation of the legislation.

The OLR can be hard to search. Here are some navigation tips for it.

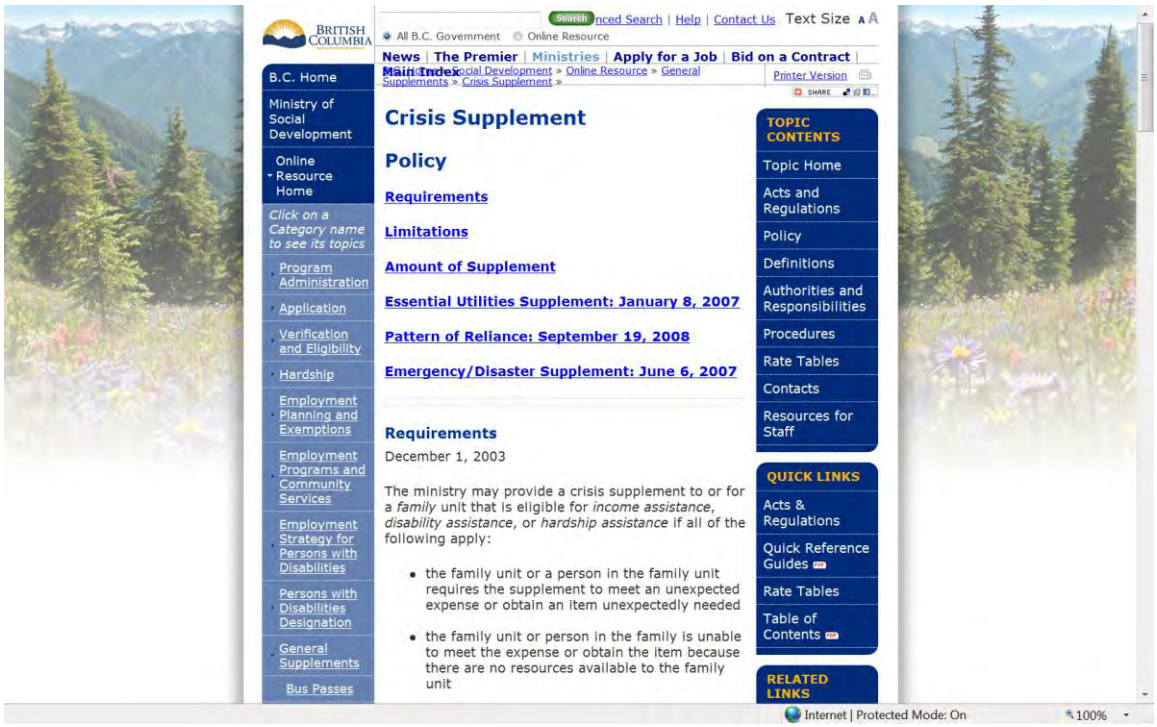
- The OLR is at http://www.gov.bc.ca/meia/online_resource/ It has a search box at the top of the page. **Do not use the search box**; it works badly.

- The OLR home page has a link to the index for the OLR, and a link to a table of contents for the OLR. The table of contents is confusing. **The index is very useful; use it!** Bookmark the index at http://www.gov.bc.ca/meia/online_resource/or_index/

- The index is in alphabetical order by subject, and has cross references. Try using it instinctively. E.g if you want information about funding for crutches, look under "C". There is an entry for crutches that refers you to go to *Medical Equipment - Basic Mobility, Positioning and Breathing Devices.* You will find the policy you want under "M" for Medical.

- **The OLR is divided into "topics." Each topic has many sub-topics.** For example, if you want information on Crisis Supplements, look in the index under "C". Click on the main entry for crisis supplements, and you will get to this page:

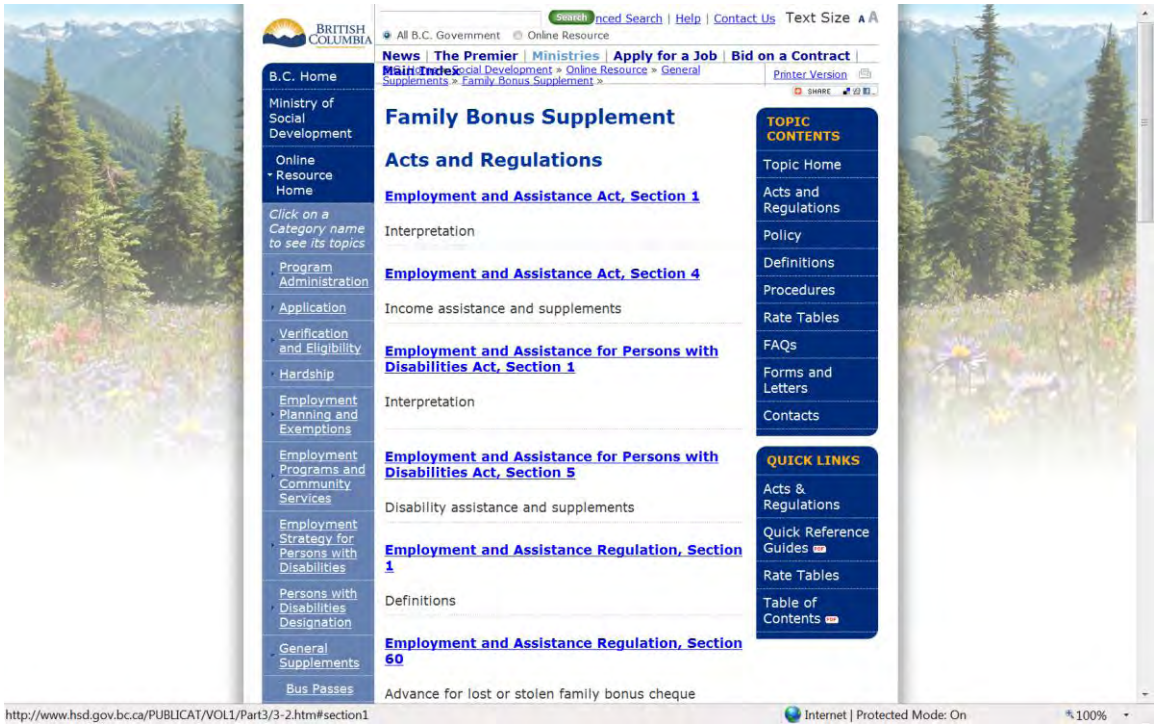
- That page is the "home page" for the Crisis Supplement topic. It just gives a topic overview. **The "Topic Contents" blue box on the right hand side of the page has links that are all sub-topics, specific to the topic you looked up**. For example, if you click on "policy" in the "topic contents" box above, that will take you to the actual MSD policy on crisis supplements:



- The "procedures" section of the Topic Contents box is also worth looking at; this section sometimes has policy-like information that may help you argue that MSD should do something in your client's favour.

- The "Resources for Staff" and "Resources for Clients' sections are also work looking at if you are having trouble finding something. For example, the dental fee schedules are found in the "Resources for Clients" section of the "Dental and orthodontic services" topic.

- **The Topic Contents box can also help you locate legislation that applies to a particular issue.** If you are having trouble finding what sections of the Regulations apply to a particular issue, the "Acts and Regulations" link in the Topic Contents box may help you hone things down and find what you are looking for. Let's say you can't remember what section of the Regulations allows MSD to issue a family bonus top up if your client's child tax benefits are delayed. You know it's in one of the Schedules, but can't find it. Try using the OLR. The OLR index has an entry for Family Bonus Supplement; click on that. You get to the Family bonus Supplement topic. From there, click on the "Acts and Regulations" box in the Topic Contents box. Up will come a list of the various sections of the legislation that the Ministry thinks apply to that topic (*note: MSD does not always include all relevant sections, so don't rely on this for research).*



This screen shot does not capture all the sections of the legislation that MSD has listed as being relevant to the family bonus topic. But toward the end of the list you will find it lists the EA Regulation, Schedule A, subsections 2(2) to 2(5) which, you realize, is what you were looking for.

Joe has lived in his apartment for six years. He has been complaining to his landlord, Sketchy Property Management Corporation for the past two years about water leaking from his bedroom ceiling when it rains. He has written them six letters requesting repairs dating back to October 2010. The building manager has promised to fix it numerous times but has not followed through. Joe has not been able to use his bedroom since October 2010 because the hole in the ceiling is directly over where his bed should be. Also, there is mildew growing in his carpet and black mould growing up the walls. He has to keep a bucket under the leak site and empties these buckets daily when it rains.

Joe has come to see you because in addition to this problem, his landlord has just served him with a 2 Month Notice to End Tenancy for Landlord Use of Property. Sketchy Property Management has ticked the box indicating that "The landlord has all necessary permits and approvals required by law to demolish the rental unit or repair the rental unit in a manner that requires the unit to be vacant". He thinks that the landlord is just trying to get rid of him because he has complained so much. He does not want to move and is willing to stay with a friend for a few weeks so the landlord can do the repairs. He would like to challenge the landlord's eviction notice.

Harry has lived in his basement suite for two years with his cat. When he moved in, he told his landlord that he had a cat and the landlord said that this was fine. Harry did not sign a tenancy agreement when he moved in. His tenancy was rolling along smoothly until his landlord presented him with a letter last month informing him that his rent would be increased by $280.00 per month. The landlord states that this is necessary to bring the building into line with rent charges in the neighborhood. When Harry told his landlord that this was more than he was allowed to charge, his landlord sent him a letter stating that he was violating his tenancy agreement by keeping a cat. The landlord gave him one month to get rid of the cat. When Harry did not do so, his landlord served him with a One Month Notice to End for Cause. His landlord says that Harry has breached a material term of the tenancy by having a cat. Harry believes that his landlord is retaliating against him for refusing the illegal rent increase. Harry wants to fight the eviction notice and needs your help.

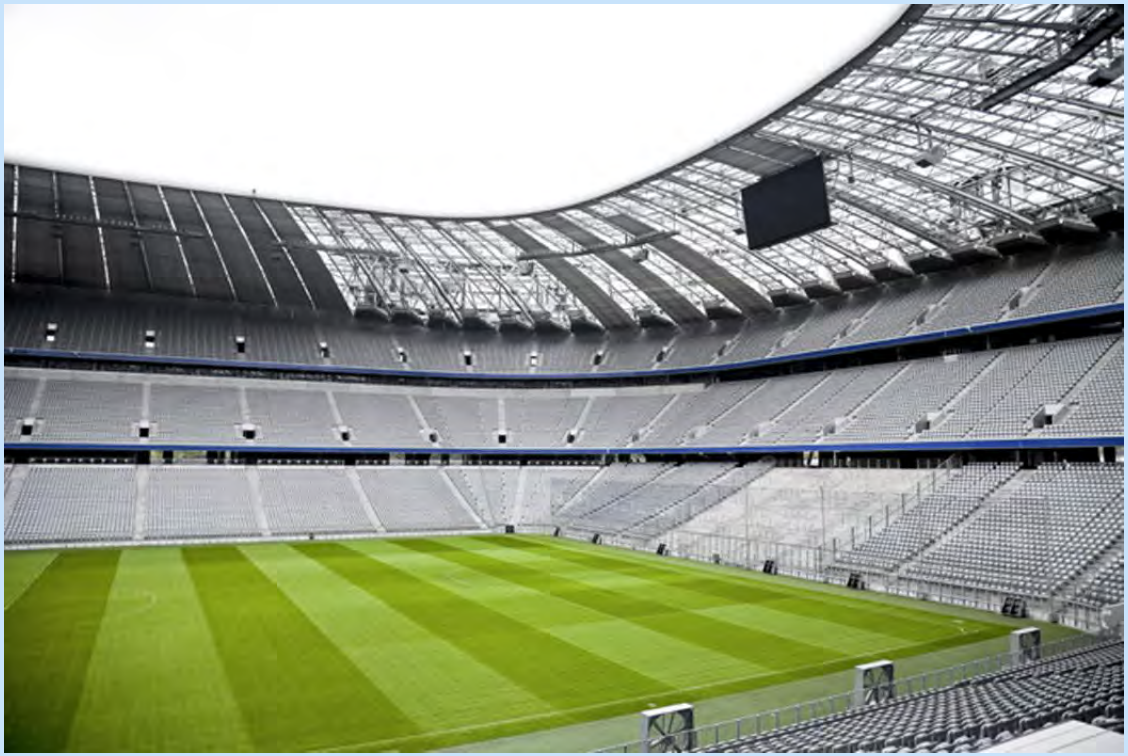
Top Ten Tools from CanLII for Legal Advocates (plus a couple bonuses)

November 22, 2011

Meghan Maddigan

COURTHOUSE LIBRARIES | BC

Increasingly legal information is available online. As this happens, it starts to level the playing field. CanLII is an example of great, flat field.



COURTHOUSE LIBRARIES | BC

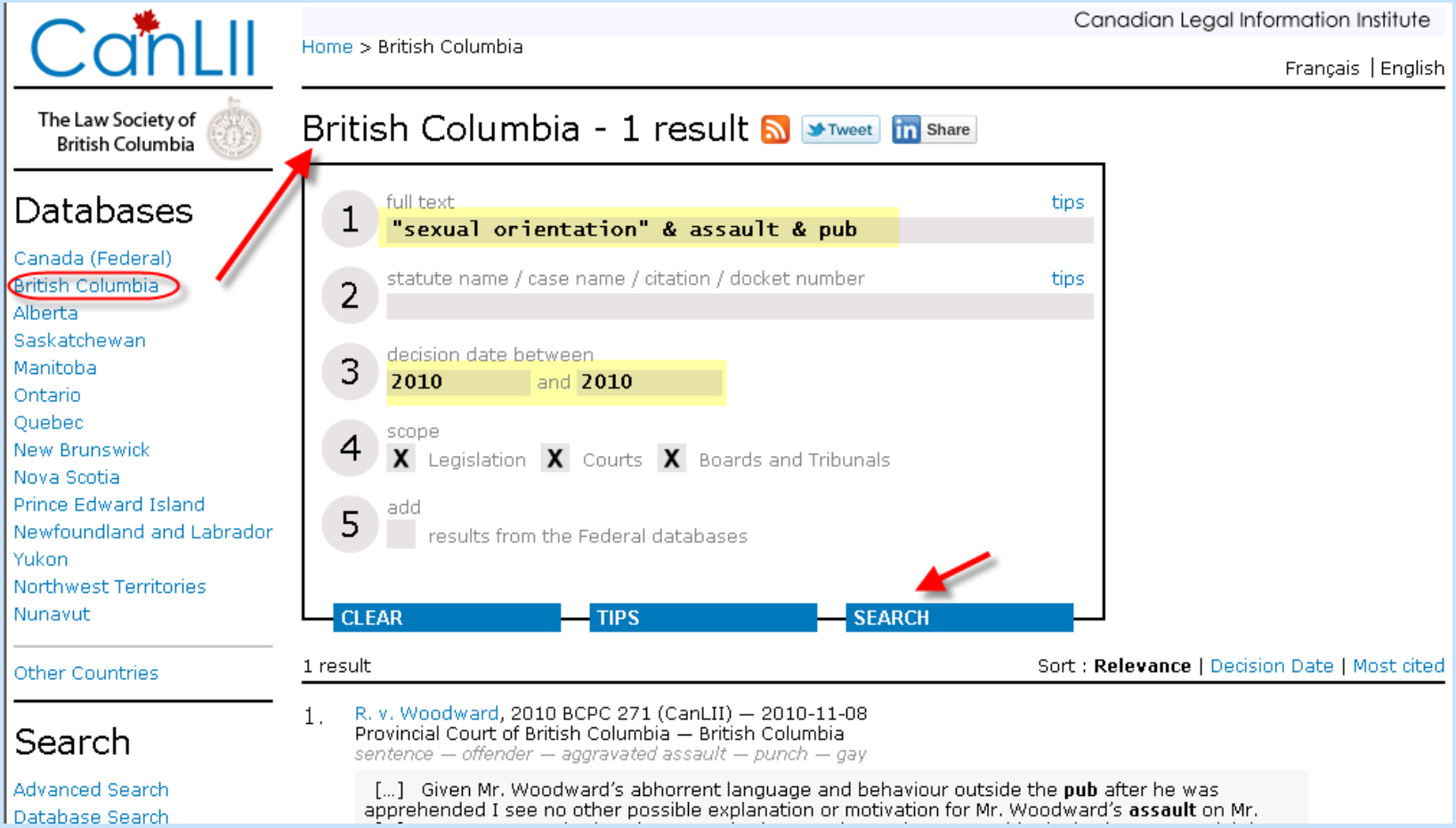
Top Ten Tools Using CanLII

1. Find a specific case
2. Find cases about a specific topic
3. Note up cases
4. Find the Law relied on in a case
5. Find Statutes
6. Find Regulations
7. Judicial Consideration of Statutes
8. Compare Point in Time Legislation
9. Print or save PDF
10. RSS Feeds

Find a Specific Case

You heard about the case in the news where a man was assaulted in a pub regarding his sexual orientation. You remember it happened last year and you'd like to read the decision.

Search in CanLII

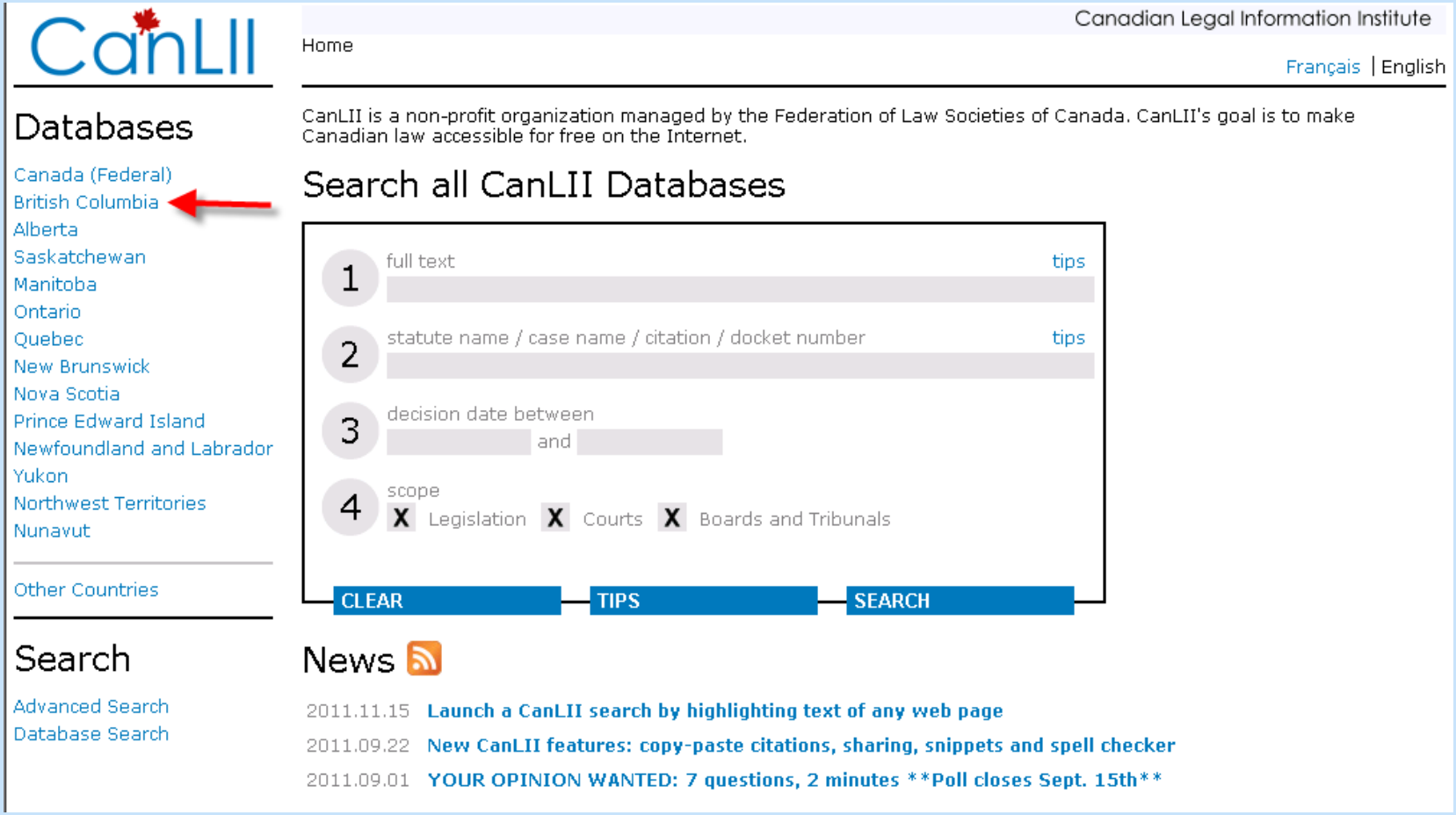


Finding Cases on a Specific Issue

Harry and The Cat

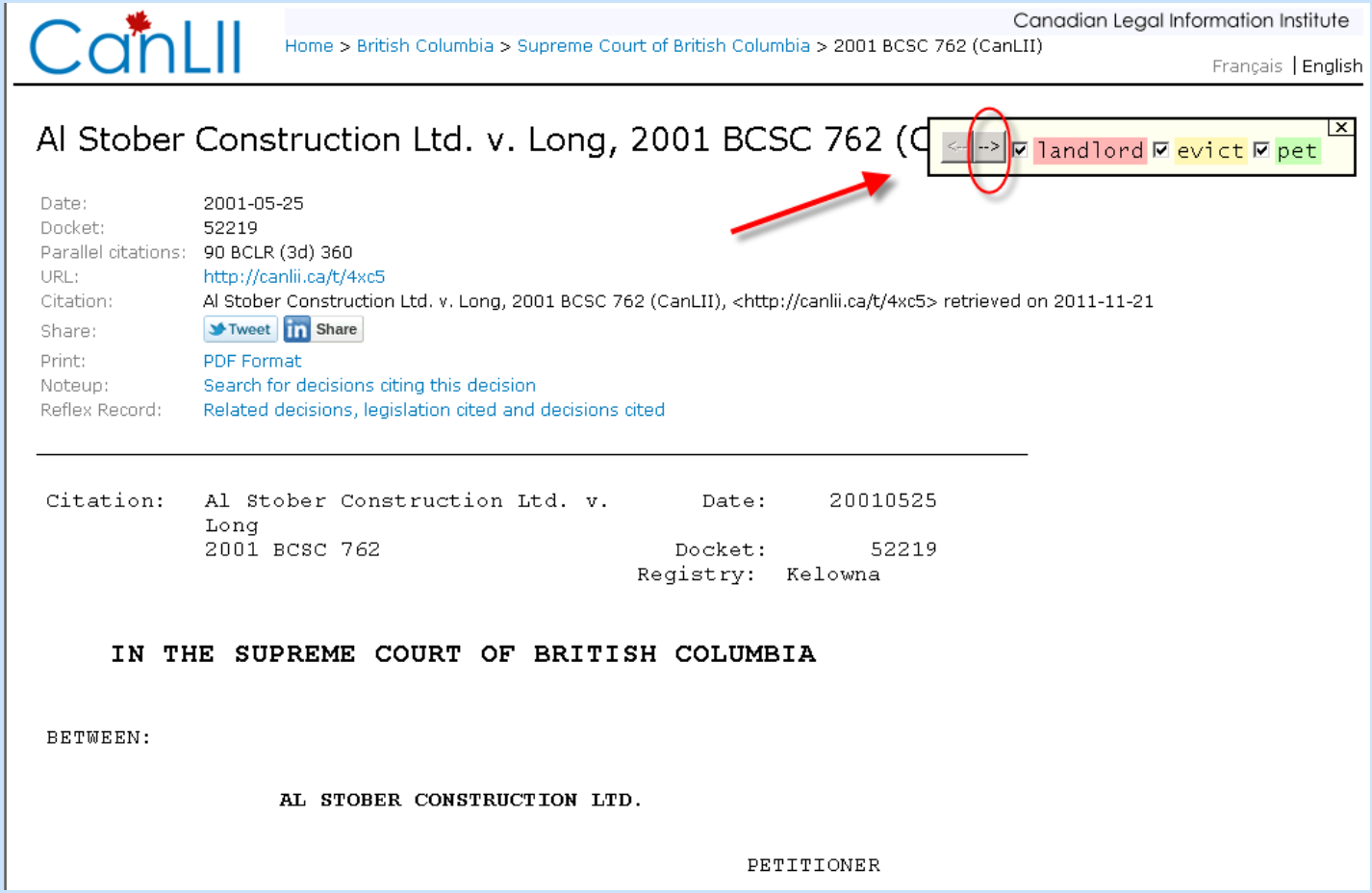
Poor Harry has had his cat for 7 years and now his landlord wants to evict him because of it, despite not having brought it up previously. You want to see if the Courts in BC have ever dealt with this issue.

From CanLII, select BC



Search in full text for landlord & evict /p pet

Results



CanLII

Canadian Legal Information Institute

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Français | English

Al Stober Construction Ltd. v. Long, 2001 BCSC 762 (C

<-- --> landlord evict pet

Date: 2001-05-25
Docket: 52219
Parallel citations: 90 BCLR (3d) 360
URL: http://canlii.ca/t/4xc5
Citation: Al Stober Construction Ltd. v. Long, 2001 BCSC 762 (CanLII), <http://canlii.ca/t/4xc5> retrieved on 2011-11-21
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Citation: Al Stober Construction Ltd. v. Long
2001 BCSC 762

Date: 20010525
Docket: 52219
Registry: Kelowna

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

AL STOBER CONSTRUCTION LTD.

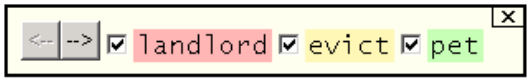
PETITIONER

The introductory paragraph usually lets you know if you're on the right track

Counsel for the Petitioner — S. Andrew

Counsel for the Respondent — C. Charbonneau

Date and Place of Hearing — March 28, 2001 Kelowna, BC



INTRODUCTION

[1] In this application for judicial review of an arbitrator's decision under the ***Residential Tenancy Act***, R.S.B.C. 1996, c. 406, the issue is whether the arbitrator erred in disallowing an eviction notice that was based upon the violation of a "no pet clause".

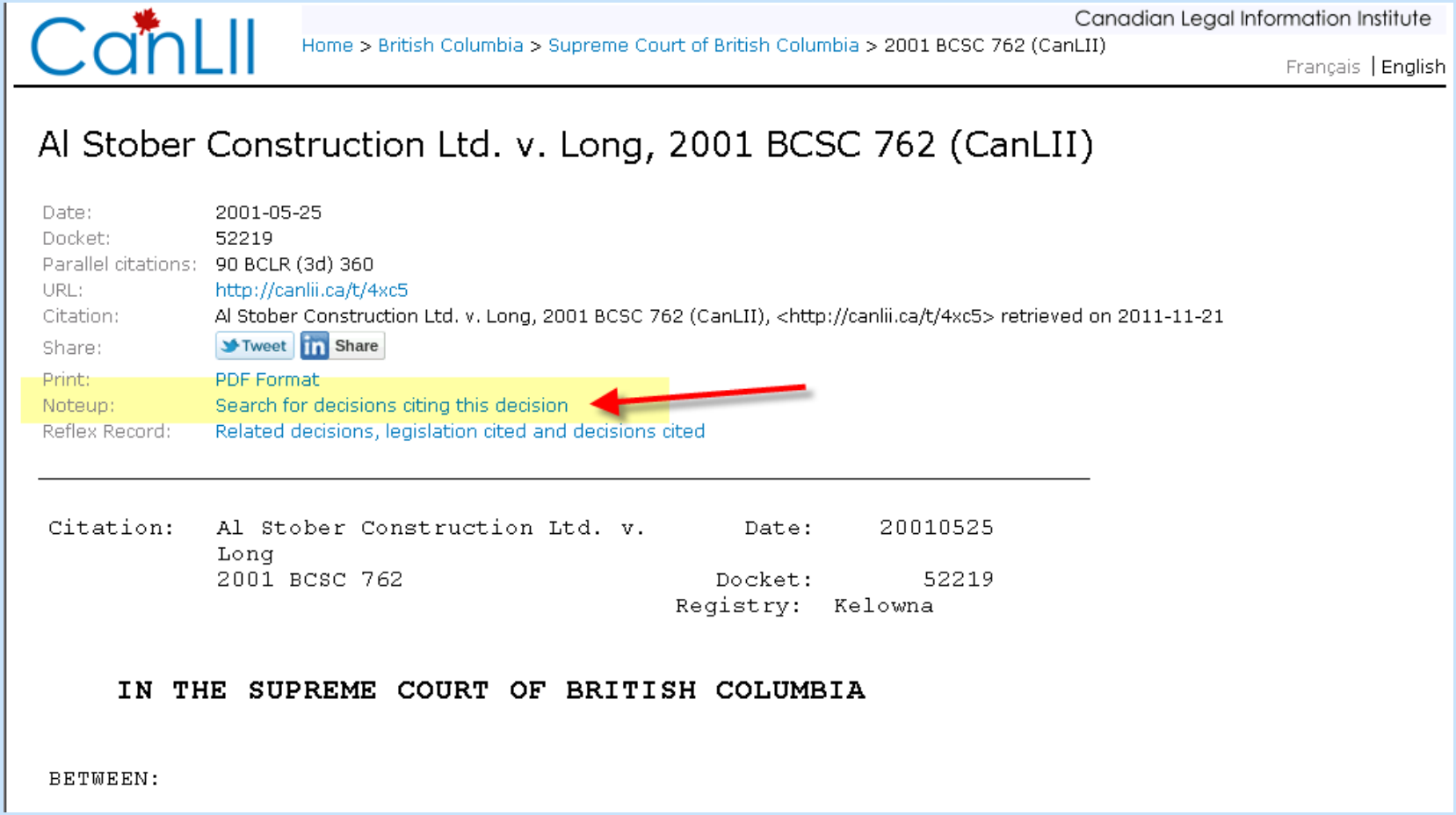
REVIEW OF EVIDENCE AND FINDINGS OF FACT

[2] The petitioner, Al Stober Construction Ltd. ("Stober"), owns a residential townhouse complex known as Coronation Village at 1099 Hillside Road in Kelowna, British Columbia. The respondent, Charles Long, has been a tenant there since June 2, 1990. Mr. Long had a pet cat. On November 15, 2000 Stober gave Mr. Long notice that it considered he was in breach of the "no pet clause" of the Tenancy Agreement. That clause provides:

> No pets will be permitted in the premises: No dogs, cats or other animals.

[3] Because Mr. Long failed to rectify what the landlord considered to be a breach, on November 25, 2000, Stober served on him a Notice to End the Residential Tenancy pursuant to section 36 of the ***Residential Tenancy Act***. Section 36 of the ***Residential Tenancy Act*** states:

Note it up – who else talked about it?



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Al Stober Construction Ltd. v. Long, 2001 BCSC 762 (CanLII)

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2001 BCSC 762

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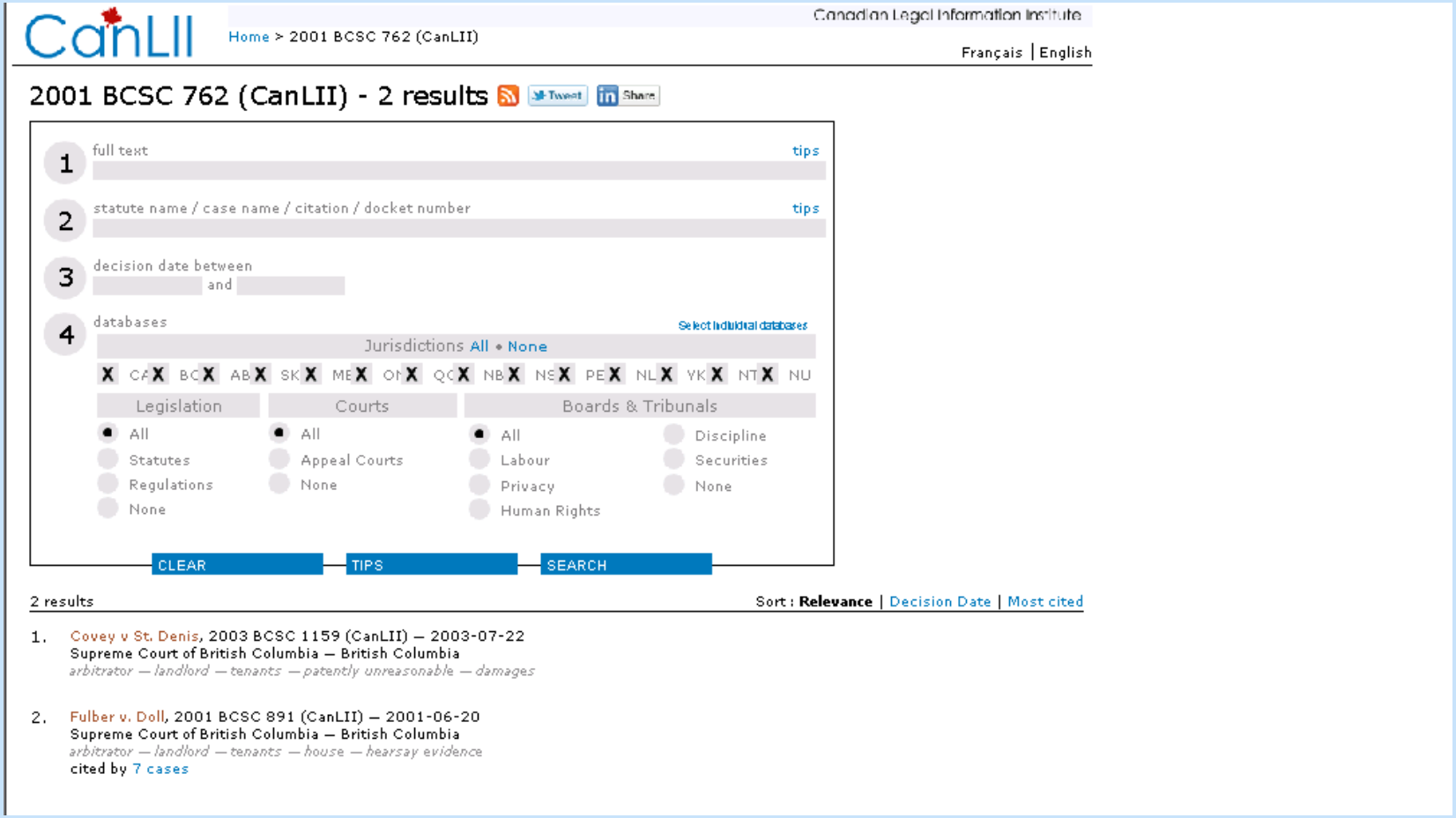
Registry: Kelowna

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

2 Results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All
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Human Rights
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Sort : Relevance | Decision Date | Most cited
1. Covey v St. Denis, 2003 BCSC 1159 (CanLII) — 2003-07-22
Supreme Court of British Columbia — British Columbia
arbitrator — landlord — tenants — patently unreasonable — damages
2. Fulber v. Doll, 2001 BCSC 891 (CanLII) — 2001-06-20
Supreme Court of British Columbia — British Columbia
arbitrator — landlord — tenants — house — hearsay evidence
cited by 7 cases

Let's go back and look at what section of the Act this case considered

INTRODUCTION

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landlord evict pet

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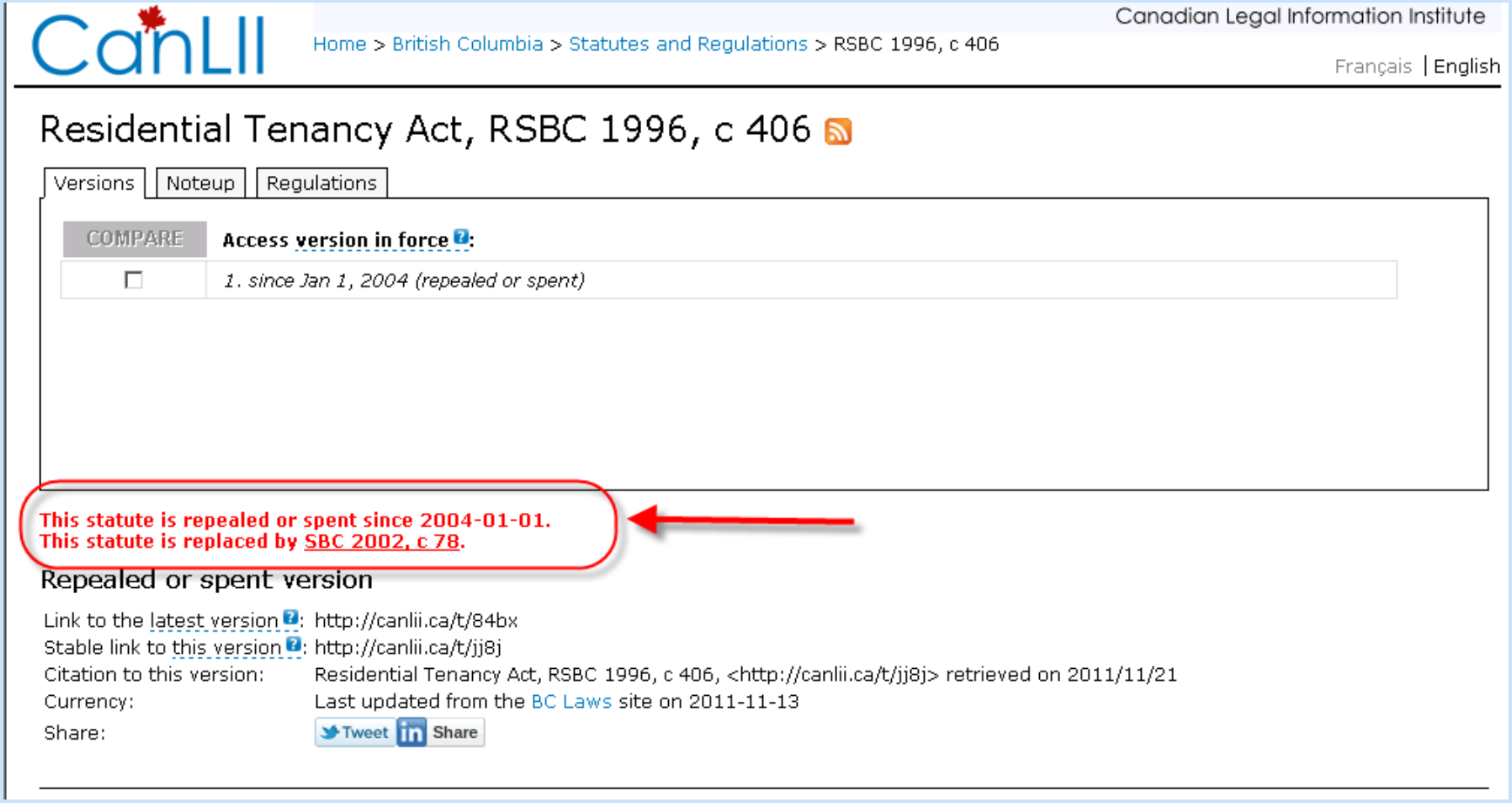
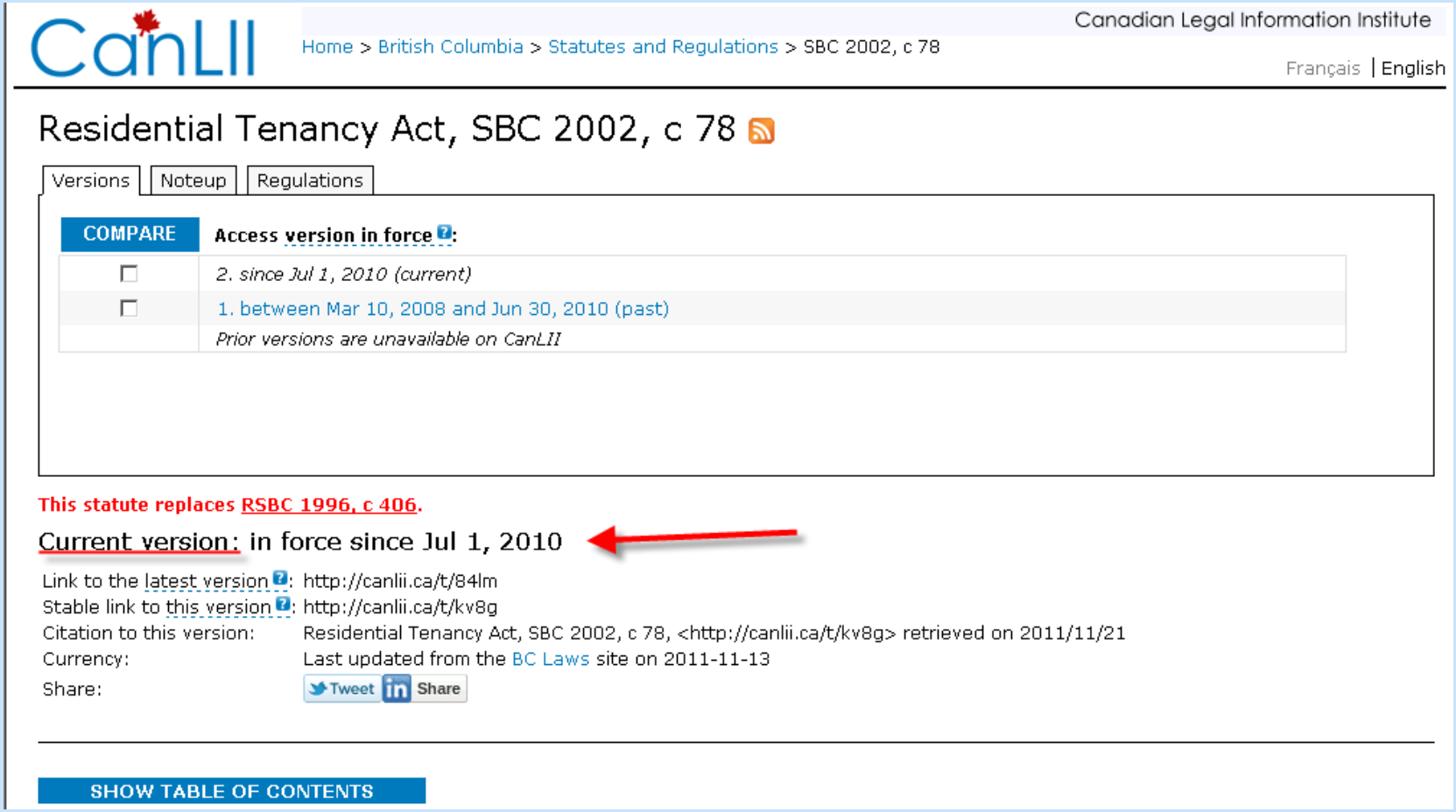
> 36(1) A landlord may, at any time, give the tenant a notice of the end of the tenancy agreement in accordance with subsection (2) if any one of the following events has occurred:
>
> ...

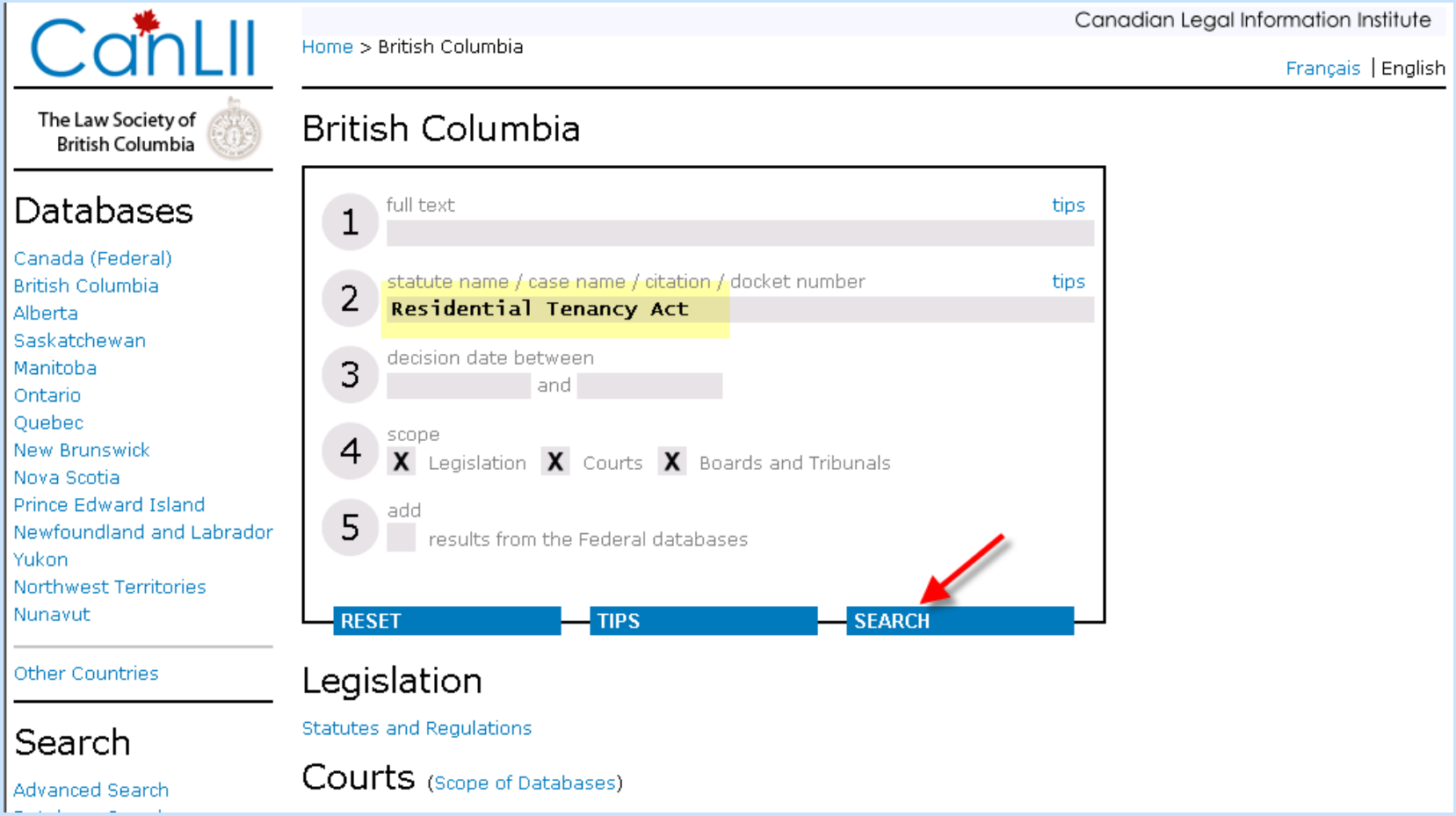
Uh Oh – the Act is no longer in force



Using link to new slide



Or Find a Statute



So does the new Act have a similar provision to section 36?

- Can use compare legislation feature if recent enough (not in this case)
- Can check the same section number just by chance (doesn't work in this case)
- Can search for terms directly out of old section – in this case try "material term"
- Can also scan table of contents

Text of Act (searchable)

CLOSE TABLE OF CONTENTS

Expand All

PART 1 — INTRODUCTORY PROVISIONS [1 - 11]
PART 2 — RESIDENTIAL TENANCIES — RIGHTS AND OBLIGATIONS [12 - 39]
PART 3 — WHAT RENT INCREASES ARE ALLOWED [40 - 43]
PART 4 — HOW TO END A TENANCY [44 - 57]
PART 5 — RESOLVING DISPUTES [58 - 87]
PART 6 — GENERAL MATTERS [88 - 97]
PART 7 — TRANSITIONAL AND CONSEQUENTIAL PROVISIONS [98 - 117]

RESIDENTIAL TENANCY ACT
[SBC 2002] CHAPTER 78

Part 1 — Introductory Provisions

Division 1 — General

Definitions

1 In this Act:

"application for dispute resolution" means an application to the director under section 58 (1) *[determining disputes]*;

"approved form" means the form approved by the director under section 10 (1) *[director may approve forms]* for the purposes of the section in which it appears;

"common area" means any part of residential property the use of which is shared by tenants, or by a landlord and one or more tenants;

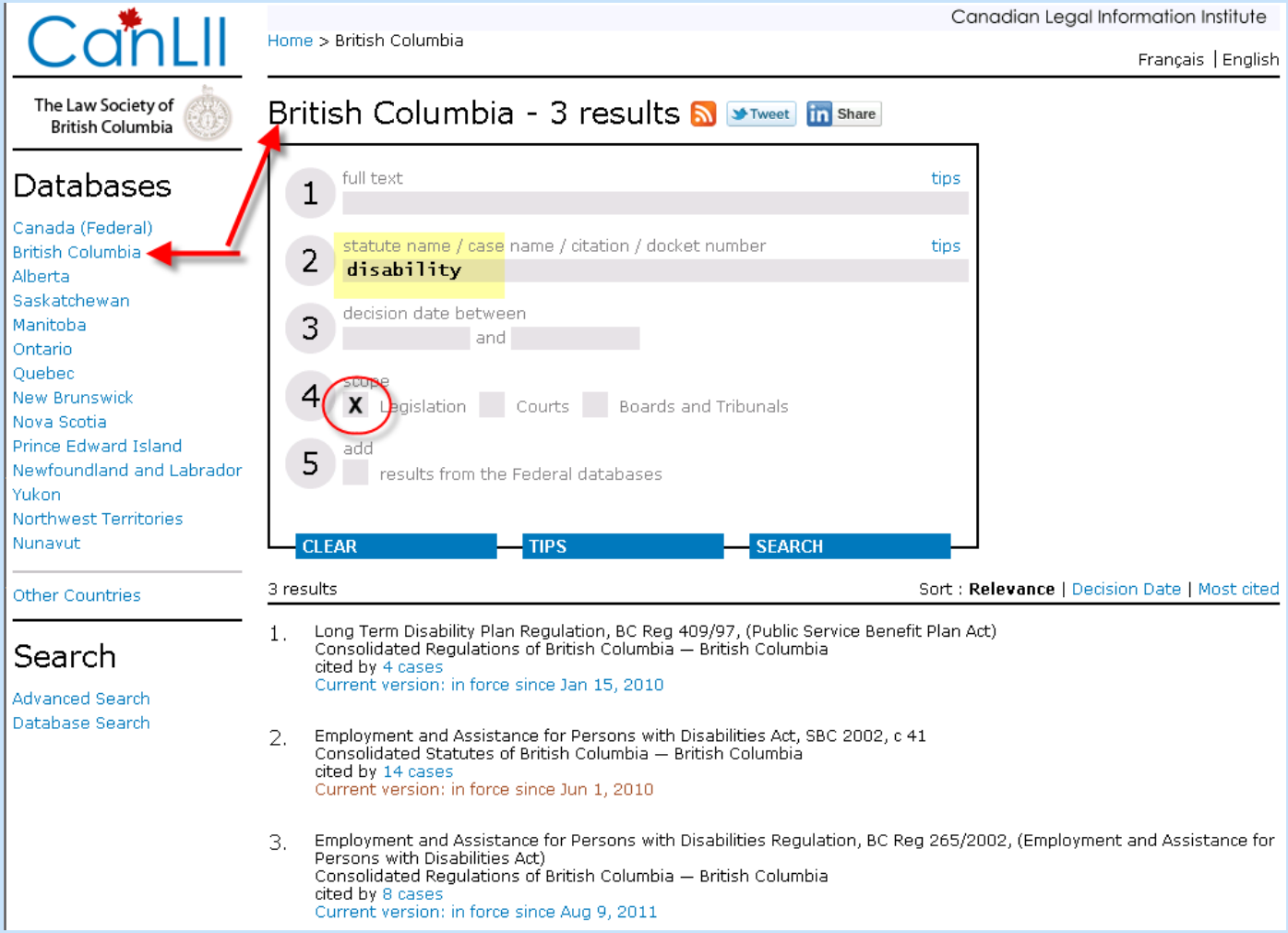
"director" means the director appointed under section 8 *[appointment of director]* and, in relation to a power, duty or function of the director given to an employee referred to in section 9 (2) or delegated to a person retained under that section, includes that employee or person;

Other Law Finding Tools

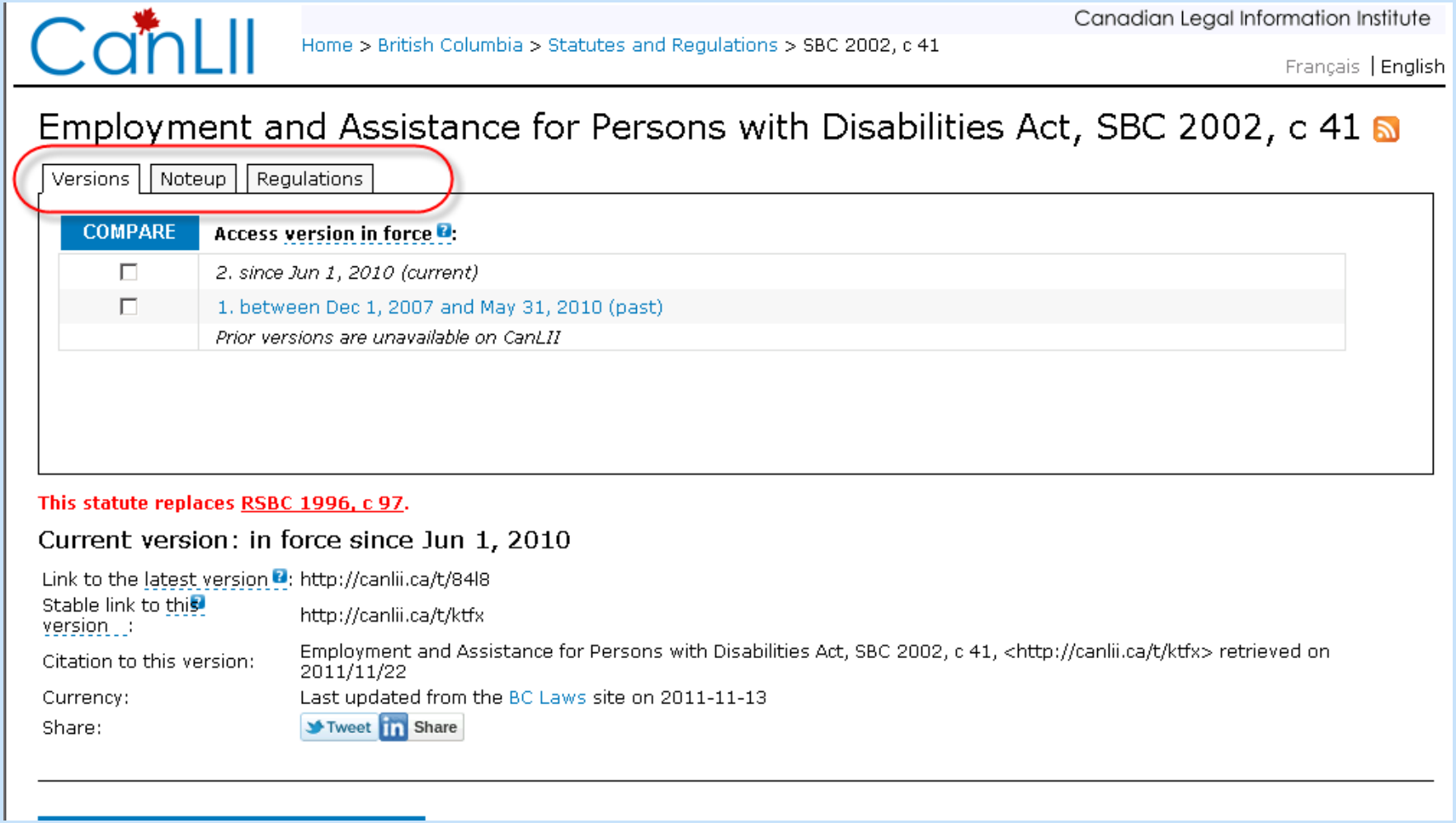
So you know that there is an Act in B.C. governing assistance for people with disabilities and the Forms to apply are found in the Regulations. You also know the forms were changed recently and you want to see the changes. You don't remember the exact name of the Act but you want to look at the Regulations that go along with the Act and compare the changes.

Search for the Act

- Select BC, limit to legislation , type “disability”



Multiple options from the Act



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Employment and Assistance for Persons with Disabilities Act, SBC 2002, c 41

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In force

Employment and Assistance for Persons with Disabilities Regulation, BC Reg 265/2002

Forms Regulation, BC Reg 315/2005

This statute replaces RSBC 1996, c 97.

Current version: in force since Jun 1, 2010

Link to the latest version:	http://canlii.ca/t/84l8
Stable link to this version:	http://canlii.ca/t/ktfx
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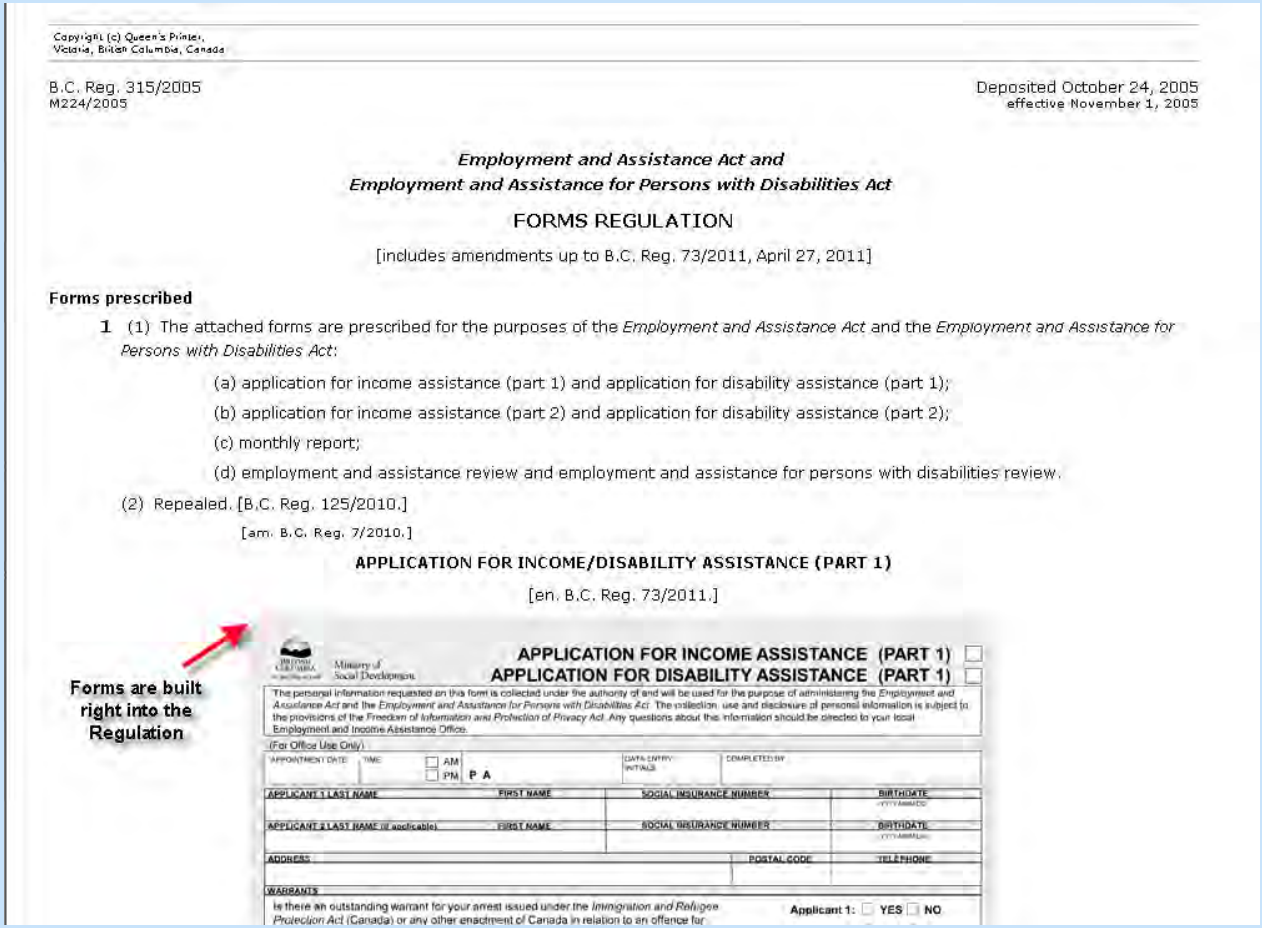
Forms Regulation



B.C. Reg. 315/2005
M224/2005

Deposited October 24, 2005
effective November 1, 2005

Employment and Assistance Act and
Employment and Assistance for Persons with Disabilities Act

FORMS REGULATION

[includes amendments up to B.C. Reg. 73/2011, April 27, 2011]

Forms prescribed

1 (1) The attached forms are prescribed for the purposes of the *Employment and Assistance Act* and the *Employment and Assistance for Persons with Disabilities Act*:

(a) application for income assistance (part 1) and application for disability assistance (part 1);

(b) application for income assistance (part 2) and application for disability assistance (part 2);

(c) monthly report;

(d) employment and assistance review and employment and assistance for persons with disabilities review.

(2) Repealed. [B.C. Reg. 125/2010.]

[am. B.C. Reg. 7/2010.]

APPLICATION FOR INCOME/DISABILITY ASSISTANCE (PART 1)

[en. B.C. Reg. 73/2011.]

Forms are built right into the Regulation

Ministry of Social Development

APPLICATION FOR INCOME ASSISTANCE (PART 1) ☐
APPLICATION FOR DISABILITY ASSISTANCE (PART 1) ☐

The personal information requested on this form is collected under the authority of and will be used for the purpose of administering the *Employment and Assistance Act* and the *Employment and Assistance for Persons with Disabilities Act*. The collection, use and disclosure of personal information is subject to the provisions of the *Freedom of Information and Protection of Privacy Act*. Any questions about the information should be directed to your local Employment and Income Assistance Office.

(For Office Use Only)

APPOINTMENT DATE	TIME	☐ AM ☐ PM P A	DATA ENTRY INITIALS	COMPLETED BY

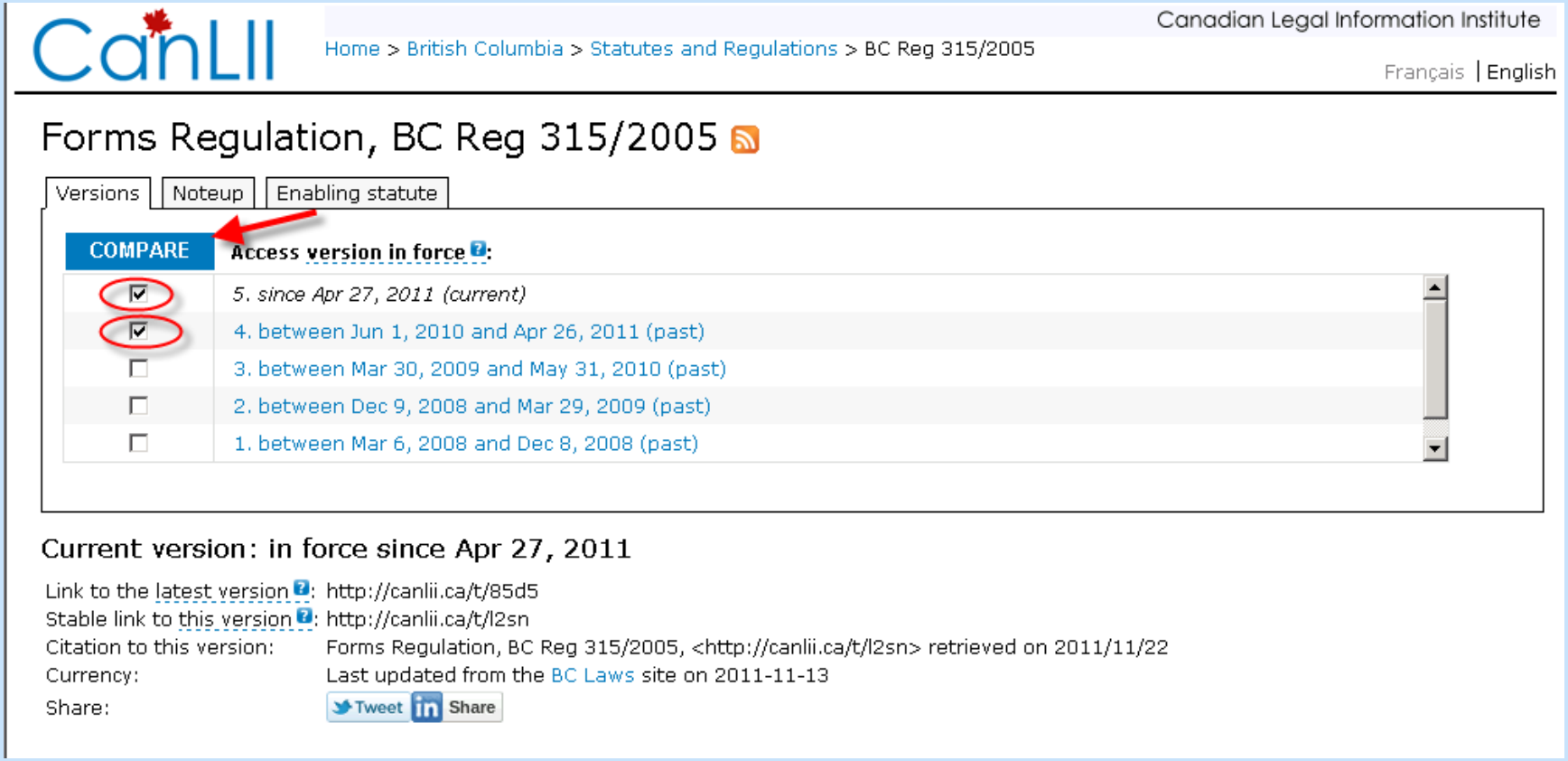
APPLICANT 1 LAST NAME	FIRST NAME	SOCIAL INSURANCE NUMBER	BIRTHDATE
APPLICANT 2 LAST NAME (if applicable)	FIRST NAME	SOCIAL INSURANCE NUMBER	BIRTHDATE
ADDRESS		POSTAL CODE	TELEPHONE

WARRANTS

Is there an outstanding warrant for your arrest issued under the *Immigration and Refugee Protection Act* (Canada) or any other enactment of Canada in relation to an offence for

Applicant 1: ☐ YES ☐ NO

Compare Old and New Versions



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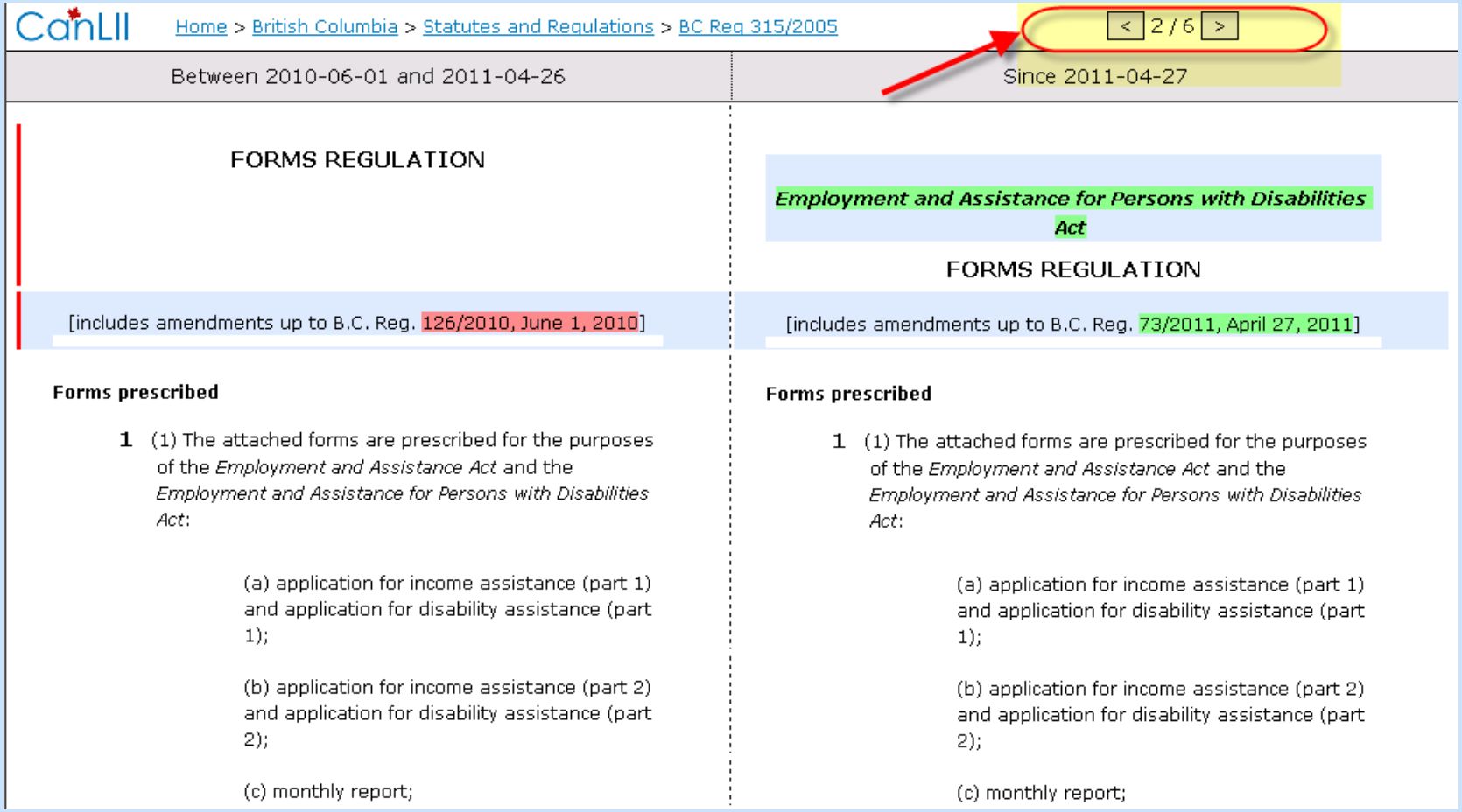
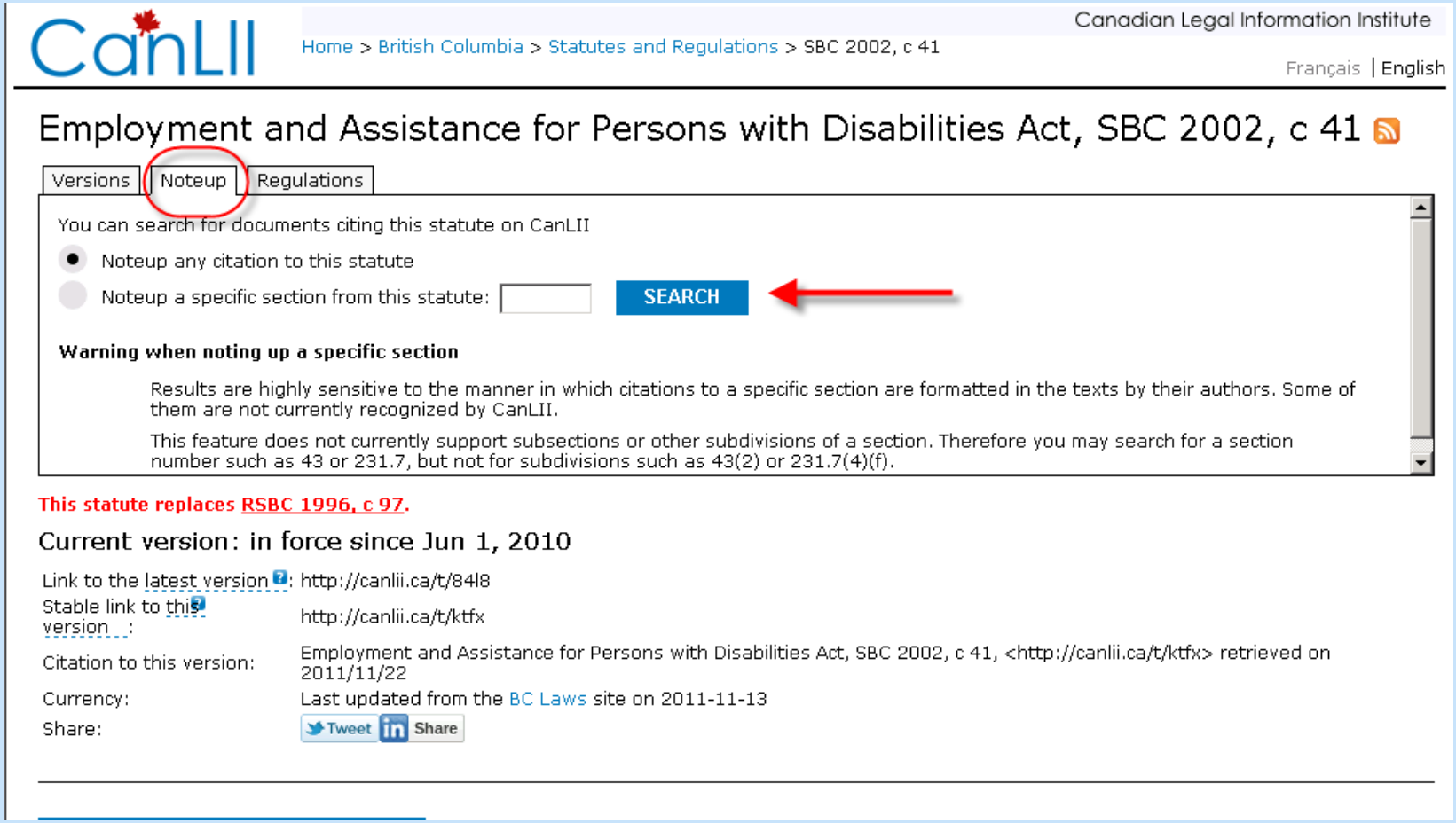


Noting Up

What if you want to read about cases where the Judges have considered your Act?

Note Up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1. R. v. Baldini, 2011 BCCA 88 (CanLII) — 2011-02-25
Court of Appeal — British Columbia
conditional sentence — pending the determination — released on his own recognizance — house arrest — residence

2. The British Columbia Coalition of People with Disabilities obo J.T. v. B.C. (Ministry of Employment and Income Assistance), 2008 BCHRT 224 (CanLII) — 2008-06-16
British Columbia Human Rights Tribunal — British Columbia
complaint — public — orthodontic supplement — initials — behalf
cited by 1 case

3. Harmer v. B.C. (Min. of Human Resources) (No. 5), 2010 BCHRT 26 (CanLII) — 2010-02-01
British Columbia Human Rights Tribunal — British Columbia
pre-requisite for provincial disability benefits — receipt of employment income — reopen — reconsider — complaint

4. McLean v HMTQ, 2004 BCSC 285 (CanLII) — 2004-03-05
Supreme Court of British Columbia — British Columbia
diet benefit — regulations — legislation — clothing — application for judicial review
cited by 4 cases

5. McIntyre v. Employ. & Assist. Appeal Tribunal, 2005 BCSC 1179 (CanLII) — 2005-08-12
Supreme Court of British Columbia — British Columbia
patently unreasonable — physiotherapy treatments — standard of review — legislation — privative
cited by 4 cases

6. Harley v. Employment and Assistance Appeal Tribunal, 2006 BCSC 1420 (CanLII) — 2006-09-20
Supreme Court of British Columbia — British Columbia
daughter — reasons — decision-maker must — evidence — money
cited by 24 cases

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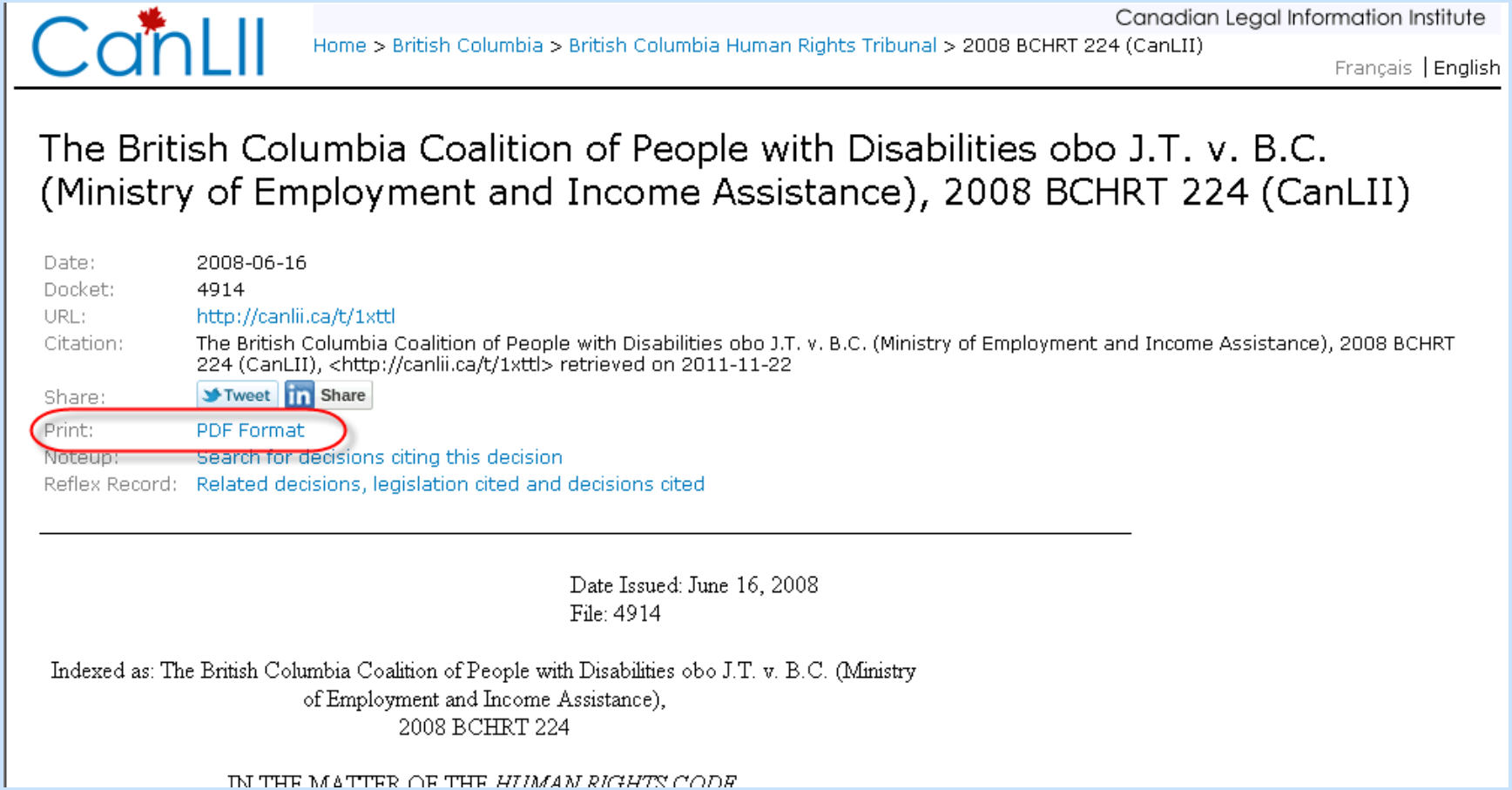

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The British Columbia Coalition of People with Disabilities obo J.T. v. B.C. (Ministry of Employment and Income Assistance), 2008 BCHRT 224 (CanLII)

Date: 2008-06-16
Docket: 4914
URL: http://canlii.ca/t/1xttl
Citation: The British Columbia Coalition of People with Disabilities obo J.T. v. B.C. (Ministry of Employment and Income Assistance), 2008 BCHRT 224 (CanLII), <http://canlii.ca/t/1xttl> retrieved on 2011-11-22
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Date Issued: June 16, 2008
File: 4914

Indexed as: The British Columbia Coalition of People with Disabilities obo J.T. v. B.C. (Ministry of Employment and Income Assistance),
2008 BCHRT 224

IN THE MATTER OF THE *HUMAN RIGHTS CODE*

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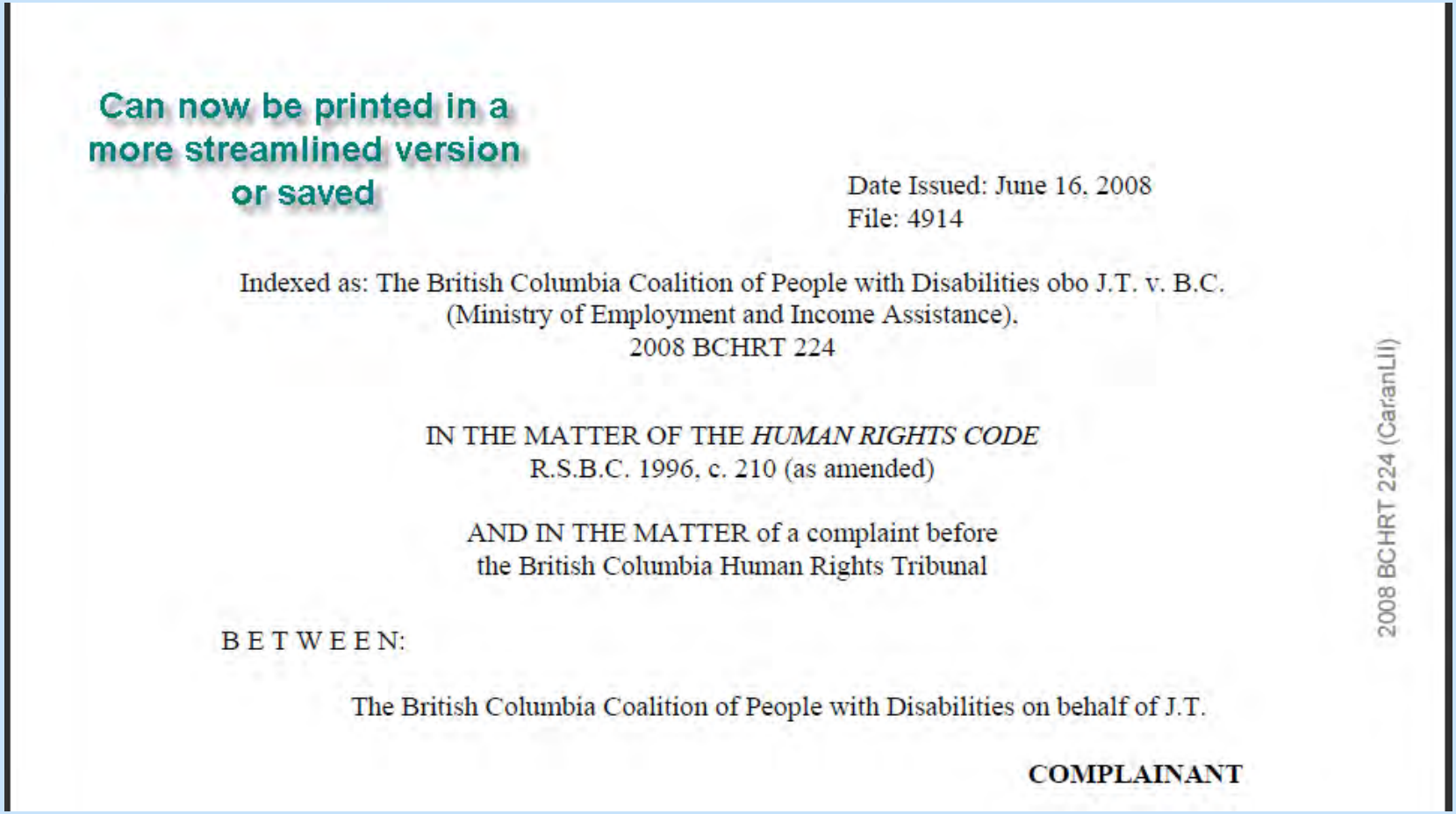
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2008 BCHRT 224
IN THE MATTER OF THE HUMAN RIGHTS CODE
R.S.B.C. 1996, c. 210 (as amended)
AND IN THE MATTER of a complaint before the British Columbia Human Rights Tribunal
BETWEEN:
The British Columbia Coalition of People with Disabilities on behalf of J.T.
COMPLAINANT
2008 BCHRT 224 (CanLII)

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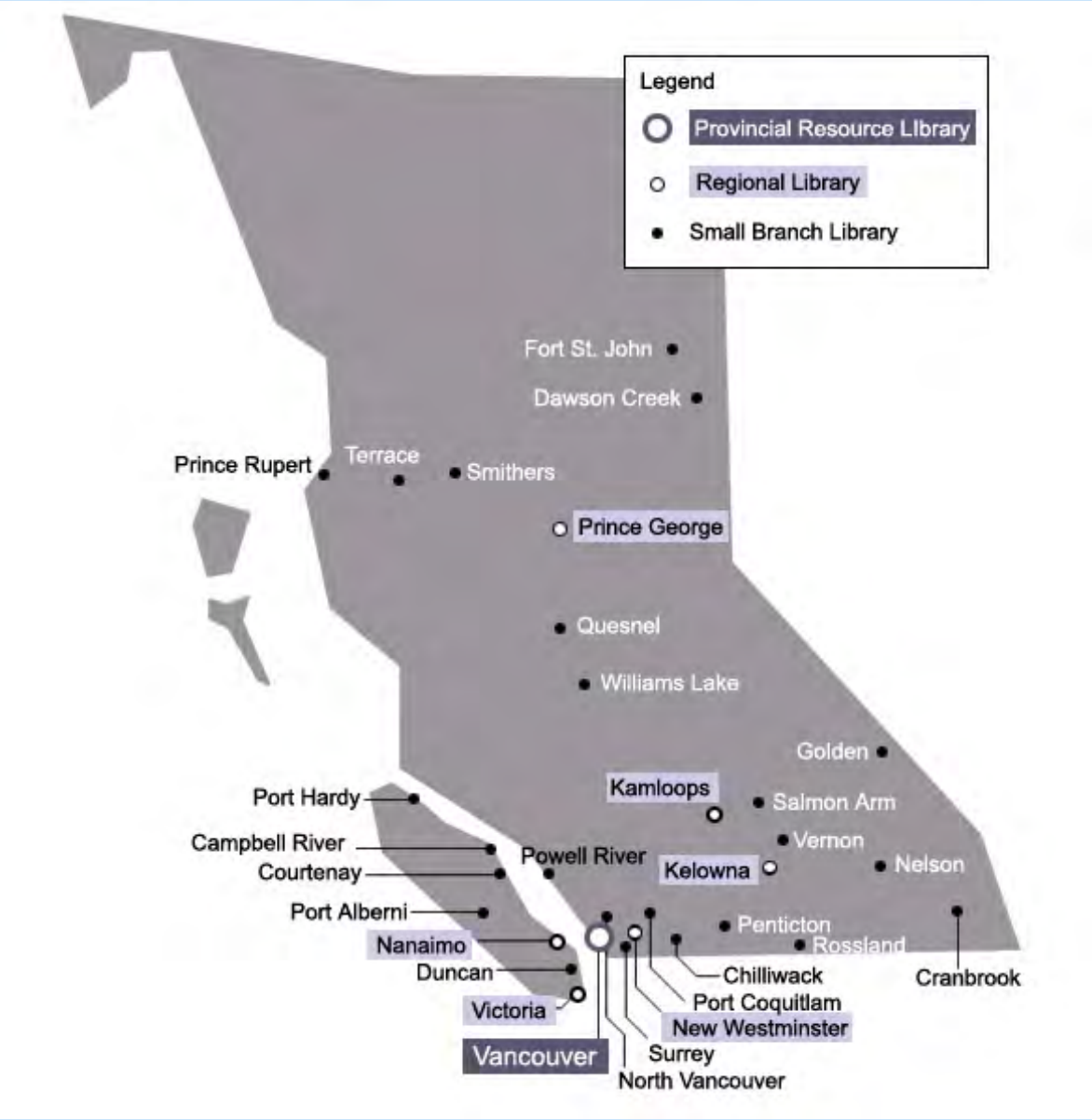

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- Ask Us a Question

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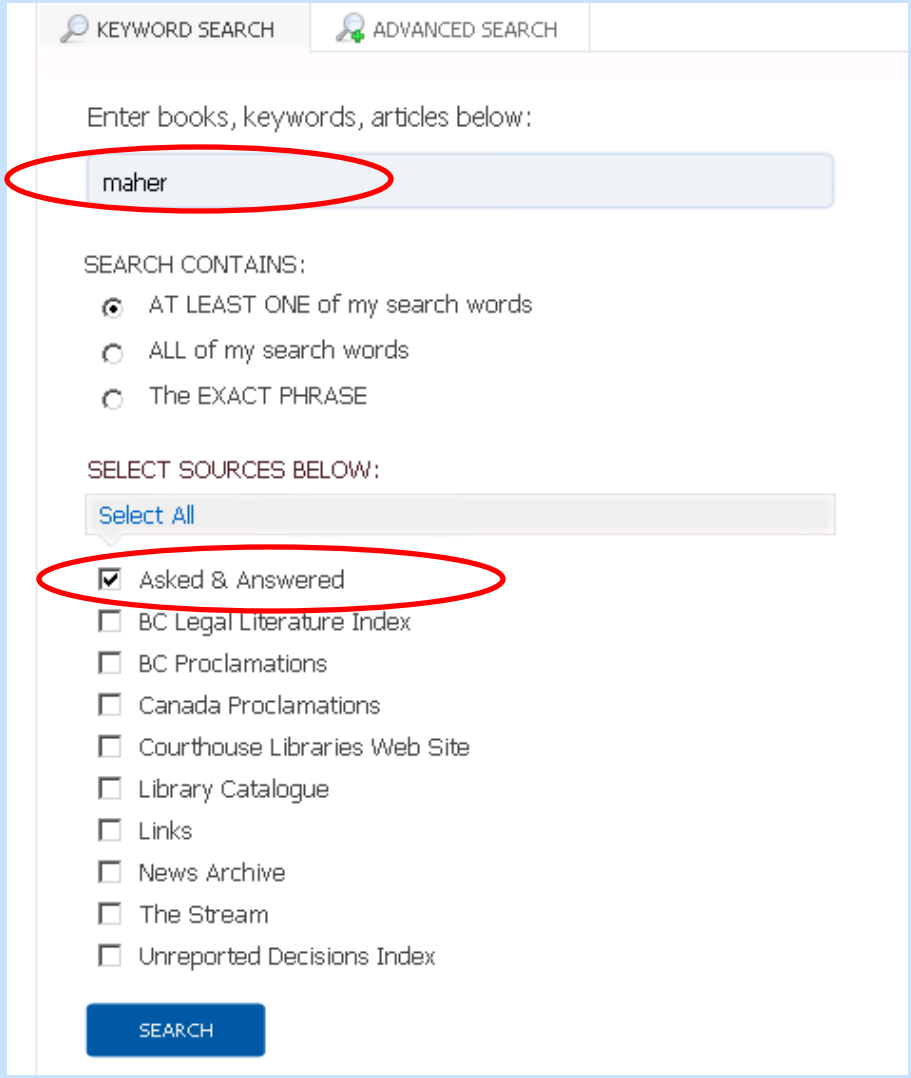
Example…

A woman comes into your office and tells you that she is Muslim and has a Maher. Your first problem is that you're not sure what a Maher is. Where do you start?

Enter “Maher” in the search box and limit to “Asked and Answered”



Voila!

MUSLIM MARRIAGE CONTRACT - MAHER

Maher (alternately transliterated as mahr, mehr, or mehrieh) is a contract some Muslims enter into upon marriage. In Islamic law, it is a gift or contribution made by the husband-to-be to his wife-to-be, for her exclusive property, as a mark of respect for the bride, and as recognition of her independence. It is not, however, a gift in the traditional sense, but is in fact obligatory and the wife-to-be receives it as a right.

In many marriages, a portion of the Maher is paid promptly, that is, before the marriage is consummated, and a portion, often the larger portion, is deferred to be paid on demand by the wife, or upon divorce, or upon the death of the husband.

In the case of such deferred payment, the portion deferred had the effect of helping look after a wife after divorce or after her husband's death. Although a wife can waive payment of the Maher, she is entitled to it as a matter of Islamic religious principle.

Trial judges have upheld maher contracts in Canadian courts.

Canadian cases that deal with the issue of Maher:

- Nathoo v. Nathoo, 1996 CanLII 2705
- Kaddoura v. Hammoud (1998), 168 D.L.R. (4th) 503
- Amlani v. Hirani , 2000 BCSC 1653
- M. (N.M.) v. M. (N.S.), 2004 BCSC 346
- Marcovitz v. Bruker, 2005 QCCA 835, 2007 SCC 54
- K. (M.A.) v. B. (E.I.), 2008 NBQB 249 (French version A.K. c. I.B., 2008 NBBR 249), 2008 CarswellNB 671, 2008 CarswellNB 673
- Nasin v. Nasin, 2008 ABQB 219
- Khanis v. Noormohamed, 2009 CanLII 27829
- Al-Mahamid v. Peart Estate, 2009 NSSC 285

REFERENCES:

P. Fournier, "In the (Canadian) Shadow of Islamic Law: Translating Mahr as a Bargaining Endowment" (2006) 44 Osgoode Hall L.J. 660 (available in the Vancouver Courthouse Library)

D. Gradley, "The Contract of Maher" (2009) 120 The Verdict 24. (available in Vancouver and regional courthouse libraries)

M. S. B. Jaffer, "Vertical Mosaic from South Asian and Ismaili Muslim Point of View" Continuing Legal Education Family Law Conference. (Vancouver: CLE, 2001) at 13.3.1 (available in most BC courthouse libraries)

G.D. Sanagan, Sanagan's Encyclopedia of Words and Phrases, Legal Maxims, Canada, 5th ed, c. M, p. M-5 (available in the Vancouver and Victoria Courthouse Libraries)

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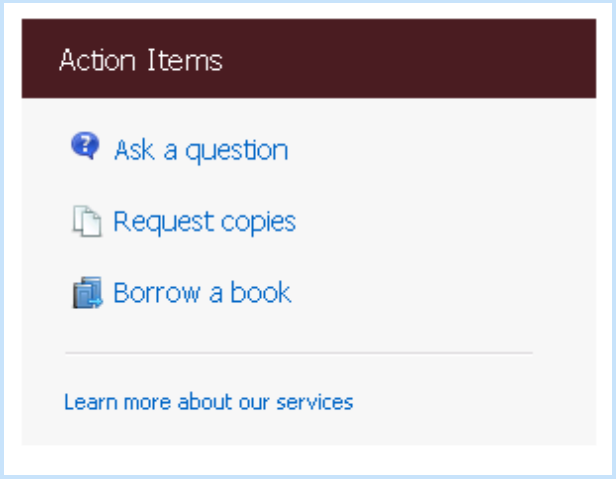
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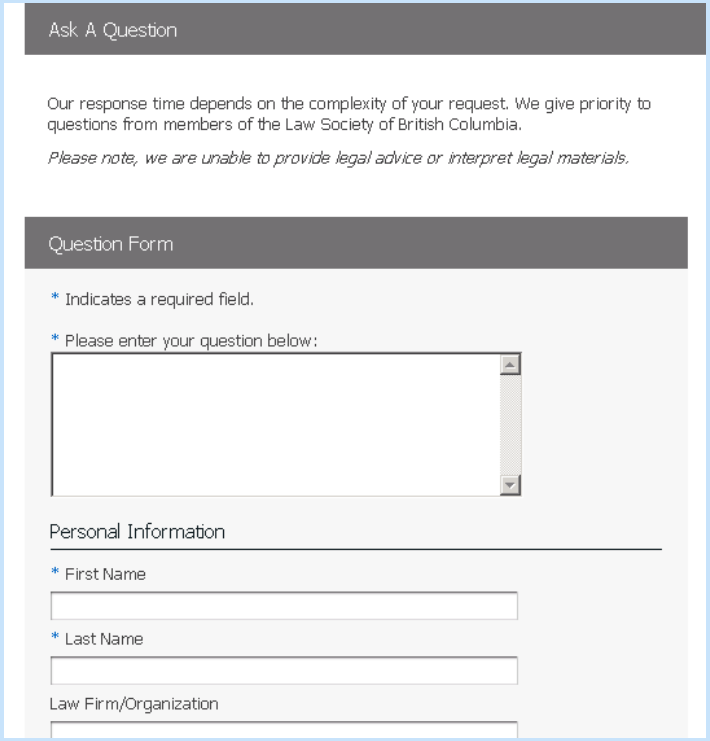
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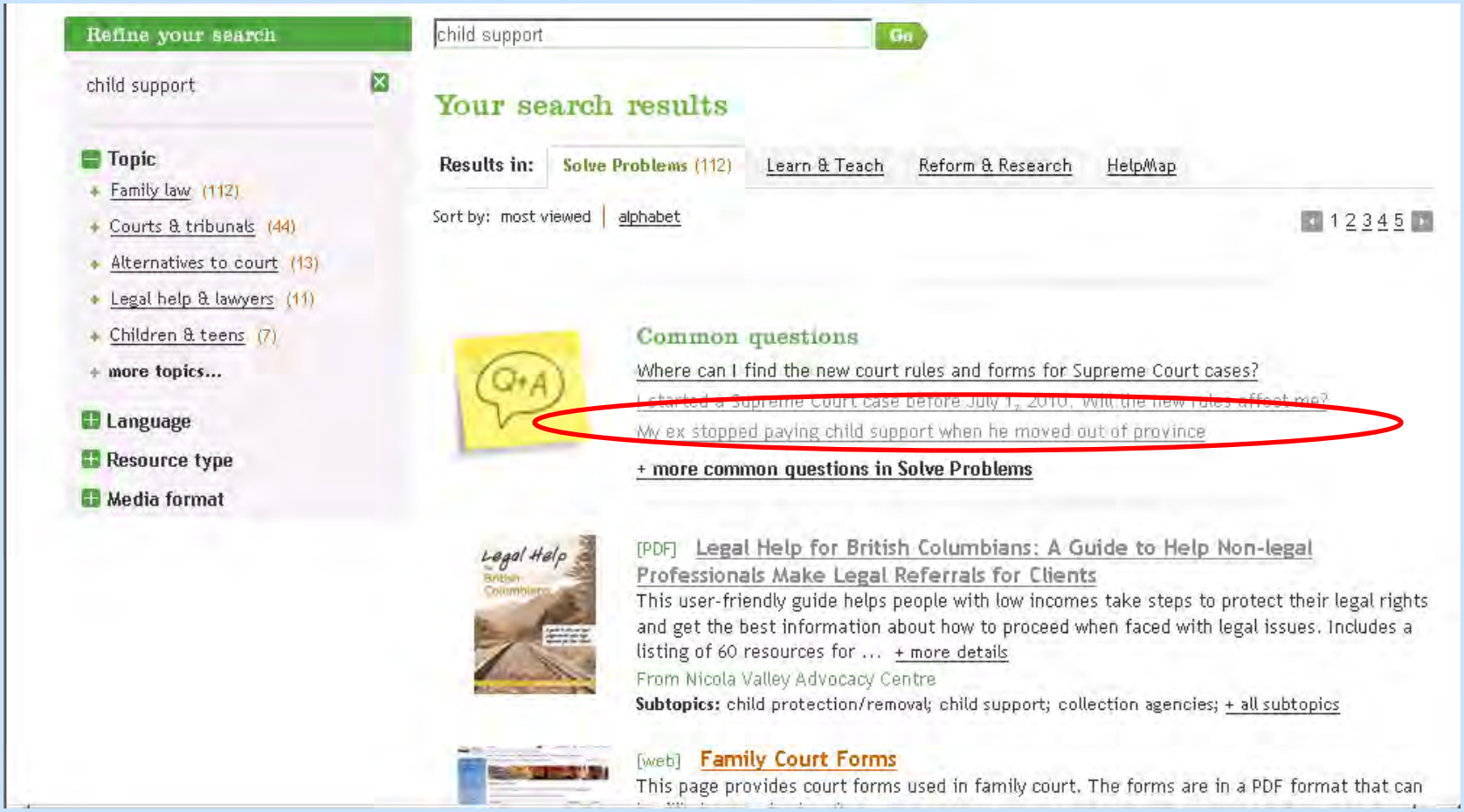
Example

A client comes in and tells you that his wife moved to Alberta, left him with the kids and is not paying her child support.

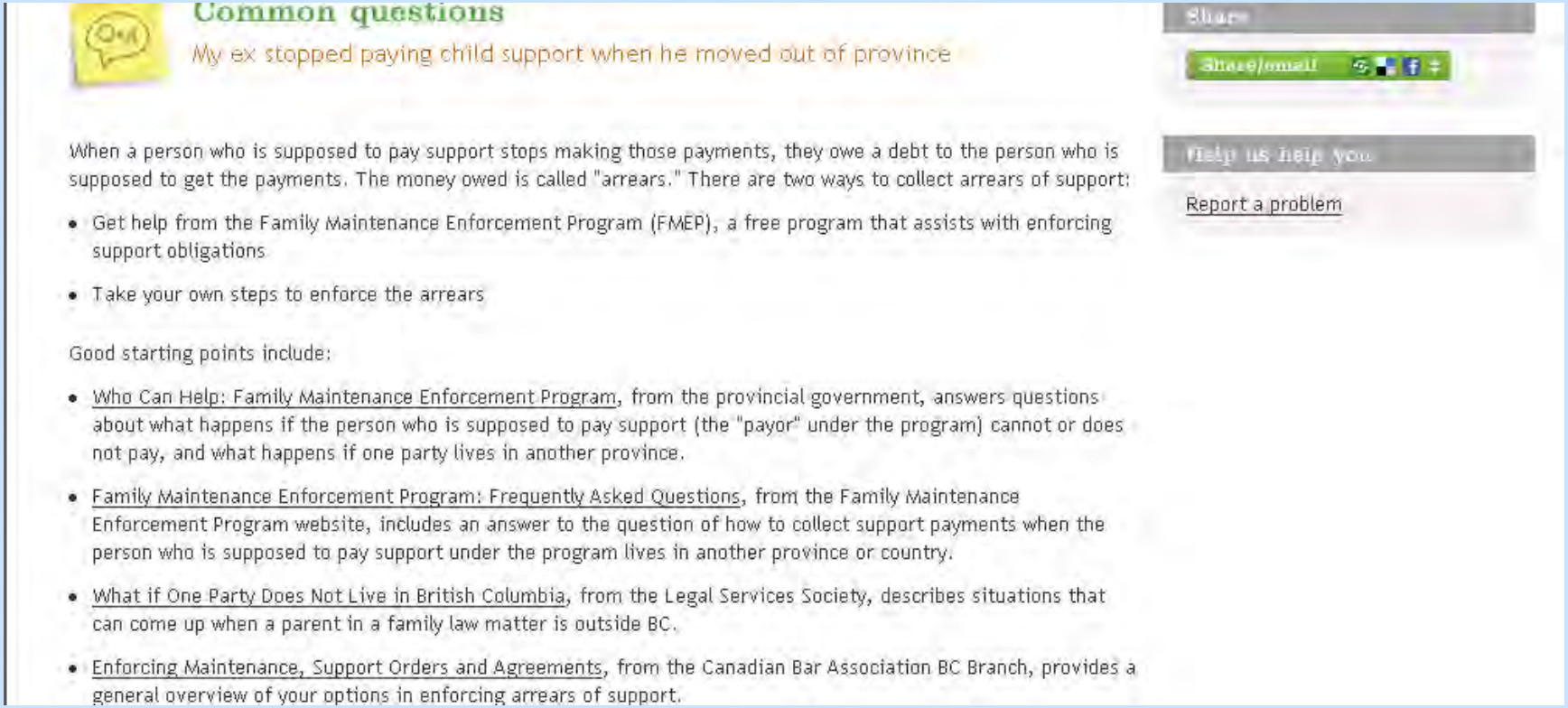
You need a crash course in inter-jurisdictional child support payments.

Search – “child support”

Results


Refine your search
child support
Topic
Family law (112)
Courts & tribunals (44)
Alternatives to court (13)
Legal help & lawyers (11)
Children & teens (7)
more topics...
Language
Resource type
Media format
child support
Go
Your search results
Results in:
Solve Problems (112)
Learn & Teach
Reform & Research
HelpMap
Sort by: most viewed | alphabet
1 2 3 4 5
Common questions
Where can I find the new court rules and forms for Supreme Court cases?
My ex stopped paying child support when he moved out of province
+ more common questions in Solve Problems
[PDF] Legal Help for British Columbians: A Guide to Help Non-legal Professionals Make Legal Referrals for Clients
This user-friendly guide helps people with low incomes take steps to protect their legal rights and get the best information about how to proceed when faced with legal issues. Includes a listing of 60 resources for ... + more details
From Nicola Valley Advocacy Centre
Subtopics: child protection/removal; child support; collection agencies; + all subtopics
[web] Family Court Forms
This page provides court forms used in family court. The forms are in a PDF format that can

Answer



Common questions

My ex stopped paying child support when he moved out of province

When a person who is supposed to pay support stops making those payments, they owe a debt to the person who is supposed to get the payments. The money owed is called "arrears." There are two ways to collect arrears of support:

- Get help from the Family Maintenance Enforcement Program (FMEP), a free program that assists with enforcing support obligations
- Take your own steps to enforce the arrears

Good starting points include:

- Who Can Help: Family Maintenance Enforcement Program, from the provincial government, answers questions about what happens if the person who is supposed to pay support (the "payor" under the program) cannot or does not pay, and what happens if one party lives in another province.
- Family Maintenance Enforcement Program: Frequently Asked Questions, from the Family Maintenance Enforcement Program website, includes an answer to the question of how to collect support payments when the person who is supposed to pay support under the program lives in another province or country.
- What if One Party Does Not Live in British Columbia, from the Legal Services Society, describes situations that can come up when a parent in a family law matter is outside BC.
- Enforcing Maintenance, Support Orders and Agreements, from the Canadian Bar Association BC Branch, provides a general overview of your options in enforcing arrears of support.

Share

Share/email

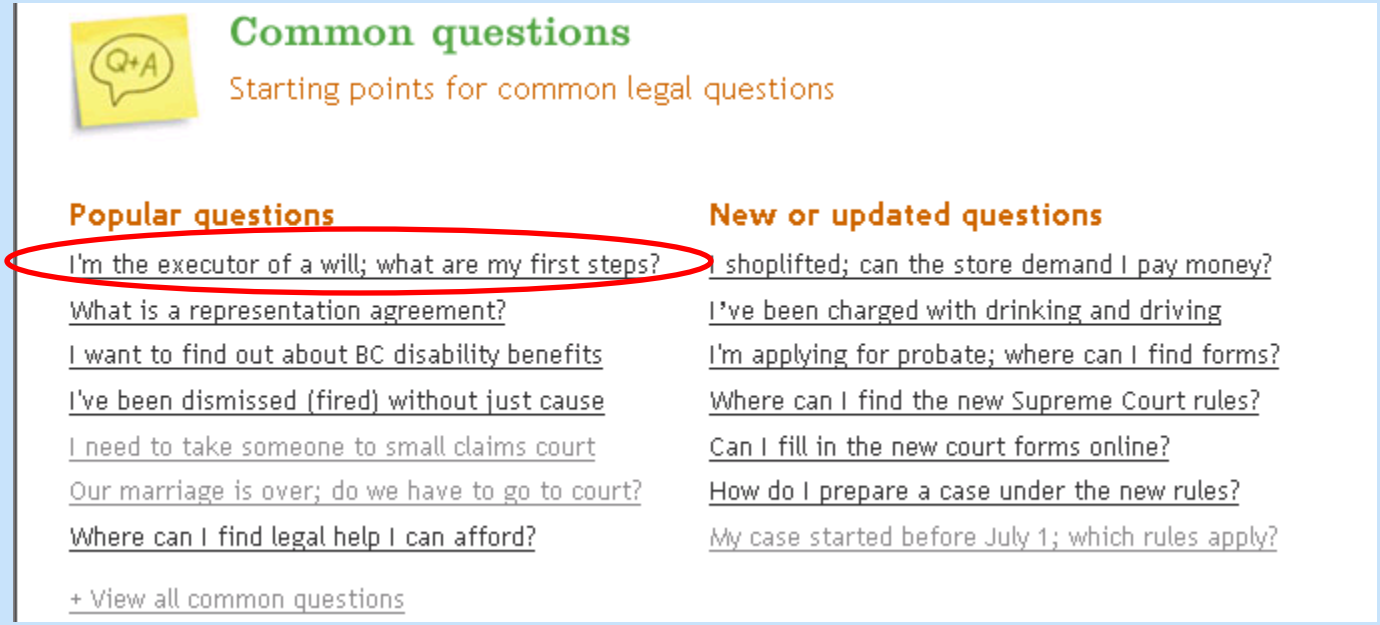
Help us help you

Report a problem

Example

A client's mother has just passed away, leaving him a small estate. He can't really afford a lawyer, doesn't qualify for help but wants to know if you can give him some information on doing it himself.

Go to Common Questions



Common questions

I am the executor of my mother's will and am doing the work myself

An **executor** is the person named in a will to carry out the instructions contained in the will. The executor is responsible for settling the person's affairs after death. The person's estate (everything he or she owned) passes temporarily to the executor. In general, the executor gathers up the estate assets, pays the funeral costs, debts and taxes, and then distributes what remains of the estate to the beneficiaries in the will.

If you are the executor of a will, good starting points include:

- Your Duties as Executor, from the Canadian Bar Association BC Branch, provides an overview of what is involved in being an executor and the steps in the process.
- Being an Executor, from People's Law School, outlines what is involved in being an executor and the steps you take as an executor. It provides answers to such questions as: Do I have to act as executor? Does an executor get paid? What do I do first?

Probate is a legal procedure that confirms the will can be acted on and that you have the authority to act as executor. Be aware that you don't always have to apply for probate. It depends on the type of assets in the estate. The procedure includes submitting special forms and the original will to the Probate Registry of the Supreme Court.

Good starting points on probating a will include:

- Your Duties as Executor, from the Canadian Bar Association BC Branch, explains some of the situations that require probate.
- Being an Executor, from People's Law School, outlines the steps involved in probating the will. It includes a checklist of tasks for the executor after probate.
- About Wills and Estates, from the provincial government, has basic information about what the Probate Registry does, and information about estates and the executor's role.

Any Questions?

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INTERPRETING LEGISLATION

presented by Kendra Milne and Devyn Cousineau
Community Legal Assistance Society
604-685-3425

Learning goals:

In this session, we hope to teach you how to interpret a specific statutory provision. This method should work regardless of the statute you are working with.

Specifically, we hope to give you a set of reasonably concrete steps you can go through to (1) determine the potential meanings of a statutory provisions, and (2) find materials to base your interpretation on and persuasively argue that the interpretation most favourable to your client should be the one the decision maker should adopt.

Content of materials

Introduction to statutory interpretation..... 2

General rule for interpreting legislation 4

The ordinary meaning(s) of the text..... 5

The context of the provision..... 6

Interpretations by others..... 6
Specific context 7
The intention or the purpose of the provision..... 9
Wider context..... 9

Conclusion..... 11

Introduction to statutory interpretation

When you are faced with a section of a statute and you are trying to determine what that sections means, it is important to remember that there is usually no right or wrong answer. There is also no silver bullet or sure fire way to determine the answer. Unless a superior court has expressly determined that the provisions cannot be interpreted in a given way, your job will generally be to look at what the plain meaning of the language could mean, and what meaning the "context" of the legislation supports. Generally, each statutory provision can be interrupted in more than one way, and you can often argue that an interpretation that helps your client is the one that a decision maker should adopt.

Think about a statutory provision like a painting:

How do you determine the meaning of the painting?

1) Plain meaning: What can you see from the physical face of the painting?
    - Are some interpretations ruled out?
2) Other interpretations: Do you look at what others have said the painting means?
    - What have others said this painting means? How valuable are their opinions (what weight can you give them)?
3) Specific context: Do you use information you can find about the content of the painting?

- Who is depicted in the painting? Where was it painting? How was it painted? Are there any other specific elements of the painting that might provide information?

4) Intention: Do you use what the artist intended the painting to mean?
    - Is there any evidence of what the artists meant the painting to mean?
5) Wider context: Do you use the wider context of the painting, and how it fits into broader developments?
    - Who painted the painting? What was going on with the artist when it was painted? Where does the painting fit in art history? What was happening in the broader social history when it was painted?

This process is similar to trying to determine what a statutory provision means. You need to think of a statutory provision as something that can be capable of different interpretations. Your job is to find an interpretation that supports your client's case and that you can realistically persuade a decision maker to adopt.

To determine whether there is an interpretation that supports your client's case, and whether or not that interpretation will be persuasive to a decision maker, you need to ask the same questions we asked with the painting:

1) Does the **ordinary meaning** of the text support this interpretation?
2) Has the section been **interpreted by others** and are those interpretations persuasive (or binding)?
3) What **specific context** supports this interpretation?
4) Does the **intention or purpose** of the provision support this interpretation?
5) What **wider context** supports this interpretation?

General rule for interpreting legislation[1]

There are many different theories, approaches and latin rules that you can use to interpreting legislation, but there is one general rule that will probably be the most effective in your practice. That general rule is called "Driedger's Modern Principle". The rule essentially boils down to this:

> *When determining the meaning of a provision, you need to look at the ordinary meaning of the actual text, together with the context of the provision.*

If you follow this general rule when interpreting a statute, it will allow you to determine what interpretations the language of the statute can support and to find the supporting context you need to persuade a decision maker to adopt the interpretation you are putting forward.

The general idea is to look at:

(1) What interpretations are supported by the actual text of the statutory section (in our painting example, this was question #1); and

(2) What interpretations are supported by the context – everything other than the text of the specific provision (in our painting example, this includes questions #2 to #5).

[1] These materials refer to statutes and regulations somewhat interchangeably, or refer simply to "legislation". There are some basic differences to remember: statutes are enacted by the legislature or parliament, and are generally the main framework for a statutory regime. Regulations are often enacted outside of the legislature (by the cabinet) and are sub-ordinate to a specific statute. The must comply with their governing statute and generally contain most of the details of the regime.

The ordinary meaning(s) of the text

Going back to our painting example, at this stage you are looking at the face of the painting (with no additional research or knowledge) to see what the painting means. This was question #1. Can the face of the painting, for example, support an interpretation about the relationship of man and animal? Probably not.

Obviously, language is more definite than art so a statute's ordinary meaning will probably support fewer interpretations than a painting, but the process is similar: which interpretation(s) can the face of the statutory provision support?

With a statute, you are determining what interpretations can be supported by the ordinary meaning(s) of the text. There is a general presumption that the legislature intended to use language in the ordinary grammatical sense when it drafted the statute. Unless there is a reason to reject it, the ordinary meaning(s) of the text will prevail (in other words, if the wording and punctuation of the text cannot support an interpretation, it's generally not going to fly with a decision maker).

You do not look at dictionary definitions or external sources at this point. Instead, you are looking for the meaning(s) that a regular person with basic language comprehension would find when reading the provisions.

READ THE WORDS AND PUNCTUATION – WHAT MEANING(S) CAN THEY SUPPORT?

Because some language can be ambiguous, there may be several reasonable interpretations of the face of the text. This is where the context comes in. You will need to look for external information that will help you understand what the text means and where the provisions fits into the larger picture.

The context of the provision

Once you've determined what interpretation(s) the face of the provision can support, you need to think about the context of the statutory provision. The context is everything outside the ordinary language of the provision – what external information can you find to help you determine what the section means? Just like in the painting example, we can divide our search for context into four questions:

- How has the section been **interpreted by others** and are those interpretations persuasive (or binding)?
- What does the **specific context** suggest?
- What is the **intention or purpose** of the provision?
- What does the **wider context** suggest?

Interpretations by others

It is important to know how others have interpreted the provision. Even more importantly, you want to know how important that other interpretation is – on other words, what weight can you give it, or how much authority will it carry with the decision maker.

1) Previous decisions: if a superior court or a binding decision maker has previously considered the provision you are dealing with, obviously that is going to be very important to your case because the decision maker in your case will be obligated to follow that interpretation.

   A previous interpretation will be binding if it is made by a superior court (BCSC for provincial decision makers) or an administrative decision maker that binds the decision maker you are dealing with. That being said, most tribunals' decisions are not binding on each other – each tribunal panel or decision maker gets to make its own decision in each specific case. To determine whether a former decision is binding, look at the statute governing the decision maker you are dealing with.

   Even if a former tribunal decision is not binding on your current decision maker, if the decision supports your client's interpretation of the provision, it may help you to persuade your decision maker to adopt it as well.

Previous court decisions can be found on CanLII: http://www.canlii.org/

Previous tribunal decisions, if publicly available, can usually be found on the webpage of the tribunal you are dealing with.

2) Secondary sources: your statutory provision may also be addressed in a secondary source, like a textbook or annotated statute. Again, it is helpful to look through these to see if the materials support your interpretation because, if so, you can use them to persuade your decision maker to adopt your interpretation.

   If you don't have secondary sources at your office, try looking at the BC Courthouse library website to see if the local branch has relevant textbooks or annotated statutes: http://www.courthouselibrary.ca/

The key to using others interpretations is to decide how much weight, or importance, you can give the interpretation. Remember that, if a binding decision has been made interpreting the provision a certain way, it may carry the day.

Specific context

You can also use the specific context of the statutory provision to support (or to refute) the interpretation you'd like to put forward. The specific context refers to external aides you can use to interpret the specific language of your provision. You're still focused on the text of the provision, but you are now looking outside the section of the statute to determine what it means. You have the text and now you are researching for external aids to help you understand what that specific text means.

1) Definitions in legislation: the first place to look is the definition section of the statute. Many statutes have defined terms, either at the beginning of the statute or at the beginning of the section you are dealing with.

   Look at the statute you are dealing with to see if there is a defined terms section and, if so, if any of the terms in your provision are there. If you find them, those definitions will generally be binding and you will not be able to suggest that different meanings should be adopted.

2) Interpretation Act: the next place you can look for an explanation of the specific terms of your provision is the Interpretation Act. There are provincial and federal interpretation acts that set out some definitions for common terms and also some general rules about some statutory interpretation issues. Specifically, it may be helpful with the calculation of

time, defining some generic terms, and determining which version of a statute applies to your client's case.

For example, see s. 8, which reads "[e]very enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

3) Other sources specific to the statute: are there any rules of practice and procedure for the decision maker that offer insight into what the provision means? Some decision makers, like the Residential Tenancy Branch, offer definitions of a handful of procedural terms in its rules of practice and procedure.

4) Policy guides: many government branches provide policy guides designed to assist in understanding the statutes and regulations that the branch administers. These are generally non-binding (which means that the decision maker is not bound to follow them), but often give an idea of what the legislature was aiming for. Be careful when using the guides – don't necessarily restrict yourself to what they say the provision means, and make sure they reflect the current version of the statute and case law.

   Some relevant examples:

   Residential Tenancy Branch Guides and Policy Guides, which can be found here: http://www.rto.gov.bc.ca/content/publications/default.aspx

   Ministry of Social Development Online Resource, which can be found here: http://www.gov.bc.ca/meia/online_resource/

   Employment Insurance Digests of Benefit Entitlement Principles: http://www.servicecanada.gc.ca/eng/ei/digest/table_of_contents.shtml

   Worksafe BC's policies can be found here: http://www.worksafebc.com/publications/default.asp
   (NOTE: many of the Worksafe BC policies, like the Claims Manuals, are binding on WCB and WCAT decision makers)

5) Dictionary: if you cannot find a term in the definition in the statute or in the Interpretation Act, you can try looking in a regular english dictionary or a legal dictionary. The definitions you find will not be binding but they may be helpful in establishing what the ordinary meaning of a provision is, or what other reasonable interpretations might exist.

The intention or the purpose of the provision

When trying to determine what a statutory provision means, an obvious solution is to ask the person who wrote it what she actually meant. Although we cannot speak to the individual drafters of our legislative, we do have tools to look at what the legislature, or the body that enacted the provision, intended it to mean.[2]

There are generally three places to look for evidence about what the legislature/parliament intended the provision to mean:

1) Legislative debates: when enacting a statute, the legislature often debates the content of the statute, and sometimes sends the act to committee so that each provision can be separately debated and examined. All of these materials can give you an idea of what the legislature intended the statute to mean – why was the section enacted? Was there an existing problem it was meant to address? Did the Minister specifically say that it was not intended to mean one interpretation?

   BC legislative debates can be found at: http://www.leg.bc.ca/hansard/

   Canada parliamentary debates can be found at: http://www.parl.gc.ca/

2) Other public statements about the meaning or intent of the provision: there may be other evidence out there about the enactor's intent in enacting the provision you are interpretation. This might include press releases or consultation materials.

These sources can provide evidence about what the body that enacted the provision intended for it to mean. Remember, though, that this evidence must be read with the ordinary meaning of the provisions as well as the rest of the context.

Wider context

Finally, you can look at the wider context of the provision, or where and how it fits into the larger picture. Like in our painting example, we are now looking beyond the text of the provision or the face of the paining; we are looking for external context that might inform what the provision means.

[2] These materials generally refer to the provincial legislature as the body that enacted a provision. Be aware that the same suggestions apply to federal parliament. For regulations, cabinet may have passed the provision.

1) The rest of the statute: make sure that you understand where your provision fits in the rest of the statutory regime. Look carefully at the index of the legislation to see of any of the other sections might be helpful. Or, look to see if other sections can provide you with more information about what the provision was designed to do.

2) Related legislation: if your provision is part of a larger legislative regime that involves more than one statute or regulation, make sure you look at related legislation (this is especially true if you are dealing with a regulation – make sure you look at the enabling statute!). Again, use the index. It is an invaluable tool that can give you a quick overview of the content of the entire piece of legislation. If similar terms or phrases are used in related legislation, those uses can inform how your provision should be interpreted.

   All BC legislation can be found here: http://www.bclaws.ca/

   All federal legislation can be found here: http://laws.justice.gc.ca/eng/

3) Purpose of the entire statutory regime: the first external aid that you might be able to use is the purpose of the entire statutory regime. If you know that the entire regime is designed, for example, to confer last resort benefits, then you can use that information to decide what your provision might mean. Generally, you can interpret your provision in line with the broader purpose of the regime is trying to achieve.

   To find the broader purpose of the regime, you can look at past decisions, the preamble of the statute (if there is one) or legislative debates on the regime more generally. (You may have come across more general information in your hunt for evidence of the specific intention of your provision.)

4) Specialized method of interpretation: some specific types of statutes have specialized methods of interpretation that you can use. They are usually not going to carry the day – you still have to make sure the text of the provision supports the interpretation you are putting forward – but they may assist the decision maker in decision which interpretation they want to adopt.

   For example, benefit conferring social welfare legislation is generally interpreted in a liberal manner and any doubt about its interpretation should be resolved in favour of the claimant.

Penal legislation, on the other hand, is generally interpreted in a strict manner and any doubts about its meaning are resolved in favour of the accused.

Again, these tools are not about the specific language of your provision, but instead provide you with information about how and where your provision fits into a wider picture. This wider picture may give you insight into how the provision should be interpreted.

Conclusion

In summary, your goals when interpreting a legislative provision are to first determine what interpretations the ordinary language can support, and second find external evidence of the context of the provision that supports the interpretation you want to put forward.

The external context is key in persuading a decision maker to adopt the interpretation you are putting forward, and can provide you with clues about the meaning when the ordinary language of the provision is unclear.

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Provincial Training Advocacy Conference

Myth vs. Fact: Conflicts of Interest

1. **Myth or Fact: It is a conflict of interest to represent both parties in the same matter (for example, where you are representing both the landlord and tenant in a residential tenancy matter or a husband and wife in the early stages of a family law matter).**

   Fact. You cannot act for both parties in the **same** matter in light of these considerations:

   - Duty to give undivided loyalty to each client. This duty cannot be met if you determine that the two parties have very different interests;
   - Each party may have information that they do not want to the other to know.

   However, you can act for clients who have opposing interests in **different** matters where:

   - The matters you are representing both parties on are substantially unrelated;
   - Both parties are informed you will act for each of them and they both consent;
   - You do not have confidential information about one of them that might reasonably affect the representation of the other.

2. **Myth vs. Fact: It is a conflict of interest to act for multiple clients who appear to be on the "same side" (eg. co-tenants in a residential tenancy matter or a spouse and his or her c/l spouse in a child protection matter).**

   Myth. You may act for two or more clients who may be "on the same side" as long as:

   - You tell each client that you have a duty to give undivided loyalty to each of them and each of them gives their informed consent (in writing, if possible) for you to represent both of them;

- You tell each client that if you get confidential information from one of them, it will have to be disclosed or told to the other;
- You get each client's informed consent for what to do in case you later get information from one client that is relevant to you representing both clients. Your clients agree that if this situation arises, you either (1) cannot disclose the information to the other client and you withdraw from representing both or (2) they agree that you must disclose the information to the other client and continue acting for the clients jointly.

3. <u>Myth vs. Fact:</u> **It is not a conflict of interest to represent a party in a matter where the opposing party is a former client of yours (eg. a wife that you formerly represented in a family law dispute is now a client of another advocate on the other side of your current client, the husband, in the same ongoing dispute);**

Myth. The correct principle is: if you have acted for a client ("A") in a matter, you should <u>not</u> act against "A" in the same or any related matter because you may have confidential information that might affect your representation of your current client ("B"). The exceptions to this rule are:

- "A" is told that you are going to be acting for "B", who is someone adverse in interest to him/her in the same or related matter and "A" gives you informed consent to do so; or,
- your representation of "D", a new client, is substantially unrelated to the representation of "C", your former client, and you do not possess confidential information arising from representing "C" that might reasonably affect the representation of "D".

4. <u>Myth vs. Fact:</u> **It is a conflict of interest to act for a client where his or her interest in a matter competes with a personal or financial interest you have or that of a third party with whom you have a relationship (eg. a family member of yours).**

Fact. Generally speaking, a legal advocate must, if he or she has a financial interest in a matter they are conducting for a client, adopt the position of saying "I can be your business partner or I can be your legal advocate but I cannot be both". Note that a

transaction of sale or purchase between a legal advocate and client will be upheld if the legal advocate can prove:

- that he or she made full disclosure to the client of all relevant information known to him or her;
- that the price was fair; and
- that the client was advised by an independent solicitor to whom all circumstances were disclosed

5. Myth vs. Fact: **When you are sharing an office space with another advocate, it is not a conflict of interest to act on behalf of a client who has an opposing interest to that of a client of another advocate.**

Myth. It is a conflict of interest for an advocate to represent a client whose interest is adverse to a client of another advocate in a space-sharing arrangement. One exception to this is where each advocate who is sharing space discloses in writing to all of his or her clients:

- that an arrangement for sharing space exists;
- the identity of all the advocates who make up the office acting for the client, and;
- that advocates sharing space with the office are free to act for other clients who are adverse in interest to the client.

6. Myth vs. Fact: **A conflict of interest can arise as a result of an advocate transferring from one advocacy office to another.**

Fact. A conflict of interest exists if you transfer from one office to another office and:

- either you or your new office knows or later learns that your former office and your new office each represent a client in the same matter;
- the clients have interests that conflict (opposing co-tenants/co-defendants); and,
- you actually have relevant information about the case that may result in prejudice or unfairness to your former client if the information is disclosed to your new office.

In this situation, your new office has to stop acting for its client unless 3 criteria are met:

- the former client consents to your new office continuing representation; or
- your office can show that it is in the interests of justice that your new office's representation of the client continue; or
- your new office has taken reasonable steps to ensure that there will not be disclosure of the former client's confidential information to anyone else at your new office. This means you cannot participate in any way in your new office's representation of the new client unless the former client consents.

This does not apply to a government employee transferring from one department, ministry or agency to another.

CHAPTER 5 – CLIENT CARE: PROFESSIONAL RESPONSIBILITY AND RELATIONSHIP WITH CLIENT

Introduction

> An effective [advocate] should help clients understand and articulate their real interests and legitimate needs. Since the [advocate's] objective is to solve the client's problems or help achieve the client's purposes, formulating and implementing an effective strategy that is consistent with the client's means and the importance of the matter is central to the client orientation of law practice.[1]

These principles may sound simple. But all of us who have spent time helping troubled people from diverse backgrounds know that putting such abstract concepts into practice involves juggling numerous skills to meet an infinite variety of needs. Good client care is central to everything we do.

Although numerous books teach techniques for interviewing, counselling and advocating on behalf of clients, they are helpful only up to a point. You must develop your own style based on your natural way of relating to others. What may work for one advocate may be disastrous for another. Your most valuable built-in tools or attitudes include

- a genuine wish to help other people
- a real interest in how they see their world
- a belief that most people are capable, trustworthy and friendly
- an awareness that different cultural groups may have different ways of communicating
- a sense of humour, and awareness of when use of humour may or may not be appropriate when communicating with clients.
- an openness to new ideas and change
- a healthy curiosity
- an ability to see all sides of a question without being judgmental
- an ability to accept and learn from mistakes
- an empathy for but professional detachment from clients

The key to a successful relationship with your clients is mutual respect. You cannot force anyone to respect you. You can, however, create an atmosphere and environment that makes it easier for them to realize that you respect them. This may start with the physical arrangement of your waiting room and continue with your willingness to deal with difficult and painful problems. Factors that contribute to trust and respect are:

- allowing for reasonable privacy and prompt attention when a client comes to your office
- having useful information pamphlets and magazines for clients to read while waiting
- having toys and books for children
- being on time for client appointments

[1] Law Society of British Columbia Law Practice Self-Assessment Guide.

- listening to the most amazing stories of survival in the face of adversity.
- having the support of understanding colleagues.

Conflicts of interest - when you should refer clients elsewhere

"A lawyer [and all legal staff have] a duty to give undivided loyalty to every client"[3]

Everyone who works in an office that offers legal services should already have in place a conflicts policy. You should also take time to read the Professional Conduct Handbook and watch the Law Society videos that set out specific examples of conflicts. These deal with the familiar situations in which there are conflicts of interest between clients or conflicts between service provider and client. They do not, however, describe all of the particular conflicts that may arise in a poverty law practice. This section will set out briefly those issues that you should watch out for.

Conflicts between clients

This is the most common and most familiar area of conflicts and includes the following situations:

- client A applies for legal assistance at your agency but you have already advised B who is an opposing party or who has a potential for being an opposing party. You may give A PLE material and a referral elsewhere - but no other service.
- clients A and B come in together and apparently have same legal interests at heart. You may decide to represent them both but you should warn them in advance that if a conflict arises, you will have to send both elsewhere. Although the Professional Handbook sets out circumstances when you may act for more than one client, you should be extremely cautious about doing so.

Conflicts between staff and client

This may arise when a staff member moves from one office to another. No one in your office should represent client A if one of you has previously advised opposing party (ex-client) B in any other office.

You should also avoid possible perception of conflict. For example, if a close family member is an RCMP officer, you should think carefully about representing a client who has a complaint against the local detachment. Even if the complaint is completely unfounded, your client will be unlikely to accept that you have acted as a "fearless advocate" if they find out that you may have divided loyalties.

Conflict between your duty to client and loyalty to community agency

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3 Law Society Professional Conduct Handbook, available online at http://www.lawsociety.bc.ca/publications_forms/handbook/handbook_toc.html

Many "Complaints about Professionals" come from clients who are angry that their lawyer or advocate has failed to keep them up to date about their case or has communicated in a disrespectful or "talking-down" way.

Providers of poverty law services encounter communications problems that are uncommon in private practice; for example, clients with no phone or fixed address, clients with cognitive difficulties who have trouble absorbing and retaining information, clients who move without telling us ... and so on. Effective communication is therefore an ongoing challenge for all of us. The following information skims the surface of a number of issues. It will alert you to subjects that you may wish to investigate more fully through the Resource section at the end of this chapter.

Disclaimers

No one likes to be sued for any reason, especially someone whose job satisfaction comes from doing their best to help others. Some organizations attempt to limit or exclude liability through the use of waivers. These may or may not be effective, depending on the nature of the suit. Appendix 2 includes two disclaimers: (1) for use in a legal information manual or website; and (2) for clients to sign when you agree to provide services.

The Interview

Useful legal counselling techniques

Professional psychological counsellors receive training in various techniques that help clients identify and express their problems in a way that results in more appropriate and effective service. Some lawyers and paralegal advocates have received similar training. However, many have not. Although on-the-job coaching and practice may be the best teacher, reading instructional material (such as the resources listed at the end of this chapter) will alert you to problems with client communications and ways to solve them

Interview activities may be divided into introduction (building initial rapport - discussed above), listening, questioning, advising (exploring alternatives) and summarizing (including work you may agree to do for the client), The amount of time spent on each will depend on the characteristics of the client and the nature of the problem or, more usually, problems. Generally the listening portion is the most important and may take up most of the time. However, it is time well spent. Jumping in too soon with questions and suggestions may discourage clients from divulging facts that later prove crucial to their case. Effective listening at an early stage will save time in the end. It can save you from much embarrassment and crisis solving down the road.

A. **Listening** - Effective listening is the key to a successful interview and to a successful outcome of your case. It adds to the atmosphere of trust and respect discussed above. It helps clients to break through their confusion and sort out why they are really in your office. Although your aim is to assist the whole person, effective listening helps you to separate legal issues from others that are beyond your skill or mandate. Useful listening techniques include:

E. Questioning and note taking

Inevitably, at the listening stage, you will have asked some questions, either to clear up your own confusion or to bring the client back on track. Unless it is absolutely necessary, note taking is not a good idea while clients are telling their stories. It may distract their attention and stop the flow of their narrative. By the time you reach the questioning stage you will have a good idea of the characteristics of your client and the nature of the problem. Now it is time to fill the gaps and clarify the legal issues.

Most of you will have received training in the use of open and closed questions for direct and cross examination at hearings. Similar techniques are invaluable during an interview. Questions help you to start an interview and to move it along smoothly. Unlike listening, questioning involves active input by the interviewer. This can be both good and bad. It is bad when the frame of reference is moved so far into the interviewer's world that the client feels ignored or misunderstood; for example, the interviewer in a slip-and-fall case bases all her questions on her own slip-and-fall experience. It is good when it draws out vital information that may otherwise have been missed. Clients react to questions in different ways. Some, because of something in their past, associate questioning with "grilling" or invasion of privacy. Others expect questions from "lawyers" and have difficulty starting their story without the initial prod of questioning.

The purpose of questioning includes the need to

- fill gaps in information and increase understanding of the problem
- open new areas for discussion
- encourage clients to give additional relevant background, especially the final event in a chain of circumstances that drove them to seek legal advice - the last straw
- check for inconsistencies in their story that could, for example, affect their credibility later in the case
- properly define the legal issues involved
- identify client's wishes and alternative solutions

One writer suggests a W5 approach to problem diagnosis:

- *Who* is the client? What is the client's background? Who else may be involved?
- *What* is the client's problem? What is happening? What are the specific details of the problem?
- *When* does (or did) the problem occur? In what environments and situations?
- *How* does the client react to the problem? How does the client feel about it?
- *Why* does (or did) the problem occur?[5]

[5] Allen E. Ivey, *Intentional Interviewing and Counseling*, Brooks/Cole Publishing Company: 1988 at p. 51.

- **Note taking during interviews**

Many psychological counsellors tape their interviews and make notes later. Except in unusual cases (for example, a blind client may wish to re-hear what was said) this is inappropriate in a legal counselling interview. This means that you will have to make some notes during the interview process.

If your client is referred from another staff member or community agency, ask them to obtain as much routine information as possible prior to your interview. This saves time, gives you valuable background and avoids having to interrupt clients while they are telling their story.

Some interviewers like to use checklists for note taking to make sure that they cover all relevant issues. Others feel that checklists act as a straight jacket and inhibit the free flow of an interview. Yet others use checklists after the interview to find out what, if anything, they have missed. Some clients like to see you tick off matters on a checklist as it apparently makes them more confident that you know what you are doing. Whether you use one or not is a matter of personal choice and may depend on the amount of experience you have with a particular issue.

Avrom Sherr in *Client Care for Lawyers* lists disadvantages and suggestions for note taking during an interview:

Disadvantages

- *losing eye contact*
- *false importance* - client interprets facts written down as being more important than others
- *threat* - some clients believe confidentiality may be lost
- *command* - stops client from talking (may be useful at times)
- pace - slows client down, varies natural flow

Suggestions

- *reading aloud* - reassures clients who are suspicious about notes; clears up misunderstandings. Use is a matter of judgment in each case.
- *discuss the question* - tell client at the beginning why notes are necessary

The most productive notes are those that are made immediately after the client leaves your office when your memory is fresh. Complete notes are essential if you are working as part of a team or someone is taking care of your cases during your absence. If you have bad handwriting, it is best that you type notes. You may also want to save your notes electronically as a back-up.

Sherr lists the following information to be included in interview notes:

- client data
- other parties' data
- witnesses
- problem types
- events

- make a point form list of issues covered for them to take home
- give them a list of things they have agreed to do for you and you have agreed to do for them
- list documents or other evidence that they have agreed to provide
- write down people or agencies that may be helpful
- send letter confirming the above

If you do this on computer, you can give them this information - in plain language - and have a copy saved for yourself for the file and for future reference.

These lists may be completed as part of the process of summarizing for clients your understanding of what you have been told. This allows them to make corrections and to see their problem in a more objective light. It is helpful to close the interview by pausing to allow clients to reflect on whether they have anything to add or to change.

See Appendix 1 for point form summary of the interview process.

Continuing the relationship

Case plans

In more complex cases, it is useful to create and go over a case plan with clients. This could be in the form of a written schedule that sets out the likely stages and progress of the case along with the tasks that each person, including the client, is to do. This should be reviewed and adapted on a regular basis. Any changes should be conveyed to the client as soon as possible.

Accessibility - methods of contacting staff; speed of response.

If your office does not have policies and procedures about responding to client communications, it is a good idea to formulate some so that everyone in the legal team follows consistent practice. What is contained in the policy depends largely on your office configuration, number of staff, methods of working with intake and with each other. One size does not necessarily fit all.

The following are procedures to consider:

- Person receiving a message must respond within a certain time (not more than 24 hours).
- If that person is absent, someone else on the team should be alerted to contact client.
- Procedures should be set out to deal with urgent matters and emergencies.
- Special provisions should be made for responding to clients who do not have phones.
- You should make contact or respond even if you have nothing new to report.

If you have to rely on an electronic receptionist and voice mail, you should explain why it is necessary and the easiest way for the client to use it.

!! ***Practice tip*** *- clients who have no phone or have to call long distance can access you free of charge through Enquiry B.C. 1-800-663-7867; Mon-Fri, 8 am - 5 pm Pacific time.*

For example:

- Counsellors may reveal confidential information to others only with the consent of the person or the person's legal representative except where failure to do so would result in clear danger to the person or others.
- It is the counsellor's responsibility to define the degree of confidentiality that can be promised.
- There is a legal requirement to break confidentiality in cases involving child abuse and danger to others.
- Practitioners have an obligation not only to protect others from the acts of dangerous people but also to protect suicidal clients. There are definite limitations to confidentiality when the counsellor determines that a client is a suicidal risk.[6]

!! *Practice tips for confidentiality*

Many of the following tips are self-evident to experienced staff but they bear repeating as a confidentiality checklist, especially for staff who have not yet taken courses on legal ethics.

- Keep up to date with court decisions. Read *Smith v. Jones*, [1999] S.C.J. No. 15, a Supreme Court of Canada decision that contains a useful restatement of the law.
- Consider having staff and volunteers sign a confidentiality agreement prior to employment or access to client information. (See samples in Appendix 3)
- As a routine matter at the first interview, obtain any necessary disclosure authorizations and waivers of confidentiality that you foresee will be necessary for your case. If more than one person is going to be working on the file, you should explain this to your client and consider having their names added to the waiver. (See sample Authorization and Waiver form in Appendix 4.) Note that some organizations or government departments may require you to use their own form.
- Schedule job interviews at times when clients are not in the office. This applies especially to offices in small communities when there is a high probability that the job applicant will recognize clients in the waiting room or in the corridors.
- Resist the temptation to discuss clients or their business with family or friends even if you change the names or details. If you have to unwind, discuss cases with staff members who are bound by the same rules of confidentiality.
- Refrain from discussing clients with colleagues in public places, even when names are not mentioned. It is possible that a listener would still be able to identify the client. Even if this is

[6] Cite publication

- Check whether you have the ability to take calls from clients who are *hearing impaired.*

- Have detailed protocols about communicating with anyone involved in a case dealing with *clients in danger*; for example, spousal abuse or stalking. These may include setting up arrangements to communicate through intermediaries, leaving messages under a safe code name, setting up a system to deal with emergencies.

Communicating with clients by letter

A. Why and when are letters necessary?

Letters are helpful and often necessary to

- *define your relationship* with clients; to tell them what you will and will not do (*Retainer letters).*
- set out *clients' obligations* for effective conduct of their case (Retainer and follow-up letters).
- confirm that you will *not be able to represent them (non-engagement letter).*
- confirm what has happened and at and what is to be done following an initial interview - *to avoid misunderstandings*.
- for you and your clients to use as a *reference tool.*
- *keep clients up to date* about activity in their case and help them understand the legal concepts involved.
- *terminate* a case before the matter is resolved (Termination letter).
- *close* a lengthy or complicated file when there is nothing further you can do - either because the issue has been resolved or it now lacks merit (Closing letter)
- *provide evidence* for funders and, if applicable, the Law Society if clients complain about your handling of their case; that is, creating a *protective paper trail.*

When writing letters to clients or other people connected with a case, you must always be conscious of the fact that they may be read by people other than the intended recipient. Be cautious about what you include. If in doubt, leave out until you have an opportunity to seek advice from your supervisor or practice advisor.

For various reasons, clients sometimes request that no correspondence be sent to them. If this is the case, document their request on file and obtain a signed acknowledgment from the client.

B. Retainer letters

Limited retainer letters are useful when: (1) there are several issues and you are not going to assistance with all of them; (2) you are going to review for merit only; (3) you are going to give some assistance but not full representation. Full retainer letters should set out the nature and scope of service, legal objectives, staff and client responsibilities, circumstances that entitle either party to terminate, payment of costs and, if appropriate, recovery of fees. See Appendix 5 for sample retainer and other letters.

C. Style and format of letters

A. Angry and hostile clients

For those able to attend, Justice Institute of B.C ("JI") courses on dealing with angry and hostile clients by telephone or in person are recommended. They teach practical skills for responding effectively and defusing anger. Another helpful course gives you techniques for dealing with your own anger which often leaps up in response to attack.

!! Practice tips for dealing with angry or hostile clients[7]

Deal with feelings first - both obvious and hidden.

- Empathize - diffuse anger by letting person talk, name the anger or hostility in a way that lets the client know you understand and do not condemn it.
- Ask questions, give feedback and summarize
- Use silence when your client goes off the rails again and then repeat above.
- Keep checking whether you feel defensive. Do not defend yourself. Avoid saying "I'm sorry." You have nothing to apologize for.
- On the other hand, if criticism is fair, apologize if appropriate and ask the client how you might improve the situation. The response may be impractical but it creates a starting point for friendlier discussion. Never blame someone else for what the client sees as your failings.
- Avoid arguing with the angry client. This is often what they consciously or unconsciously want. Counter their accusations by saying something along the lines of: "I'd like to help if you'll explain the problem."
- If you know in advance that a client is likely to be angry or hostile, use positive visualization techniques before speaking with them. Focus on their good points; picture yourself using the above strategies in a calm and effective way; place yourself within a protective coloured "bubble" (a technique used by some mental health and palliative care workers). Slow your breathing. All of this will lower your anxiety level.

  Deal with concrete problems second - Although it often seems impossible to separate feelings from facts, it is worth trying. Otherwise you are likely to be inundated with a rambling and emotional account and then accused of being incompetent because you fail to understand it.

- Find out exactly what the client wants you to do. "I can sense that you're really angry or upset about what has happened and that you believe you have a legal problem. Can you give me an idea of what you want our office to do for you?" This usually forces clients to calm down sufficiently to start thinking.

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7 These are extracted and adapted from JI material.

- Communicate in brief clear statements. Repeat as often as necessary. Ask the client to repeat back to you.

- If you know in advance that your client is mentally disturbed, set out ground rules for your relationship before you deal with substantive issues. For example, you may want to use "time out" signals as reminders to stop unacceptable behaviour before it gets out of control.

- Ensure your own physical safety at all times. If necessary, have a colleague with you while you are interviewing.

- Don't automatically assume that all disturbed clients are safety risks or problems.

Clients who are difficult to access for instructions

Everyone has encountered clients who would prefer to deal with you through relatives or friends; and the converse, relatives who insist on speaking for clients. The latter situation is more common with young and elderly clients. It is crucial that you determine and remember who your client is. It is easy to forget when, for example, obtaining information from the concerned parent of a mentally ill teen with legal problems that, as long as the teen is competent, it is he or she who is entitled to give instructions.

Another common situation is the contact from a friend or social worker who believes an isolated elder is the victim of financial or other abuse. If the elder is competent, is aware of the abuse and refuses your services, there is little you can do unless there is evidence that a crime is being committed. If you suspect that the person is incompetent, you should consider contacting the Office of the Public Guardian and Trustee for advice.

First Nations aspects

cultural awareness - do's and don'ts (?)

asking about native ancestry

outreach to native clients

THIS SECTION HAS NOT YET BEEN WRITTEN

Client conduct that entitles you to terminate service

The following are some examples of behaviour that would entitle you to terminate your relationship with the client.

- abandonment of case by client
- repeated failure to communicate or to produce available evidence
- expressed intention to lie or commit fraudulent act
- conduct that will lead you to breach an ethical duty if you assist or acquiesce
- consulting other advisers and carrying out their instructions without your knowledge for example, going to press, politicians

Remedies for and prevention of burn-out

You must recognize that, if there is little or no way in which to change the system, you can always change or control the way you react to it. When you are feeling healthy is the best time to think of strategies to use when you feel burn-out creeping on. There are numerous books that deal with the topic of "stress management." What works for one person may not conform with your sense of values. The key is to explore what works for you. For example, some people respond to creative visualization techniques and positive affirmations, others keep daily journals, yet others go walking in the park. Some suggestions to consider:

- realistically evaluate your goals - should you be in this job?
- listen to your body and learn to recognize symptoms of stress - learn your limits.
- learn how to work for self-validation rather than the validation of others.
- refuse to take on other peoples' burdens.
- rearrange your work schedule.
- learn to accept your imperfections.
- form a support group with colleagues to share feelings of frustration and find better ways of approaching a difficult job.
- find new interests outside work.
- ask for professional help through a counsellor.

Dealing with your own anger

Anger is one of the first emotions human beings experience and probably one of the last emotions we learn to manage effectively...Anger happens when we perceive an event as threatening or when we experience the frustration of unmet needs.[9]

Many of the strategies for burn-out are useful for dealing with your own anger. Anger is a natural and sometimes useful feeling, but uncontrolled or bottled-up anger can be harmful to clients, colleagues and yourself. If anger is a problem for you, there are many resources to help you deal with it. Some useful techniques:

- Positive affirmations - "I am calm and centred. I can cope."
- Accept the situation and use your curiosity to find out how it has arisen. "What button did they push to get me to react this way?"
- Relaxation techniques: breathing exercises, stretching, muscle tensing and relaxing.
- See the problem through and then leave it behind.

How to say no

How to say 'no" in a non-aggressive manner may be the most import skill in preventing burn-out and avoiding anger. If you find it difficult, consider taking courses on assertiveness. Suggestions:

- make sure you understand what is being asked of you; ask for clarification if necessary.

[9] Justice Institute of B.C., *Dealing with Anger in Conflict Situations,"* 1990 course materials. [would have to obtain permission to quote from manual].

Ownership of File Contents

The Client is entitled to:

1. originals of all documents existing before they retained the advocate (unless belonging to a third party)
2. originals of letters by the advocate to the client
3. originals of letters sent by third parties to the advocate
4. any expert opinions and medical reports
5. copies of letters sent by the client to the advocate
6. copies of letters sent by the advocate to third parties
7. notes of conversations with witnesses (if the hearing has not been held)
8. memorandum of law
9. transcripts of any proceedings held
10. all legal documents prepared in relation to the file

The Advocate is entitled to:

1. notes of conversations (other than with witnesses, if the hearing has not been held)
2. notes on evidence and notes of submissions to courts and tribunals
3. inter-office memos
4. routine forms such as diary, time or BF forms
5. originals of letters sent by the client to the advocate
6. authorizations and instructions given to the advocate by the client

The documents the client is entitled to must be provided to the client upon demand. The advocate is still entitled to keep copies for their file. The documents the advocate is entitled to do not have to be provided to the client.

ALTERNATIVES TO GOING TO A HEARING

presented by
Sarah Khan and Eugene Kung

Materials prepared by Kendra Milne, Community Legal Assistance Society

From this session, we hope that you'll learn:

- some basics underlying negotiation and alterative to proceeding to a hearing;
- to identify what types of files might be appropriate for alternatives to a hearing;
- to be able to identify what leverage your client might have to reach an agreed resolution without the need for a hearing;
- what issues you need to think about before negotiating an alternative to a hearing; and
- how you might propose an alternative resolution to the opposing party.

Material contents

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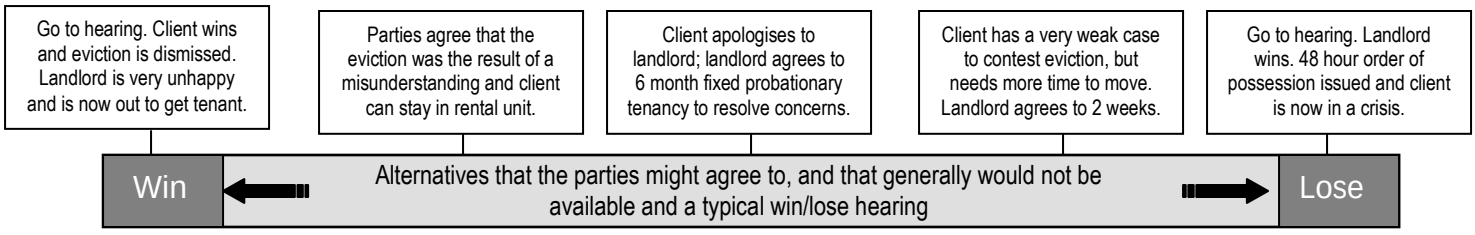
Alternative solutions to your client's legal issue: the basics

Some files require a hearing, but many (most in fact) do not need a hearing to resolve the legal conflict at issue. You can often get your client a resolution, and sometimes a better one, by trying to negotiate a solution instead of proceeding to a hearing.

There are many benefits for everyone involved if the parties can reach a mutual solution. The benefits include:

- Certainty in the outcome of the dispute. The parties no longer have to rely on an unfamiliar decision maker to decide their fate.
- An opportunity to address and try to resolve underlying issues between the parties. There may be conflict between the parties that the anticipated hearing cannot address. In a mutual resolution that the parties negotiate, they can agree to resolve whatever they like.
- An increased likelihood that the parties might be able to get past the conflict and continue in a legal relationship. Instead of having a happy winner and a sore loser, the parties may be able to agree to a solution that allows both of them to leave the conflict in the past.

Let's take the example of a Residential Tenancy Act eviction case. Proceeding to a hearing leads to two potential results, but there may be a whole host of other options that lie somewhere in between "winning" and "losing".



Disputing the eviction and proceeding to a Residential Tenancy Branch hearing will generally lead to one of two outcomes: your client with either win or lose. But there are many, many other potential resolutions to the dispute (just a few are set out in the diagram above). Despite the continuum of potential resolutions, it's unusual for the parties to agree to a more creative solution in the adversarial atmosphere of a dispute resolution, and the DRO does not have the power to order the other resolutions unless the parties agree.

Depending on the strength of your client's case and what she wants to happen, there are many options that you can propose to the landlord that do not require a hearing. And, in an eviction hearing, it is easy to see why a client may actually prefer having control over a compromised solution instead of putting herself in the hands of a stranger to determine the fate of her housing.

As we will explain below, to advise your client properly and to come up with a realistic set of potential alterative resolutions, you need to do a merit assessment of the client's case at the outset. Once you know the likelihood of hearing outcomes, you will better be able to some up with a range of alterative resolutions. More importantly, you will be able to give the client an idea of what she would be conceded and what she would be gaining with each potential alterative resolution.

When deciding whether an alterative resolution might be appropriate for a specific client, you should follow these steps:

Step 1: Turn your mind to what alterative resolutions might be available in the specific case, as well as the pros and cons of each for the client;

Step 2: Then turn your mind to determine what leverage, if any, your client might have for each of the alterative resolutions you've come up with; and

Step 3: Go over with the client each alterative resolution you think might be available, the pros and cons of each, and the leverage they might have. Then determine if you client is on board with any of them.

Step 1: What are the potential alterative resolutions in the case, and what are the pros and cons of each?

The first step to determine whether an alternative resolution might be appropriate is to brainstorm what options might be available and whether or not they would benefit your client.

To come up with potential alterative, you need to think about what the case is about and identify what both parties are trying to achieve. What are their ideal outcomes? What does your client say she wants to happen, best case scenario? What do you think the parties might be willing to give up? Talk to your client about what she thinks the other party is really after. There maybe an underlying dispute or a history of problems that you don't know about. Then, do your best to think of possible resolutions that meet as many of both parties' desires as possible.

Think about the following Residential Tenancy Act eviction example:

> *Your client is facing eviction. The landlord has received several complaints from other tenants that your client is being loud late at night. The other tenants have threatened to move out. Your client is on a medication that keeps her up at night so she is often up late watching TV or listening to music. When you question her, your client tells you the landlord previously tried to evict her because her ex-boyfriend kept trying to get people to buzz him into the apartment when she refused to let him in. That eviction attempt failed. She is no longer with the boyfriend and he has not come to the rental in 2 months.*

From this information, you can brainstorm what the landlord's goals might be:

- to have other tenants stop complaining to him.
- to not have to look for new tenants of complaining tenants leave.
- to not have complaining tenants to file for dispute resolution for loss of quiet enjoyment.
- to have a secure building and not have other tenants bothered by the ex-boyfriend.

The client tells you that her goals are:

- to keep her housing and to not have to worry about losing it.
- to live without her neighbours complaining all the time.

- to have her landlord and neighbours recognize that she is up at night because of a medical issue.

From these two sets of goals, you might be able to brainstorm the following alterative resolutions:

- The client could tell the landlord that the ex-boyfriend is no longer around and will not be a problem in the future.

    - Pros for the client: maybe this issue is the landlord's real concern and assuring him that it is solved will ease some of his concerns.
    - Cons for the client: she may feel this is none of the landlord's business. She won her hearing on this and the landlord cannot evict her for it.

- The client could explain to the landlord the medication issue and his duty to accommodate under the Human Rights Code, providing him with medical confirmation. The client could also suggest ways that she could minimize her noise during the night (moving to a different unit where her noise will disturb others less, sound proofing her current unit, etc.).

    - Pros for the client: she can assert her right to be accommodated but also work with the landlord to try to come up with a reasonable accommodation that meets both parties' needs.
    - Cons for the client may be uncomfortable disclosing medical information. She may also not want to participate in some of the accommodation suggestions.

- The client could simply move.

    - Pros for the client: she would not have to deal with the landlord or the complaining tenants anymore and she could find a new rental where her noise would be less of an issue. She would have control over the situation and not take any risk of losing her housing without notice.
    - Cons for the client: obviously this would require her to give up her housing. She may not have the resources to do that and simply may not want to move.

Note that many of the pros and cons for the tenants are going to be dependent on your assessment of her case to oppose the eviction. If she has a good case, offering to move will be a big concession for her. If she has a very weak case, offering a move out date that she has control over may not require her to concede much.

When thinking of the pros and cons for your client, it is important to keep in mind the strength and weakness of the case should it proceed to hearing.

Exercise: Brainstorm some alternatives to a win/lose hearing

For the following client situations, brainstorm some alternative resolutions that do not involve only a win/lose outcome:

1) Your client is facing eviction from his housing co-op. The co-op is claiming that he did not pay his housing charges for the last three months and has withdrawn his occupancy agreement. The Co-op is now threatening to go to court.
2) Your client has been asking her landlord to fix a broken window in her rental unit for several weeks. The landlord is saying that he does not have the money to fix it right now.
3) Your client is being evicted because her roommate has been playing music loudly late at night. Other tenants have complained several times to the landlord.
4) Your client has been told that if he doesn't bring in certain financial documentation by a certain date, he'll be cut off income assistance.
5) Your client has been told that he is not eligible for certain dental benefits.

Step 2: What leverage does your client have?

Once you've come up with a list of possible alterative solutions for your client, it's now time for you to think about what leverage she has to get the other party to agree to the proposal. Leverage is essentially anything that might persuade the other party to accept the offered resolution you're putting forward. It can be positive (the benefits for the other party if agrees to the resolution) or negative (the pitfalls the other party can avoid if he agrees to the offer).

Some general areas of leverage you may want to think about are:

- Legal leverage: is the other party likely going to lose the case if it goes to hearing? Would it be better for him to accept a small benefit in your offer instead of getting nothing at a hearing?

- Financial leverage: will the offered resolution save the other party money? Will going to a hearing instead cost him money?

- Emotional leverage: is your client particular sympathetic? Or would losing the hearing have particularly extreme effects for her?

- Certainty: just like your client, the other party probably doesn't want to roll the dice at a hearing. Will your offer bring some certainty to the situation?

- Underlying issues: is there a tangential issue not being directly addressed in the hearing that can also be resolved? Can your resolution resolve something that other party would have no chance of getting resolved at a hearing? Or, is your client willing to agree not to pursue a tangential issue is a resolution can be reached?

Exercise: what leverage might your client have?

For the following client situations, think about the possible alternative resolutions we've come up with and determine what leverage your client might have:

1) Your client is facing eviction from his housing co-op. The co-op is claiming that he did not pay his housing charges last three months and have withdrawn his occupancy agreement. The Co-op is now threatening to go to court.
2) Your client has been asking her landlord to fix a broken window in her rental unit for several weeks. The landlord is saying that he does not have the money to fix it right now.
3) Your client is being evicted because her roommate has been playing music loudly late at night. Other tenants have complained several times to the landlord.
4) Your client has been told that if he doesn't bring in certain financial documentation by a certain date, he'll be cut off income assistance.
5) Your client has been told that he is not eligible for certain dental benefits.

Step 3: Things to think about before negotiating

A negotiated settlement between two parties is a legal contract and breaching it can come with legal consequences. Once you put forward a specific offer on behalf of your client, she will generally be bound if the opposing party accepts it. Before discussing or offering an alternative resolution to the opposing party, make sure you've thought about the following:

- Your client's instructions: many alterative resolutions will involve your client giving something up or conceding something. There will almost always be some "cons" to explain to the client about the different potential resolutions. Because your client will generally be bound if you make and offer on her behalf and it is

accepted, make absolutely sure that you have clearly explained all the options to your client and she instructs you to put the offer forward.

- Deadlines for hearing: although you may be exploring alternative resolutions and trying to negotiate an agreement, you still need to make sure that you are complying with all deadlines and requirement for the hearing in case it's required. Think of it as two parallel ways to resolve a file – you may well be able to reach an agreed resolution, but there is always the chance that your client will not agree to concede anything or the other party simply will not agree. You need to make sure that your client doesn't lose the ability to proceed to a hearing and argue her case in case no resolution can be negotiated.

- Without prejudice: if you are offering an alterative resolution in writing, you are probably going to be conceding some issues on behalf of your client. For example, maybe you are offering that the client will enter into a fixed term probationary tenancy for her to show the landlord that she can resolve the problems he is concerned about. This requires her to concede that her current tenancy is over and that the landlord's concerns have merit, but she may instruct you to offer it because it has benefits for your client: maybe she wants control over her housing and doesn't want the uncertainty of a hearing. If the landlord refuses this resolution, you do not want your client to be limited to those concessions at the hearing. For that reason, you should mark your written offer with "Without Prejudice", which means that your client is making the offer, but she is not agreeing to concede anything contained in the offer if the case goes to a hearing.

- Deadline for the offer: if you plan to put forward an offer to resolve the dispute, you probably want to think carefully about timing. Unless you state otherwise, any settlement offer is open until it is retracted. It's generally good practice to put a deadline for a response in the offer so that you and your client know the other party's position on it with plenty of time before the hearing.

- Legal advice: obviously you can only represent your client and act in her best interests. When you put forward an offered resolution, you are generally trying to convince the other party why the offer is a good option for him. This can often cross over into territory where the other party is asking you advice about his own satiation (especially if you're communicating by phone and the other party is unrepresented). You want to be very careful not to give the other party legal advice. It is generally a good idea to note that you cannot act for the opposing party and that you suggest he get his own legal advice.

Step 4: Offer an alternative resolution

Once you have come up with a potential alternative resolution, you've explained it to your client (along with its pros and cons) and your client has instructed you to offer the resolution to the other party, you now need to think about the most effective way to put the offer forward.

Depending on what you know about the file and about the opposing party, you approach will likely change. If you client has a very strong case to win the hearing, you may take a more aggressive approach in how you communicate with the other side. For example, you may want to set out the weaknesses of the other party's case and essentially state that you think there is a strong chance he will lose the hearing, so he should agree to an alterative resolution that at least addresses some if his concerns.

On the other hand, if your client has a weak case and will likely lose the hearing if it proceeds, then you probably want to take a much more subtle and conciliatory tone in your communications. You don't want to come out swinging when you've got nothing to back it up! Instead, you probably want to take an approach where the client is conceding that the other party's concerns are valid and trying to address them the best she can.

Deciding what tone to take in communications with the other party is difficult and also, to a certain extent, it's about personal preference. Take the time to think about what tone would be the most beneficial and <u>always</u> be respectful in how you communicate with other parties. It's not helpful to you client to inflame the dispute further and it is not going to help reach an agreed resolution! We have included several examples of written settlement offers with these materials. Please use them as examples only – you need to think about your particular file and the best way to frame an offer given the specific circumstances.

If you reach an agreement, get the agreement in writing! Whether you have been communicating with the other party in writing or by phone, make sure to always confirm your in writing or (better still) get the other party to sign a written agreement setting out the details of the agreed resolution. If your client is giving up on a hearing because an agreement has been reached, you want to make sure you confirm that agreement.

ESSENTIAL CHECKLIST
FOR ADVOCATES DOING HEARINGS

INITIAL ASSESSMENT OF THE CASE

Always do this initial checklist before committing to represent a client at his/her hearing.

Go over these questions <u>with the client</u>:

- ☐ What, exactly, does your client want to achieve by doing the hearing?
- ☐ Is the client's goal realistic?
- ☐ Realistically, what specific results can the hearing process be expected to produce for the client?
- ☐ Are there any risks of doing the hearing, and if so what are they?
- ☐ Overall, is the hearing likely to be helpful to the client?
- ☐ Are there other options (apart from going to a hearing) that you and the client should explore?

And go over these questions <u>in your own mind</u>:

- ☐ Do you have the skills and experience necessary to do a proper job of this case? Should you get some support and mentorship from a supervising lawyer or senior advocate, and if so is that person available?
- ☐ How much time do you think it will take to prepare properly for the hearing?
- ☐ Given your overall workload, do you have enough time to prepare?
- ☐ Does the client have at least some chance of succeeding in the hearing?

Only commit to doing a hearing when you are satisfied,
after going over these questions, that it is appropriate to do so.

Prepared by Jess Hadley of Community Legal Assistance Society for the Law Foundation advocate training conference held November 22-24, 2011 in Richmond, BC.

EARLY PREPARATION AND SELF-ORIENTATION

Do this soon after you have taken on the case, but before you do any other work on the file.

☐ **Identify your objective and write it down.**

What, specifically, are you hoping to achieve for your client with this case?

☐ **Write down your theory of the case.**

In one sentence, write down the core message that, based on what you know now, you think you'll be asking the tribunal to "buy into". This is your "theory of the case".

Your theory of the case doesn't have to capture every element of the case, just the core message.

You should keep re-examining your theory of the case, and modifying it as needed, as you prepare your case.

☐ **Locate the law.**

What statutes and regulations will you rely on? Is there any policy relevant to your case? Is there case law that applies?

Read these materials carefully and find the specific parts you will rely on.

If in doubt, ask your supervising lawyer or a senior advocate, to make sure you are finding everything and focusing on the right stuff.

☐ **Think about the nature of the tribunal.**

How are hearings done at this particular tribunal? Formal or informal? In person, by phone, or in writing? How long are the hearings?

What are the rules governing procedure at this tribunal? If the rules are published, get a copy and read them. Pay particular attention to timelines.

You can usually get this information from the tribunal's website.

☐ **Take the time to identify any deadlines you will need to meet. Carefully note these deadlines, as well as the time and date of the hearing, in your calendar.**

☐ **Determine what you need to prove in this hearing.**

What points, exactly, do you need to prove? What do you need to convince the decision maker about?

Write down a list of all the key points you need to prove, and keep refining that list as you think about the case.

☐ **Brainstorm evidence.**

For each point you need to prove, consider what specific evidence you might be able to rely on?

Remember, evidence can be in the form of **documents** (such as pictures, letters, emails, contracts, receipts, etc.), or it can be in the form of **a witness's testimony.**

Consider: what would be the simplest and most convincing way to prove each point? It is usually best to keep it simple.

IMPORTANT: Create a table (or list) that connects the points you need to prove with the specific evidence you would like to use to prove each point.

EVIDENCE-GATHERING

☐ Decide what documents you need for evidence, and go get them!

You might be able to get some documents yourself. Others you may have to get from the client or a third party.

Keep these documents organized in a sensible way, in an evidence folder *separate from the rest of the file.*

☐ Decide what witnesses you might need, and talk to them right away.

Make sure each prospective witness's evidence is actually going to be helpful to your client. If so, make sure they can attend the hearing.

Keep a list of witness names and phone numbers in your evidence folder.

☐ Think about both sides of the case – what witnesses and documents do you think the other side will use? Does that change what evidence you may want to call?

Once you have gathered your evidence, it should be sent in to the tribunal (and to the other side) well in advance of the hearing, and within the tribunal's timelines.

It is okay to send in additional evidence later if you need to, but keep in mind if it's sent in after the deadline it might not be accepted.

WRITTEN SUBMISSIONS

You might not always have enough time to prepare a full written argument. But at minimum, always prepare the following written submissions:

☐ **A written opening statement,** no more than half a page long, that sets out an overview of the case. It should include:

- Who the parties are;
- What the case is about (in one sentence);
- Your theory of the case;
- Specifically what you expect the evidence at the hearing will show – BUT DO NOT OVERSTATE IT; and most importantly
- What, exactly, you are asking the tribunal to do for your client.

☐ **A list of the documents that you are putting in**. You should structure the list to help the decision-maker see what the documents prove.

☐ And if you have to explain sums of money, prepare **a table showing how the numbers add up.** This is necessary, for example, any time your client is claiming monetary damages at the RTB, or arguing about assets or income in a welfare case.

Wherever possible, prepare a full written argument. This is because a written argument forces you to think through the case in detail, and ensures your ideas get across to the tribunal. A written argument also protects your client by creating a record of what was argued, which is essential if your client loses at the tribunal and needs to seek judicial review in court.

A good written argument is brief and to the point, and includes the following elements:

☐ It is in a decent sized font.

☐ It has the case name and file number at the top.

☐ It is well organized and uses headings to help get the information across.

☐ It starts with an opening statement.

☐ It then gives a brief statement of the facts and refers to specific pieces of evidence. Stick to the relevant facts and don't get bogged down in excessive detail.

- ☐ It then states the applicable law and refers to specific legal authorities. Again, stick to the key points and don't get bogged down.
- ☐ It then provides a simple outline of your legal arguments about the case.
- ☐ It concludes with a simple statement of what you are asking for.
- ☐ It is signed and dated.

If possible, send your written argument to the tribunal (and to the other side) well in advance of the hearing.

Ideally it should be sent in along with your documents.

HEARING PREP PART 1:
Preparation for presenting your evidence

☐ **Prepare a list of direct examination questions for each of your witnesses.** If you don't have time to do a full list of questions, at least write out the key points you want to get across, in chronological order.

The questions should be short and simple.

Start with 2 or 3 questions that guide the witness to introduce herself and explain her relationship to the case. *These can be leading questions (questions that suggest an answer, e.g. "Your tenancy started on September 1, 2010, right?")*

Then, move on to questions that lead the witness through her testimony in an orderly way. *These cannot be leading questions. The goal is to stay out of the witness's way as much as possible. Some tribunals won't even want you to ask questions and will just want to hear from the witness.*

In direct examination it can help to start with descriptive questions that "set the scene", and then move on to questions about sequences of events.

☐ **Prepare each of your witnesses for direct examination.**

Go over the time and place of the hearing, and how the witness will attend.

Describe the tribunal and how it operates.

Explain what exclusion of a witness is.

Explain the duty to tell the truth.

Tell the witness how to address the decision-maker. It's usually appropriate to address him/her by surname (e.g. Mr. Wong or Ms. Smith).

Go over the "4 S's" – 4 basic principles for direct examination:

1) Simple questions; simple answers.
2) Slow answers: allow time for the decision maker to absorb information.
3) Specific answers: do not generalize.
4) Systematic testimony: let the advocate guide the way.

Go over the 3 or 4 key points you need the witness to get across.

☐ **Practice the direct examination with your witnesses.**

☐ **Prepare your witnesses for cross-examination by the other side.**

Explain that the purpose of cross-examination, from the other side's point of view, is (A) to get evidence that hurts your client's case; and (B) to attack your witness's credibility.

Go over any topics you expect will be brought up in cross examination, and practice asking the questions you think the other side might ask.

Tell the witness to keep the following points in mind:

1) Tell the truth and don't exaggerate.
2) Listen carefully to the questions, and take your time before answering.
3) If you don't know, say so.
4) If you don't remember, say so.
5) If you don't understand the question, say so.
6) Answer the questions directly, <u>then</u> give an explanation if you need to.

☐ Finally, think about how you will draw the tribunal's attention to all the important **documents**. Will the documents be discussed during the witnesses' testimony? Will they be referred to later, in the course of your argument? Have a plan for bringing each important document to the tribunal's attention.

HEARING PREP PART 2:
Preparation for challenging the other side's evidence

☐ **Consider whether you actually need to challenge the other side's case using cross-examination.**

Remember the 2 main purposes of cross-examination, which are:

(A) To get the witness to admit something that helps your client's case, and
(B) To attack the witness's credibility.

You should only bother with cross-examination if you actually need to (A) get a specific admission or (B) attack the witness's credibility, and you can see some way of accomplishing this via cross-examination.

☐ **If you decide that cross-examination is appropriate, prepare a list of questions for each of the witnesses you have decided you may want to cross-examine.**

Again, remember the 2 main purposes of cross-examination:

(A) To get the witness to admit something that helps your client's case, and
(B) To attack the witness's credibility.

Use leading questions, such as:

- "You didn't ever respond to the tenant's request, did you?"
- "Lagoon's policy was not to cover any expenses relating to bedbugs, wasn't' it?"
- "You'd agree that the tenant's apartment was neat and tidy, right?"

☐ **Don't go on auto-pilot with cross-examination.**

Cross-examination is challenging. If done poorly (or too aggressively) it can create problems by eliciting unhelpful information or antagonizing the tribunal. Get input from a supervising lawyer or senior advocate if you are thinking of cross-examining a witness on an important point.

In the hearing, you may find that the witness gives out all the evidence you need in the course of her direct testimony. If that happens, don't cross-examine. Or, new information may come out that changes the case dramatically. If that happens, you need to change your cross-examination plan to take into account the changed circumstances.

HEARING PREP PART 3:
Preparation for presenting your argument

☐ If you have done a written argument, pat yourself on the back because you can use this as a template for most of your argument to the tribunal.

☐ Whether or not you have done a written argument, you should <u>always</u> prepare a **hearing binder** containing your notes for the hearing. Your binder should contain:

(A) Your written argument if you have one;

(B) Your list of documents;

(C) Your plan for leading your witnesses through their evidence (direct examination);

(D) Your plan for cross-examining witnesses on the other side, if appropriate; and

(E) Any other materials you may not want to refer to.

☐ If you do not have a written argument, you will need to prepare the following items to put in the hearing binder:

(A) Your opening statement including your statement of what, exactly, you are asking the tribunal to do.

(B) A summary of the key facts, organized chronologically. Stick to the relevant facts and don't get bogged down in excessive detail. Have a plan for referring to the documents as you go through the facts.

(C) A statement of the applicable law. Again, stick to the key points and don't get bogged down.

(D) A statement of your legal arguments about the case.

It is essential to spend some time, in each individual case, thinking about exactly how you will present your client's case. There is no "one size fits all" formula.

The best way to get ready is to become completely familiar with the evidence, the law, your client's theory of the case, and exactly what you are asking for.

HEARING PREP PART 4:
Preparation for any procedural requests and objections

☐ Think in advance about any procedural requests you expect to have. For example:

Do you need an adjournment?

Do you need a witness to testify by phone?

Do you need to ask the tribunal to accept documents you filed late?

Does your client need a translator?

Does your client need a special accommodation due to a disability?

☐ For each procedural request, think about the reason *why* you will be making the request. Why would it be fair for the tribunal to grant the request?

☐ If possible, make any procedural requests to the tribunal in writing, well in advance of the hearing. If possible, get the other side to agree to your request before contacting the tribunal.

☐ If you will be making the procedural request at the hearing itself, make a note of exactly how you plan to express the request, clearly and simply, at the outset of the hearing. Include a simple explanation for why you didn't make the request sooner. Again, try to get the other side to agree to your request before you raise the issue with the tribunal.

☐ If the request is denied at the hearing, then you may have to make an objection. **If you end up making an objection at the hearing, be sure to do the following:**

- Clearly state that you object to the proceeding going ahead without granting your client's request for XYZ;
- Request that the decision-maker note on the record that you objected; and
- Make a detailed note about the objection in your own hearing notes.

Having gone over this checklist you should now be feeling prepared for your hearing. Good luck! ☺

THE HEARING ITSELF

The day of the hearing:

☐ Have paper and a pen handy.

☐ Have all the documents organized and ready. If the hearing is in your office and you are attending by phone, clear away any other files.

At the start of the hearing:

☐ Politely introduce yourself and explain you are acting as an advocate for your client.

☐ Write down the names of everyone attending.

☐ Check that the tribunal, and the other side, have received your documents and your written submissions.

☐ Make any procedural requests you may have.

☐ Ask permission to make an opening statement.

Throughout the hearing:

☐ Keep in mind the "ideal structure" of a hearing:

(1) Applicant gives an opening statement;
(2) Respondent gives an opening statement;
(3) Applicant presents his/her evidence (witnesses and documents);
(4) Respondent challenges the applicant's evidence;
(5) Respondent presents his/her evidence (witnesses and documents);
(6) Applicant challenges the respondent's evidence;
(7) Applicant makes his/her argument; and
(8) Respondent makes his/her argument.

☐ With this structure in mind, try to make sure you get a chance to present your case and challenge the other side's case.

☐ <u>However</u>, be aware that many tribunal hearings follow this structure quite loosely.

☐ Use your written argument as a template for your argument.

☐ Take detailed notes (as much as you can).

At the end of the hearing:

☐ Summarize your case in a closing statement.

- This can be loosely based upon your opening statement, but be aware that you cannot plan it in advance, because it will depend on what has happened at the hearing.

- A good closing statement should briefly reiterate the key evidence that supports your client's case, and reiterate why you say the tribunal should give your client what he/she is asking for.

👍 GOOD WORK! 👍

Advocacy Skills Fact Pattern

★ READ CAREFULLY BEFORE NOVEMBER 24, 2011 ★

Cathy Frank is a 54 year-old Kelowna woman who suffers from debilitating arthritis in her hips and spine. She is on Persons with Disabilities benefits and also earns between $300 and $500 per month at her part-time job at a hardware store.

On July 1, 2011 Cathy moved into suite #101 in Prendergast Place, a subsidized building managed by **Housing Access Kelowna**. The rent was $450 per month for a one-bedroom apartment close to the grocery store and her workplace. The only thing Cathy didn't like about Prendergast Place was **Peggy McKenzie**, the live-in building manager, who was a total control freak. As soon as Cathy moved in, Peggy started carping at her for minor things, like smoking too close to the front walkway, playing the TV too loud, or not closing the back door all the way (which was hard to do because there was something wrong with the latch). But overall, Cathy was happy to find a place she could afford.

On September 20, 2011 an electrical socket in Cathy's apartment overheated and caused a small fire. Cathy's La-Z Boy armchair and her expensive Obusforme back support got scorched, and her electric blanket was melted. Peggy arranged to fix the damage to the apartment, but she flatly refused to replace Cathy's damaged belongings. Even though the electrician (**Gary Wong**) said the fire wasn't Cathy's fault and the wiring in the socket was "a recipe for disaster", Cathy decided not to make a fuss about getting her stuff replaced. It was just too much of a pain dealing with Peggy. She resigned herself to using the damaged chair and Obusforme, and bought herself a new electric blanket.

Then in mid-October, Cathy started getting phone calls from her 33-year old son **James Frank**. He wanted to borrow some money, and he wanted a place to stay for a few nights. This made Cathy nervous, as she had been through this before with James. He had always had a terrible temper, and in the past few years he had been getting involved with drugs and alcohol and hadn't been able to hold down a job. A couple of years ago, Cathy had agreed to let James stay with her for a while to get "straightened out" - but that had ended badly. Within a couple of weeks James had gone out of control, and the neighbors had called the police several nights in a row because of the noise. Then one night James had kicked a big hole in the wall, and Cathy had told him to leave. After that incident, Cathy had resolved not to give James any more help.

But now James kept calling, and leaving voicemail messages saying how sorry he was about last time, and promising he just needed a little help. She began to feel guilty, especially because his birthday was coming up soon. On November 10th, the day before her son's birthday, she called him and invited him over for dinner on the 11th.

James arrived late for dinner, at about 7:45 pm. Cathy could tell from his voice on the intercom that he was already intoxicated, and she let him in cautiously, still hoping they might be able to have a nice evening together if she kept things light. But sure enough,

after about half an hour, James became belligerent, criticizing the meal, and insisting she lend him her car. Cathy didn't want to lend James her car - she needed it to get around, and he wasn't fit to drive anyway. For all she knew he might sell it for drug money! Cathy tried to say no, and the conversation quickly got out of control. Soon James was yelling mean things, and Cathy was getting upset and emotional. She tried her best to stay calm, but at one point she yelled something like, "You useless junkie! You came here to take advantage your own mother on your birthday!"

A moment later, Cathy's neighbour **Roy Tereberry** knocked loudly on the door and called, "Is everything okay? Simmer down in there!" Cathy was too embarrassed to open the door, but she called out an apology to Roy, and tried in vain to smooth things over with James.

A couple of minutes later, at about 8:35, the police pulled up outside. James stormed down the hall and out the back way, slamming the door behind him, hard. He was gone by the time the building manager was able to let the officers in. Cathy tried to assure the police that everything was fine. **Constable Marsh** gave her business card to Cathy, Roy, and the building manager, with a police file to quote if they needed anything.

A few days later, on November 15th, the building manager knocked on Cathy's door, and handed her a **1-Month Notice to End Tenancy for Cause** form. Cathy was shocked. The **Notice to End Tenancy** said that Cathy had to be out by December 31, 2011! It gave the following reasons:

> Tenant or a person permitted on the property by the tenant has:
> - significantly interfered with or unreasonably disturbed another occupant or the landlord
> - put the landlord's property at significant risk
>
> Tenant has caused extraordinary damage to the unit/site or property/park

A week later, on November 22nd, Cathy found a **Notice of Dispute Resolution Hearing** in an envelope taped to her door. It said there would be a teleconference hearing on December 19, 2011. Also in the envelope was a **Landlord's Application for Dispute Resolution** saying the landlord wanted:

- an order of possession (reason for ending tenancy: landlord has cause under the Act);
- a monetary order for $2550; and
- recovery of the filing fee.

At the bottom of the **Landlord's Application for Dispute Resolution**, Peggy had written:

> *"Tenant and guest created unacceptable, violent disturbance on evening of November 11, 2011. Police were called by management. Guest damaged drywall in hallway and hinge and latch of external door, total repair cost $2550."*

Now it's November 24 and Cathy has come to you for help.

- She wants to challenge the Notice to End Tenancy, as she says there was only one incident of noise, and it wasn't that bad. She really doesn't want to lose her subsidized unit and she knows if she gets evicted for cause she will have to wait a year before she can get back on the BC Housing list.

- She also wants to challenge the landlord's monetary claim. While she agrees there are a couple of minor dents in the drywall in the hallway, she doesn't think they came from her son. Meanwhile, the back door was always messed up, and Peggy is just trying to pin the expensive repairs on her son.

- As well, Cathy wonders about trying to get compensation for the $250 worth of stuff she lost in the fire back in September. If the landlord is going after every little thing, why shouldn't she?

Cathy has brought you a couple of relevant sections of the *Residential Tenancy Act* that she got from a law student friend (see attached).

Please help Cathy.

Residential Tenancy Act, S.B.C. 2002, c. 78

Liability for not complying with this Act or a tenancy agreement

7 (1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Landlord and tenant obligations to repair and maintain

32 (1) A landlord must provide and maintain residential property in a state of decoration and repair that ...

...

(b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

...

(3) A tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

Landlord's notice: cause

47 (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

...

(d) the tenant or a person permitted on the residential property by the tenant has

(i) significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,

...

(iii) put the landlord's property at significant risk;

...

(f) the tenant or a person permitted on the residential property by the tenant has caused extraordinary damage to a rental unit or residential property;

Director's orders: compensation for damage or loss

67 Without limiting the general authority in section 62 (3) *[director's authority respecting dispute resolution proceedings]*, if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

Advocacy Skills: FACT AND EVIDENCE TABLE (BLANK)

Housing Access Kelowna v. Cathy Frank
RTB File 111234
Hearing Date: December 19, 2011 at 9:00 a.m.

Fact to be proven	Evidence to prove it

Advocacy Skills: FACT AND EVIDENCE TABLE (BLANK)

Fact to be proven	Evidence to prove it

Advocacy Skills: FACT AND EVIDENCE TABLE – EXAMPLE

Housing Access Kelowna v. Cathy Frank
RTB File 111234
Hearing Date: December 19, 2011 at 9:00 a.m.

Fact to be proven	Evidence to prove it
The disturbance on Nov. 11, 2011 was not very serious.	
The disturbance didn't last long – the noise began around 8:15 and stopped by 8:35.	
The neighbours were not really bothered by the incident; they were just a bit worried about Cathy. Peggy is the only one actually upset at Cathy about the incident, and it's only because she is so unreasonable.	
The back door was already damaged prior to November 11th. Cathy's son did not damage it further.	
Cathy's son did not damage the drywall in the hallway.	
In any case, the damage to drywall is very minor and wouldn't cost much to repair.	

Fact to be proven	Evidence to prove it
The fire on September 20, 2011 was caused by faulty wiring.	
Cathy's La-Z-Boy armchair, Obusforme back rest, and electric blanket were damaged in the fire.	
The value of Cathy's damaged belongings adds up to $675.33. • Armchair $459.99 + tax • Obusforme $112.99 + tax • Electric blanket $49.99 + tax	

Housing Access Kelowna v. Cathy Frank
RTB File 111234
Hearing Date: Dec. 19, 2011 at 9:00 a.m.

LIST OF DOCUMENTS

Documents about the notice to end tenancy, and the landlord's monetary claim

1. Written statement from neighbour Roy Tereberry (dated November 26, 2011) regarding:
   - Events of Nov. 11, 2011; and
   - Ongoing problems with back door prior to Nov. 11, 2011.

2. Photo of back door showing problem with latch (taken Nov. 26, 2011).

3. Photo showing condition of drywall in hallway (taken Nov. 26, 2011).

4. Estimate dated Dec. 3, 2011 from Repair Rite on cost to fix drywall and back door.

Documents about the tenant's monetary claim

5. Report dated Dec. 1, 2011 from electrician Gary Wong regarding repairs done on September 22, 2011 to faulty wiring in Suite 101.

6. Photo of damage to tenant's armchair and back support (taken Nov. 26, 2011).

7. Photo of melted electric blanket (taken Nov. 26, 2011).

8. Documents to prove value of belongings damaged in fire:

	Item	**Replacement cost**	**Description**
8A	La-Z Boy Armchair	$459.99	Quote from Sears
8B	Obusforme back rest	$112.99	Print-out from Rexall website
8C	Sunbeam electric blanket	$49.99	Print-out from London Drugs website
	TOTAL	**$622.97**	
	Plus HST 12%	$74.76	
	TOTAL LOSSES INCLUDING TAX	**$697.73**	

Housing Access Kelowna v. Cathy Frank

RTB File 111234

Hearing Date: December 19, 2011 at 9:00 a.m.

TENANT'S WRITTEN SUBMISSION

FACTS

1. Cathy Frank has been a tenant in at #101, 1234 Lawrence Avenue, Kelowna, since July 1, 2011. Her monthly rent is $450 and her landlord is Housing Access Kelowna.

2. On September 20, 2011 there was an electrical fire in Ms. Frank's unit caused by faulty wiring. Some of Ms. Frank's possessions were damaged. The landlord did not compensate her for the damage.

3. On November 11, 2011 Ms. Frank and her son had a 20 minute argument in her unit. Someone called the police. No-one was arrested. Ms. Frank's neighbours did not regard the incident as serious.

4. The landlord has served Ms. Frank with a notice to end tenancy based on the November 11, 2011 incident. The landlord has also applied for a monetary order for damage it says was caused by Ms. Frank's son. Ms. Frank says the November 11, 2011 incident was brief and not significant in nature, and denies that her son caused the alleged damage.

5. Ms. Frank has applied for:

    - An order setting aside the landlord's November 15, 2011 notice to end tenancy for cause;
    - A monetary order of $697.73 (for belongings that were damaged by the September 20, 2011 fire); and
    - An order requiring the landlord to pay her RTB filling fee.

6. Ms. Frank also opposes the landlord's application for:

    - An order of possession;
    - An $2500 monetary order; and
    - The RTB filing fee.

ISSUES

7. There are three issues in this case:

A. Application to set aside notice to end tenancy for cause: Did the tenant, or a person permitted on the residential property by the tenant:
- Significantly interfere with or unreasonably disturb another occupant or the landlord of the residential property (s. 47(1)(d)(i)),
- Put the landlord's property at significant risk (s. 47(1)(d)(iii)), or
- Cause extraordinary damage to a rental unit or residential property (s. 47(1)(f))?

B. Landlord's claim for repairs to back door and to drywall in the hallway: Did the tenant, or a person permitted on the residential property by the tenant, cause damage to the back door and the drywall (s. 32(3))? If so, what is the reasonable cost of repairing the damage?

C. Tenant's claim for belongings damaged in the September 20, 2011 fire: Was the fire caused by the landlord's failure to properly repair and maintain the residential property (s. 32(1))? If so, did the fire cause damage to the tenant's belongings (s. 7) and what is the reasonable replacement cost of the damaged belongings?

LAW

The relevant sections of the *Residential Tenancy Act* are as follows:

> **Liability for not complying with this Act or a tenancy agreement**
>
> **7** (1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.
>
> (2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.
>
> **Landlord and tenant obligations to repair and maintain**
>
> **32** (1) A landlord must provide and maintain residential property in a state of decoration and repair that
>
> ...
>
> (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.
>
> **...**

(3) A tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

Landlord's notice: cause

47 (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

...

(d) the tenant or a person permitted on the residential property by the tenant has

(i) significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,

...

(iii) put the landlord's property at significant risk;

...

(f) the tenant or a person permitted on the residential property by the tenant has caused extraordinary damage to a rental unit or residential property;

Director's orders: compensation for damage or loss

67 Without limiting the general authority in section 62 (3) *[director's authority respecting dispute resolution proceedings]*, if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

ANALYSIS

Issue A. **Application to set aside notice to end tenancy for cause: Did the tenant, or a person permitted on the residential property by the tenant:**

- **Significantly interfere with or unreasonably disturb another occupant or the landlord of the residential property (s. 47(1)(d)(i)),**
- **Put the landlord's property at significant risk (s. 47(1)(d)(iii)), or**
- **Cause extraordinary damage to a rental unit or residential property (s. 47(1)(f))?**

8. On November 11, 2011 Ms. Frank and her son had a 20-minute argument in her unit between about 8:15 and 8:35 pm on a Friday evening.

9. The police showed up at 8:35 and Ms. Frank's son left at that time. No-one was injured and no-one was arrested.

10. There is no evidence that any of Ms. Frank's neighbours experienced the incident as a "significant interference" or "unreasonable disturbance" pursuant to s. 47(1)(d)(i) of the *Act*. Ms. Frank's neighbour Roy Tereberry was the only

person, apart from the building manager, who even noticed the incident.

11. Mr. Tereberry knocked on Ms. Frank's door about 8:30 pm to ask if everything was okay, but he did not complain to the landlord. *Tenant's document #1* is a written statement from Mr. Tereberry explaining his perspective on the incident.

12. The November 11, 2011 incident was brief and isolated. A reasonable neighbour or landlord would not have experienced the incident as a significant interference or unreasonable disturbance justifying an eviction for cause under s. 47(1)(d)(i) of the Act.

13. Meanwhile, there is no evidence that Ms. Frank's son caused any damage to the landlord's property, let alone the type of "extraordinary" or "significant" damage that would warrant eviction for cause. The evidence is clear that the back door of the building was broken well before November 11th, and there is no credible evidence to show that Ms. Frank's guest is responsible for the minor dents in the drywall. Ms. Frank's testimony on this point is supported by Mr. Tereberry's written statement (*Tenant's document #1*).

14. The landlord has failed to show that Ms. Frank or her guest "put the landlord's property at significant risk" or "caused extraordinary damage to a rental unit or residential property" to justify eviction for cause under s. 47(1)(d)(iii) or 47(f) of the Act.

Issue B. Landlord's claim for compensation for repairs: Did the tenant, or a person permitted on the residential property by the tenant, cause damage to the back door and the drywall in the hallway (s. 32(3))? If so, what is the reasonable cost of repairing the damage?

15. As noted above, there is absolutely no evidence that Ms. Frank's son caused any damage to the drywall in the hallway, or to the back door. The back door of the building was broken even before November 11th (*Tenant's document #1*).

16. In an application for a monetary order, the landlord bears the burden of proving the tenant or her guest caused damage. In this case the landlord has only speculated that the tenant or her guest caused the damage. This is not enough to meet the landlord's burden of proof.

17. Furthermore, even if the tenant were responsible for the damage, which she says she was not, the landlord has claimed repair costs well above what would be reasonable. *Tenant's documents #2 and 3* are photos showing there is minimal damage to the drywall in the hallway and the back door latch (neither of which have been repaired to date). *Tenant's document #4* is a quote from Repair Rite, a reputable handyman company, estimating the total cost of repairing the drywall and door at $785, not $2500.

Issue C. **Tenant's claim for belongings damaged in the September 20, 2011 fire: Was the fire caused by the landlord's failure to properly repair and maintain the residential property (s. 32(1))? If so, did the fire cause damage to the tenant's belongings (s. 7), and what is the reasonable replacement cost of the damaged belongings?**

18. The electrical fire on September 20, 2011 there was caused by faulty wiring. *Tenant's document #5* is a report dated Dec. 1, 2011 from Gary Wong, the electrician who repaired the wiring after the fire.

19. Ms. Frank's La-Z boy armchair, her Obusforme back support, and her electric blanket were all severely damaged in the fire. *Tenant's documents #6 and 7* are photos showing the state of these items after the fire, and showing the manufacturer's label for the chair and back rest.

20. Ms. Frank has continued using the scorched chair and back rest since the fire and has gone without an electric blanket. The landlord did not compensate her for the damage.

21. Ms. Frank obtained quotes for the replacement cost of her damaged items (*Tenant's documents 8A, 8B, and 8C*).

	Item	**Replacement cost**	**Proof**
8A	La-Z Boy Armchair	$459.99	Quote from Sears
8B	Obusforme back rest	$112.99	Print-out from Rexall website
8C	Sunbeam electric blanket	$49.99	Print-out from London Drugs website
	TOTAL	**$622.97**	
	Plus HST 12%	$74.76	
	TOTAL LOSSES INCLUDING TAX	**$697.73**	

22. The total replacement cost for Ms. Frank's damaged belongings is **$697.73.**

CONCLUSION

23. The landlord has not established it has cause to terminate MS. Frank's tenancy.

24. Nor has the landlord established it has a monetary claim against Ms. Frank for damage to the drywall and back door. In the alternative, the landlord's monetary claim for these items is too high and should be reduced.

25. The tenant has established that her belongings valued at $697.73 were damaged in the September 20, 2011 fire, because of the landlord's negligence and/or breach of the Act in failing to properly maintain the electrical wiring.

ORDERS SOUGHT

26. Ms. Frank asks for:

- An order setting aside the Notice to End Tenancy for cause.
- An order requiring the landlord to pay $697.73 to compensate her for her damaged belongings.
- An order requiring the landlord to pay her RTB filing fee.

27. Ms. Frank asks that the landlord's applications be dismissed.

Dated: _____

Applicant: _____

This Submission has been prepared by Advocate X.
Address: XYZ
Phone number: (250) 111-1111

Advocacy Skills: DIRECT EXAMINATION EXERCISE

DIRECT EXAMINATION OF CATHY FRANK

STEP 1: ASK YOURSELF, "WHAT AM I TRYING TO GET OUT OF THIS DIRECT EXAMINATION?"

In a direct examination you will ask questions that gently guide your witness to tell the full story you want them to get across. The less <u>you</u> say, and the more you can leave it to the witness, the better.

In this exercise don't worry about getting across the whole story Coach has to tell. The exercise will just let you practice:

- Introducing the witness, and
- Guiding the witness through a portion of the evidence they will give.

STEP 2: CRAFT 2 OR 3 BRIEF QUESTIONS THAT GUIDE CATHY FRANK TO INTRODUCE HERSELF AND PUT THE CASE IN VERY GENERAL CONTEXT.

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-

STEP 3: PICK OUT <u>NO MORE THAN TWO</u> TOPICS THAT CATHY NEEDS TO GIVE EVIDENCE ON. WRITE THEM DOWN HERE:

THEN CRAFT ABOUT <u>15 or 20 SIMPLE</u> AND <u>NON-LEADING</u> QUESTIONS TO GUIDE CATHY THROUGH HER TESTIMONY ON THESE TWO TOPICS.

-
-

DIRECT EXAMINATION EXERCISE, CONT'D

Advocacy Skills: CROSS-EXAMINATION EXERCISE

CROSS-EXAMINATION OF PEGGY MCKENZIE

STEP 1: ASK YOURSELF, "WHAT AM I TRYING TO GET OUT OF THIS CROSS-EXAMINATION?"

List one or two simple points you will try and get out of Peggy McKenzie.

STEP 2: CRAFT 10 CROSS-EXAMINATION QUESTIONS FOR PEGGY MCKENZIE. Ask simple, <u>leading</u> questions that will get at the points you wrote in the box above.

1.

2.

3.

4.

5.

CROSS-EXAMINATION EXERCISE, CONT'D

6.

7. r

8. r

9. r

10. r

Advocacy Skills: CROSS-EXAMINATION EXERCISE

WITNESS TESTIMONY FOR CROSS-EXAMINATION

This is a summary of Peggy McKenzie's testimony on direct examination.

I served the eviction notice on this tenant because she is, to put it bluntly, unable to be considerate of her neighbours, and her behaviour is making everyone uncomfortable. For one thing, there is a long history of her insisting on smoking right outside the front entrance (and my living room window), even though she was told from the outset it's a non smoking building. For another thing, when I have reminded her about the rules, or just basic matters of courtesy like shutting the door behind her, she has gotten all uppity.

But the big thing, really, is the noise, and the general lack of respect for the comfort of the other tenants, many of whom are elderly and coping with disabilities. I live immediately across the hall from this tenant in #102, and several times I have heard her talking loudly on the phone, even late at night, or playing her TV at a very loud volume, and I've had to go over and tell her to keep it down. Basic courtesy folks!

Anyway, on November 11th it was really the last straw when her druggie son came over and the two of them made a big ruckus on Remembrance Day of all days. I mean, show some respect. That's why I called the police. If it's so bad the police get called, then I think we can agree it's a significant disturbance.

After the police left, I did a walk through the building and noticed the dents where the tenant's son had punched the wall. I also noticed the back door: the hinge and latch were all messed up. That made sense, because I had heard the door crashing shut when her son made his dignified exit. I do a walk through every day, and while I know the door had minor problems shutting before, it was never this bad. And I am sure I would have noticed those dents in the wall sooner if they had been there all along.

As for the tenant's claim that the building should pay for her stuff that got burned, she was using an electric blanket day in, day out, and everyone knows what a fire hazard those things are. I think she fried the electrical with that blanket. We have never had problems with electrical fires before.

Advocacy Skills: CROSS EXAMINATION EXERCISE

DOCUMENT FOR CROSS EXAMINATION

This is a document the landlord has provided for the dispute resolution hearing. If you wish, you can use it to cross-examine Peggy McKenzie.

ZAP ELECTRIC

Mischa Mouat, Sole Proprietor

"Professional Electrician for your Home and Business"

November 18, 2011

To Whom it May Concern:

I have done electrical work at 1234 Lawrence Avenue at various points in the past 5 years. The property manager at said address requested I write a report commenting on the quality of the electrical at 1234 Lawrence.

The wiring in the suites I have worked in was reasonably up to date and was adequately installed with proper materials. I doubt a fire would have been caused by electrical errors given what I saw.

The owner also asked me to comment on electric blankets. Yes, they are a fire hazard.

Any questions please call me at 250-555-5555.

Yours professionally,

MISCHA MOUAT

Mischa Mouat

Advocacy Skills: PROCEDURAL REQUESTS AND OBJECTIONS EXERCISE (BLANK)

Suggested approach:

- First, **make a procedural request,** and explain why you are requesting it. (What is the fairness issue?)
- If the request is denied, and if you think it's appropriate to object, tell the tribunal you object. Make sure you do all 3 of these things:
  - **Explain to the tribunal why you object.**
  - **Request that your objection be noted on the record.**
  - **Make a clear note in your own hearing notes about the fact you objected, why, and what the tribunal's response was.**

This table gives examples of issues that might justify a procedural request, and possibly an objection.

ISSUE / PROBLEM:	YOUR REQUEST:	YOUR OBJECTION (IF NECESSARY AND APPROPRIATE):
#1. Other side's evidence is late. You need an adjournment because your client only got the landlord's documents 2 days before the hearing. The landlord's evidence contains a witness statement from Sissy Lynde, an elderly neighbour of Cathy's who is quite nosy. Mrs. Lynde claims that Cathy had a habit of talking loudly on the phone and playing her TV at high volume at all hours of the day and night. Mrs. Lynde's note claims that Cathy is a rude and thoughtless person.	**You could say:**	**If the adjournment is refused:**

#2. DRO tries to stop you from asking a relevant question. You start to ask Peggy McKenzie how recently the electrician Mischa Mouat was hired to do any work at 1234 Lawrence Avenue, and what specific units she worked in. The DRO says: "I don't think that's relevant. This case is about unit #101 and unit #101 only. You are trying to confuse things and I need to stay focused on the relevant issues. Please stay on track. Let's move on."	**You could say:**	**If the adjournment is refused:**
#3. DRO tells you that you are not allowed to act as an advocate and he doesn't want to hear from you. Cathy Frank is very anxious and is counting on you to present the case for her.	**You could say:**	**If the adjournment is refused:**

Advocacy Skills: PROCEDURAL REQUESTS AND OBJECTIONS EXERCISE (EXAMPLE)

Suggested approach:

- First, **make a procedural request,** and explain why you are requesting it. (What is the fairness issue?)
- If the request is denied, and if you think it's appropriate to object, tell the tribunal you object. Make sure you do all 3 of these things:
  - **Explain to the tribunal why you object.**
  - **Request that your objection be noted on the record.**
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This table gives examples of issues that might justify a procedural request, and possibly an objection.

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#1. Other side's evidence is late. You need an adjournment because your client only got the landlord's documents 2 days before the hearing. The landlord's evidence contains a witness statement from Sissy Lynde, an elderly neighbour of Cathy's who is quite nosy. Mrs. Lynde claims that Cathy had a habit of talking loudly on the phone and playing her TV at high volume at all hours of the day and night including November 11, 2011. Mrs. Lynde's note claims that Cathy is a rude and thoughtless person.	**You could say:** I need an adjournment because my client only got the landlord's evidence 2 days ago. • The rules of procedure say the landlord was required to serve the evidence 5 days before the hearing. • Ms. Frank hasn't had enough time to respond to the evidence from Sissy Lynde. She would like to arrange for one or two more of her neighbours to testify about the incident the landlord says gives cause for eviction.	**If the adjournment is refused:** I object to this proceeding continuing without an adjournment. Ms. Frank should have a fair chance to respond to the other side's evidence. If we are going to proceed without an adjournment, can my objection please be noted on the record? (MAKE NOTE IN OWN NOTES)

Prepared by Jess Hadley of Community Legal Assistance Society for the Law Foundation advocate training conference held November 22-24, 2011 in Richmond, BC.

Advocacy Skills: PROCEDURAL REQUESTS AND OBJECTIONS EXERCISE (EXAMPLE)

#2. DRO tries to stop you from asking a relevant question. You start to ask Peggy McKenzie how recently the electrician Mischa Mouat was hired to do any work at 1234 Lawrence Avenue, and what specific units she worked in. The DRO says: "I don't think that's relevant. This case is about unit #101 and unit #101 only. You are trying to confuse things and I need to stay focused on the relevant issues. Please stay on track. Let's move on."	**You could say:** (EXAMPLE) With respect, I need to question Mr. Mouat on this point. It's a key part of Ms. Frank's monetary claim that the landlord failed to maintain the electrical system in her particular suite. Mischa Mouat's letter talks about the building generally but doesn't make it clear whether she ever worked in suite 101. May I ask the question please?	**If you are blocked from questioning the witness:** (EXAMPLE) I object to this limit on my questioning of this witness. Ms. Frank should be given a fair chance to get this evidence across. If we are going to proceed without me being allowed to ask these questions, can my objection please be noted on the record? (MAKE NOTE IN OWN NOTES)
#3. DRO tells you that you are not allowed to act as an advocate and he doesn't want to hear from you. Cathy Frank is very anxious and is counting on you to present the case for her.	**You could say:** (EXAMPLE) Ms. Frank is entitled under s. 74(4) of the RTA to have an agent at the hearing. She isn't prepared to present the case without my assistance. It would be unfair to proceed without my involvement. Ms. Frank is right here and she can confirm she wants me to act as his agent. I am not going to be giving evidence. May I continue to present the case?	**If the DRO insists you may not speak:** (EXAMPLE) I object to the hearing continuing without me as Ms. Frank's agent. If you are going to prevent me from acting as agent, please can my objection please be noted on the record? (MAKE NOTE IN OWN NOTES)

9. Welfare and Disability Benefits

Legal Services Society
British Columbia
www.legalaid.bc.ca

THE LAW FOUNDATION OF BRITISH COLUMBIA

Change to eligibility for shelter benefits when a child is removed by MCFD

(Alison Ward, Barrister and Solicitor, Community Legal Assistance Society, November 12, 2011).

A May 3, 2011 policy change by the Ministry of Social Development will help parents who receive welfare benefits and whose children have been removed by the Ministry of Child and Family Development ("MCFD") because of alleged child protection concerns.

Under the new MSD policy, the family unit's shelter rate will continue to include the children as part of the family unit (even though they temporarily living outside the home). The shelter rate will include the children until either:

- an MCFD social worker advises MSD that the parent is no longer actively working toward the return of the child; or

- a continuing custody order is made in regard to the child/ren (i.e. the child is made a ward of the state).

Before this policy change, shelter benefits would include the children only if MCFD confirmed the children would be returned within 3 months. This meant many parents had to move into smaller, cheaper places that were often not appropriate for children to be returned to; children were kept in foster care longer as a result and family reunification was impeded.

In May 2010, Pivot and West Coast LEAF (Women's Legal Education and Action Fund) filed a systemic complaint with the Office of the Ombudsperson regarding MSD's prior policy, alleging it was unfair and discriminated against poor families and single mothers in particular. The complaint was brought on behalf of Atira Women's Resource Society, Battered Women's Support Services, the Downtown Eastside Women's Centre, and the Kettle Friendship Society. The Ministry's policy change was made before the Ombudsperson had initiated its investigation.

Community Volunteer Supplement –repeal and grandfathering

(Alison Ward, Barrister and Solicitor, Community Legal Assistance Society, November 12, 2011).

Effective August 9, 2012, the *Employment and Assistance Regulation* and the *Employment and Assistance for Persons with Disabilities Regulation* were amended to repeal the sections under which the Community Volunteer Supplement ("CVS") and the monthly incentive supplement were provided.

The CVS provided up to $100 per month to eligible individuals who volunteered at least 10 hours a month for a non-profit agency. The monthly incentive supplement could provide up to $50 per month for people with PWD status who participated for at least 20 hours per month in a vocational, self-improvement or other program to prepare the person for employment. The monthly incentive supplement was for a maximum of 6 months every three years.

The provincial government has said it is reviewing the CVS program and may introduce something else to promote volunteerism to, essentially, replace the CVS, but none has been introduced yet.

Two groups of people will continue to be eligible for the CVS from MSD if they participate in a volunteer program with a non-profit agency:

a) People who were receiving the CVS before August 9th can continue to receive CVS as long as they continue to receive welfare and participate in a community volunteer program; and

b) People who had been put on the Ministry's CVS waitlist as on August 8th, 2011.

There are some uncertainties about CVS at this point. For example, the Ministry's announcement about changes to CVS said that people on the waitlist who wanted to be considered for CVS must submit a completed Request for CVS form to MSD by October 31, 2011. The ministry is accepting Request for CVS forms as long as they were post-marked by October 31st. However, that date does not appear in Ministry policy. If you have a client on the CVS waitlist who did not get their Request for CVS form in by October 31, 2011, but wants to pursue CVS now, you should have them submit a completed Request for CVS form as soon as possible, and then seek legal advice about their specific situation.

There is also some uncertainty about what appeal rights apply to people who have been receiving CVS since before August 9th, or who were on the CVS waitlist as of August 8th. The Ministry has said that that because CVS is no longer provided under the authority of the welfare legislation (as those sections were repealed), those groups of people cannot appeal any decision to reduce, refuse or cut-off CVS benefits.

However, I think there is a reasonable legal argument that people on the CVS waitlist or who have been receiving CVS since before August 9th, have accrued rights and may be able to appeal any decision to refuse, reduce or discontinue CVS benefits. If you come across such cases, please post them to PovNet and/or contact me on CASL.

ELAN
Electronic Legal Aid News
For Community Workers
Legal Services Society

Expanded orthotics coverage for people on social assistance

Oct 18th, 2011 by Legal aid.

The BC Ministry of Social Development made changes to their orthotics program as of August 2, 2011. The program can now pay for a wider range of medical footwear and orthotic needs to help people with disabilities perform day-to-day activities. People whose requests for orthotics were refused before August 2, 2011 may want to re-apply to MSD for orthotic coverage under the new criteria.

MSD can now provide more items under the program, including:

- off-the-shelf foot orthotics (such as prefabricated insoles and arch supports);
- off-the-shelf orthopedic footwear (such as prefabricated diabetic footwear and wound care footwear) with a cost limit of $250 and a one-year replacement period; and
- off-the-shelf footwear with a cost limit of $125 and a one-year replacement period only when required to accommodate a custom-made orthotic

The eligibility criteria for custom-made foot orthotics also changed. Some key changes are:

- You no longer need to show that a custom-made foot orthotic is needed to prevent amputation of your foot.
- The $375 cost limit was increased to $450.
- The replacement period was decreased from one pair in four years, to one pair in three years.

More information on these changes can be found by visiting the Medical equipment — orthoses section of the ministry's website. Our thanks to Alison Ward, Community Advocate Support Line lawyer at the Community Legal Assistance Society for providing the above entry.

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Posted in: legal aid.
Tagged: orthotics · social assistance · welfare

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Electronic Legal Aid News
For Community Workers
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Screening expanded to all Child in the Home of a Relative (CIHR) program recipients

Nov 3rd, 2011 by Legal aid.

Effective September 1, 2011, families who receive benefits from the Ministry of Social Development through the Child in the Home of a Relative (CIHR) Program, and who started to receive CIHR benefits before 2007 will be required to undergo screening checks. In 2007, the BC Ministry of Children and Family Development (MCFD) introduced screening for all new CIHR applicants. Families who were already receiving CIHR benefits were exempt. The ministry recently reviewed this decision, and added screening for all families receiving CIHR benefits as a precautionary step to help ensure that no children are being put at risk.

Under the new screening requirements, each person age 18 or over living in a home that receives CIHR benefits must provide written consent for MCFD to conduct screening checks (unless that person has been screened before). Two kinds of checks will be done:

- a Prior Contact Check: this check reviews any contact the adult may have had with either MCFD or a Delegated Aboriginal Agency; and
- a criminal record check

If another adult (aged 18 or over) moves into the home or another child in the home turns 18, that person must agree to be screened by MCFD for continued CIHR eligibility.

MCFD will use the information obtained by these checks to decide whether the household poses any evidence of risk to the child on whose behalf CIHR benefits are paid.

Families must participate in the screening process to continue to receive CIHR benefits. Caregivers who agree to the screening will continue to receive CIHR benefits as long as the child remains in their home.

The ministry says that screening will begin with families caring for the youngest and most vulnerable children, and that they plan to complete the screening process by March 2012.

This change in policy affects families caring for approximately 1,800 children and youth in BC. Affected families will receive letters notifying them of the new policy and requesting that they fill out consent forms agreeing to both kinds of checks.

For more information about changes to the CIHR policy, and about the Extended Family Program (the program that replaces CIHR for all new applicants), please visit the BC government website.

Our thanks to Alison Ward, Community Advocate Support Line lawyer at the Community Legal Assistance Society for providing the above entry.

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Nutritional supplements and social assistance on reserve

Sep 7th, 2011
by Legal aid.

Aboriginal Affairs and Northern Development Canada (AAND; formerly Indian and Northern Affairs Canada) recently introduced a Monthly Nutritional Supplement and Tube Feed Supplement program.

For the Monthly Nutritional Supplement Program, people living on reserve:

- who have the Persons with Disabilities (PWD) designation, and
- are receiving disability assistance,

can apply to their Band social development worker for financial support for nutritional supplements and vitamins and minerals to help address chronic medical conditions. A total of up to $205 per month may be available.

To qualify, individuals must:

- be receiving treatment from a medical practitioner or nurse practitioner for a chronic, progressive deterioration of health due to a severe medical condition,
- require items to alleviate specific symptoms that are a direct result of the deterioration and are necessary to prevent imminent danger to life, and
- have no other resources available to them.

For more information, please see AAND's questions and answers and application instructions.

The Tube Feed Supplement Program is intended for eligible people who cannot eat or digest solid food. The supplement can be used to pay for liquid nutrition as well as the medical equipment and supplies needed to deliver it. To be eligible for a tube feed supplement, individuals must be:

- living on reserve and receiving income assistance or disability assistance, or
- living on reserve but temporarily residing in a licensed drug and alcohol facility; or
- a dependent of an individual described above; or
- a child living with a relative who receives the Child out of the Parental Home benefit from the band on that child's behalf.

To qualify, a medical practitioner, nurse practitioner, or registered dietician must confirm:

- that the individual must obtain his or her main source of nutrition through tube feeding;
- what kind (and how much) of a nutritional product he or she needs;
- how long he or she is expected to need tube feeding for; and
- what other tube feeding supplies and equipment he or she needs.

For more information, see the AAND policy on the tube feed supplement. Our thanks to Alison Ward for providing the above entry.

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Posted in: legal aid.

Criminal Charges and Social Assistance

Consequences for social assistance recipients of a criminal conviction for welfare fraud

This document is to assist counsel when representing people who are charged under the *Criminal Code* with welfare fraud (when the fraud applies to provincial legislation for the provision of welfare benefits). The consequences of a conviction for defrauding the Ministry of Housing and Social Development are drastic. **Unless your client receives a discharge, he or she becomes ineligible for social assistance for *life*.**

Statutory provisions

The *Employment and Assistance Act* (*EAA*), S.B.C 2002, Chapter 40 states:

15 (1) A family unit that includes a person who is convicted of an offence under the *Criminal Code* in relation to obtaining money, under this Act or the *Employment and Assistance for Persons with Disabilities Act*, by fraud or false or misleading representation is subject to the consequence described in subsection (5) for a family unit that matches the person's family unit for the lifetime of the person, beginning with the first calendar month following the date of the conviction.

(2) A family unit that includes a person who is convicted of an offence under this Act or the *Employment and Assistance for Persons with Disabilities Act* is subject to the consequence described in subsection (5) for a family unit that matches the person's family unit, beginning with the first calendar month following the date of conviction,

(a) after a first conviction, for a period of 12 consecutive months,

(b) after a second conviction, for a period of 24 consecutive months, and

(c) after a third conviction, for the lifetime of the person.

(3) If

(a) [Repealed 2006-22-3.]

(b) a court has given judgment in favour of the government in an action for debt against a person for obtaining income assistance, hardship assistance or a supplement under this Act, or disability assistance, hardship assistance or a supplement under the *Employment and Assistance for Persons with Disabilities Act*, for which he or she was not eligible,

unless the income assistance, hardship assistance, disability assistance or supplement was provided to or for the person in error, the minister may declare that the person's family unit is subject to the consequence described in subsection (5) for a family unit that matches the person's family unit for the prescribed period, beginning with the first calendar month following the date of the judgment.

(4) The periods prescribed for the purpose of subsection (3) may vary with the number of applicable judgments.

(5) If a family unit includes

(a) only persons described in subsection (1) or (2), or subsection (3) if the minister has made a declaration under that subsection, the family unit is not eligible for income assistance for the applicable period, and

(b) one or more persons described in subsection (1) or (2), or subsection (3) if the minister has made a declaration under that subsection, and at least one other person, the amount of income assistance, hardship assistance or a supplement provided to or for the family unit must be reduced by the prescribed amount for the applicable period.

An identical provision appears in the *Employment and Assistance for Persons with Disabilities Act*, S.B.C 2002, Chapter 41, at Section 14.

Context

If a person is charged with welfare fraud, the initial sentencing position of the Crown upon conviction is usually a period of incarceration. Discussions with the Crown might well lead to a non-custodial sentence. However, beware of a resolution that may see a client plead guilty and not go to jail but *lose his or her likely only source of living*.

If a client is sure that they are not going to need to access social assistance again in their lifetime, a lifetime ban is no longer a major concern and you can focus solely on the standard criminal case considerations to achieve the best outcome possible for your client. However, this would be an unusual situation and the Ministry of Housing and Social Development's own statistics show that most recipients go on and off welfare throughout their lives, and it is the exception that a person receives assistance once and never again.

Intention

Charges of welfare fraud can arise from a variety of circumstances including failing to report income, gifts, inheritance, disposal of assets, change in circumstance, and being in a spousal relationship (defined in the *EAA*). What is important to remember in all of these instances is that a conviction requires an intention to defraud. Many people charged with these offences will admit to having committed the act but were unaware at the time that what they were doing was unlawful. It is vital that you thoroughly explore whether there was sufficient intention to support a finding of guilt. Often your client will be functionally illiterate, relatively unsophisticated, perhaps facing mental health issues, and overwhelmed in every sense by poverty. While these factors may make it difficult to ascertain the person's true intention, they may also contribute to a judge making a finding of reasonable doubt.

Disclosure

The ministry has extensive record-keeping capacity and a freedom of information request may result in the delivery of hundreds of pages of documents. Often there is the basis for a sound defence hidden within them. You may find a record of an appeal to a tribunal under the *EAA* that accepted your client's explanation favourably. This should be sufficient for the Crown to enter a stay of proceedings.

You may be surprised at the large amount of the alleged fraud. If a person has been deemed ineligible for assistance, the entire amount advanced during that period of ineligibility is declared a debt owing to the Crown. For example, if it is alleged that a person had unreported income of $100 per month for a year, the debt claimed will not be for $1200 but for the *entire amount* of assistance that they received during the course of the year. This could be as much as 12 times the unreported income. Go over the records of the amounts carefully as such wide variations may be perceived differently by both Crown counsel and the court. This information could be useful to negotiate for a lesser included charge where a discharge is available or as a means to convince the court that a restitution order is not proper in this case.

Often a client will tell you that the ministry worker said that he or she could do the action that gave rise to the charge of fraud. Records of conversations will be in the ministry files and you may be able to find some support for your client's story. You can rely on this evidence as a business record and do not have to subpoena the ministry worker.

Discharge provisions of the Code

If your client is found guilty under the *Criminal Code*, the only possibility for him or her to avoid a lifetime ban is if sentenced to an absolute or conditional discharge. Since the outcome of either sentence is no record of conviction, the lifetime ban in *EAA* Section 15(1) would not apply. However, if the Crown proceeds pursuant to *Criminal Code* Section 380(1)(a) — fraud exceeding $5,000 — a discharge would not be available as this section carries a maximum sentence of 14 years. (Section 730 precludes consideration of

a discharge where the sentence may be 14 years or for life.)

Because of this, the Crown might be open to changing the charge to theft or false pretences where the maximum sentence is 10 years. Or, in situations where a small unreported amount resulted in a debt claimed of an amount over $5,000, the Crown might be convinced to change the charge to an amount under $5,000 which would permit consideration of the discharge provisions. Additionally, a careful review of the documents may show that the actual amount of the debt *is in fact* less than $5,000.

Alternative to Criminal Code

Section 15 of the *EAA* provides a range of penalties for the same basic offence depending on whether the person is charged under the *Criminal Code* or the provincial legislation. Where there is no possible defence for your client and a discharge is unlikely, you should explore whether the Crown would be willing to proceed under Section 15(2), an offence under the *EAA*, rather than the *Criminal Code*. Only a third conviction under the *EAA* will result in a lifetime ban from assistance. However, the consequences for first and second convictions under the *EAA* are still harsh, resulting in 12- and 24-month periods of ineligibility, respectively.

Resources

The Legal Services Society (LSS) provides legal aid lawyers with Legal Aid Ontario (LAO) law memoranda that are designed to help lawyers prepare cases for legal aid clients. There are two memos available about welfare fraud: O23-2 *Welfare Fraud* and S2-1 *Defrauding Government Agencies — Welfare Fraud & UIC*. See the Lawyers section of the LSS website (www.lss.bc.ca) under "Practice resources — Legal research memoranda" for more information. LSS also gives a plain language fact sheet about welfare fraud (*What You Need to Know about Fraud Charges and Social Assistance*) to legal aid clients facing these charges. It is also available on the publications page of the LSS website.

Legal Services Society

British Columbia
www.lss.bc.ca

What You Need to Know About Fraud Charges and Social Assistance

This is an important document to read. If you are found guilty of welfare fraud, you may be banned from receiving welfare for one or two years, or even for life.

You have been given this fact sheet because you have been charged under either the Criminal Code or the BC Employment and Assistance Act (or the BC Employment and Assistance for Persons with Disabilities Act) with defrauding the provincial government under its social assistance laws and regulations.

If you plead guilty or if you are found guilty (convicted) of this charge, this will affect when you can get welfare again or if you can ever get welfare again. You need to ask your lawyer what will happen to your benefits if you are found guilty. Then you need to make sure your lawyer understands just what that could mean for you personally.

Because this charge is so serious, you need to meet with your lawyer and carefully talk about all the facts. This may take some time. At the trial, you will have a better chance of winning your case if you have done everything possible to co-operate with your lawyer while preparing for it.

Before the trial, and especially if your lawyer suggests that you plead guilty, you need to ask your lawyer if it is possible for you to get an **absolute discharge** or **conditional discharge**. An absolute discharge means that even if you are found guilty, you will have no conviction on your record. A conditional discharge is the same except you must first follow certain rules while on probation. In both cases, your ability to get welfare in the future will not be affected.

If a discharge is not possible for you, your lawyer may be able to get your fraud charge changed to one for which a discharge may be possible.

Remember that even if a discharge is possible, it doesn't mean you will definitely get one. Ask your lawyer what you can do to make a discharge more likely; for example, by going to counselling or treatment, volunteering, or getting letters of reference.

If you do get a sentence that results in a lifetime ban from welfare, you may be able to get hardship benefits instead. Ask for these benefits at a Ministry of Housing and Social Development office. If you are told that you can't get them, get help immediately from a local community advocate to ask for a review of this decision. See the PovNet website to find the community advocate closest to you:

www.povnet.org

August 2009

Ministry of Social Development - Dental Fee Guides

*Prepared by Stacey Tyers, advocate, Terrace and District Community Services Society, Nov 16, 2011

The Ministry of Social Development pays up to 100% of THEIR own fee guide. It is important that you and the client both understand that many dentists do not bill according to the Ministry's fee guide. Most dentists charge higher fees than what the Ministry fee guide will pay. If that happens, the dentist will bill the client for the difference (balance billing).

The Ministry's fee guides are online:

Dentists' fee guide: http://www.hsd.gov.bc.ca/publicat/pdf/dentistschedule.pdf

Denturists' fee guide: http://www.hsd.gov.bc.ca/publicat/pdf/denturistschedule.pdf

Hygienists' fee guide: http://www.hsd.gov.bc.ca/publicat/pdf/hygienistschedule.pdf

Free or Lower Cost Dental Clinics/Services

Finding a dentist that charges Ministry rates (or close to Ministry) can be very helpful for your client, to avoid or reduce balance billing.

The following clinics provide dental treatment at reduced rates. Clients should call for specific information about fees and hours of service. Clients may also want to contact local dental hygiene, denturist and dental assisting teaching institutions for low-cost services.

More information is available at http://www.bcdental.org/index.htm , including search capabilities to find dentists who speak languages other than English, or service other areas of BC.

This list of clinics is courtesy of the College of Dental Hygienists website, at http://www.cdhbc.com/Forms---Resources/Resources/LowCostOralHealthClinicsinBC.aspx

1. Dental Clinics

Kamloops

New Life Mission

Address: Outreach Services@181 West Victoria St.

Corporate Office@346 Seymour Street

Phone: Outreach Services call 250-434-9898

Corporate Office call 250-372-9898

Services: Basic and emergency services, adults. Open every Thursday and every second Wednesday. Must call ahead to book appointment. Accepts MSD clients that need dentures.

Kelowna

Kelowna Gospel Mission Dental Clinic

Address: 259-B Leon Avenue, Kelowna B.C.

Phone: 250-763-3737

Services: Youth/Adults only. Emergency services provided for relief of pain/infection for homeless, impoverished, and clients who cannot afford treatment in a private dental office. Financial eligibility determined through screening process. Appointments required. Open 2 evenings/month.

Prince George

Emergency Dental Outreach Clinic

Address: Prince George Native Friendship Centre

1600 Third Avenue (side door entrance), Prince George BC, V2L 3G6

Phone: 250-613-PAIN (7246)

Services: Emergency services for relief of pain/Infection, for clients who cannot afford treatment in a private dental office. Clients are seen on a first come first serve basis. Urgency of dental need will be considered. Basic dental hygiene services may be available.

Salmon Arm

Living Waters Dental Clinic

Address: Living Waters Church

180 Lakeshore Drive NW, Salmon Arm BC.

Phone: 250-832-3433

Services: Basic and emergency services, adults. Open every second Wednesday. Must call ahead to book appointment. MSD clients who need dentures are accepted.

Vancouver Area

REACH Community Health Centre

Address: 1145 Commercial Drive, East Vancouver (between William & Napier St.)

Phone: 604-254-1331

Services: Basic dentistry, all ages.

Mid Main Community Health Centre Dental Clinic

Address: 3998 Main St & 24th, Vancouver,

Phone: 604-873-3602

Services: Basic and emergency dentistry, all ages.

Portland Community Clinic

Address: 360 Columbia St. (Sunrise Hotel at corner of Hastings & Columbia),

Phone: 778-371-0060

Services: Basic dentistry for adults of the downtown eastside community.

Vancouver General Hospital Diamond Health Care Centre

Address: 2775 Laurel Street, 7th Floor, Vancouver

Phone: 604-875-4006

Services: Basic dentistry, must be 18 years and older.

Strathcona Community Dental Clinic

Address: 601 Keefer St, Vancouver

Phone: 604-713-4485

Services: Basic dentistry by appointment for children to age 18 who are residents of Vancouver, family members of child patients, and seniors aged 60+ who are residents of Vancouver.

Vancouver Native Health Society Dental Clinic

Address: 455 East Hasting Street, Vancouver

Phone: 604-255-9766

Services: Emergency and basic dentistry for relief of pain. Focus on aboriginal people and residents of the downtown east side, although all drop-ins welcome.

Vancouver Community Dental Health Program

(Vancouver Coastal Health Authority - Public Health)

Address: #200 1651 Commercial Drive

Phone: 604-215-3935

Services: Basic dentistry for all children residing in Vancouver.

UBC Dental School

Address: 2151 Wesbrook Mall, Vancouver

Phone: 604-822-6917 emergency clinic: September - May only

604-822-2112 general dentistry clinic

Services: For general dentistry clinic, applicants go through a screening process to determine eligibility based on type of dental work needed. Age 6 and up.

Victoria

Cool Aid Community Health Centre/Dental Clinic

Address: 713 Johnson St., 2nd Floor, Victoria

Phone: 250-383-5957

Services: Basic and emergency dentistry. All ages.

2. Dental Hygiene Teaching Institutions

Students in these institutions provide dental hygiene and preventive services for a nominal fee. Restorative and emergency services are not offered. Clinics generally run Monday Friday from September to June. Contact the program for more specific information.

More information is available at http://www.bcdha.bc.ca/ or from the teaching institution.

Chilliwack

University College of the Fraser Valley

Address: 45635 Yale Road, Chilliwack, BC, V2P 6T4

Phone: (604) 795-2829

Nanaimo

Vancouver Island University

Address: 900 5th Street, Nanaimo, BC, V9R 5S5

Phone: (250) 740-6240

Prince George

College of New Caledonia

Address: 3330 22nd Avenue, Prince George, BC, V2N 1P8

Phone: (250) 561-5810 or (800) 371- 8111

Vancouver

Vancouver Community College

Address: 250 West Pender Street, Vancouver, B.C. V6B 1S9

Phone: (604) 443-8499

Vancouver College of Dental Hygiene Inc

Address: 3030 Broadway East, Vancouver, BC V5M 1Z4

Phone: (604) 215-7611

Victoria

Camosun College

Address: 3100 Foul Bay Road, Victoria, B.C. V8P 5J2

Phone: (250) 370-3184

3. Denturists' Teaching Institutions

Students make complete and partial dentures as well as repairs and relines at reduced fees. Call for details and to set up a screening appointment.

Vancouver Community College

Address: 250 West Pender Street, Vancouver, B.C. V6B 1S9

Phone: (604) 443-8500

4. Certified Dental Assistant Teaching Institutions

Preventive services (fluoride, sealants, oral hygiene instruction) provided by dental assisting students. Restorative and emergency services are not offered. Limited clinic availability, often during a month in the spring, depending on class intake schedules.

Generally for ages 3-25. More information is available at http://www.cdaa.ca/e/schools/index.asp#bc

Campbell River

Discovery Community College

Address: 1325 Shoppers Road, Campbell River, BC, V9W 2C9

Telephone: 250-287-9898

Chilliwack

University College of the Fraser Valley

Address: 45635 Yale Road, Chilliwack, BC, V2P 6T4

Telephone: 604-795-2829

Cranbrook

College of the Rockies

2700 College Way, Cranbrook, BC V1C 5L7

Telephone: (250) 489-2751 ext 364

Fraser Valley

University of the Fraser Valley

45635 Yale Road Chilliwack, BC V2P 6T4

Telephone: (604) 795-2817

Kelowna

Okanagan University College

1000 KLO Road, Kelowna, BC V1Y 4X8

Telephone: (250) 862-5424

Nanaimo

Vancouver Island University

900 Fifth Ave. Nanaimo, BC V9R 5S5

Telephone: (250) 740-6240

Prince George

College of New Caledonia

3330-22nd Avenue Prince George, BC V2N 1P8

Telephone: (250) 561-5810 / (800) 371- 8111

Vancouver Area

CDI College of Business, Technology & Healthcare, Burnaby Campus

4603 Kingsway Street, Suite 211, Burnaby, BC V5H 4M4

Telephone: (604) 437-8585

CDI College of Business, Technology & Healthcare, Surrey Campus

9180 King George Hwy. Surrey, BC V3T 5H5

Telephone: (604) 585-8585

West Coast College

#210 2383 King George Hwy Surrey, BC V4A 5A4

Telephone: (604) 535-9253

Douglas College

700 Royal Avenue New Westminster, BC V3L 5B2

Telephone: (604) 527-5464

Vancouver Community College

250 West Pender Street Vancouver, BC V6B 1S9

Telephone: (604) 443-8499

Victoria

Camosun College, Lansdowne Campus

3100 Foul Bay Road, Victoria, BC V8P 5J2

Telephone: (250) 370-3184

PWD eligibility criteria: Judicial Review sets standards

In *Hudson v. Employment and Assistance Appeal Tribunal*, 2009 BCSC 1461, the Supreme Court of BC made several findings with respect to the eligibility criteria for designation as a person with disabilities ("PWD") under the *Employment and Assistance for Persons with Disabilities* legislation. The decision in *Hudson* is found at http://www.courts.gov.bc.ca/jdb-txt/SC/09/14/2009BCSC1461.htm

The Court held that:

a) "The ordinary meaning of the plural „activities' … dictates that there must be evidence from a prescribed professional indicating a direct and significant restriction on at least two daily living activities." There is no statutory requirement that more than two daily living activities be restricted.

[See para. 43 of *Hudson*]

b) An application is sufficient if:

   i. Either the medical practitioner or the assessor confirms that a person's severe impairment directly and significantly restricts their ability to perform daily living activities. There is no statutory requirement for confirmation from both;

   or

   ii. The medical practitioner and the assessor's evidence, when read together, confirm that a person has a severe impairment that directly and significantly restricts their ability to perform daily living activities. There is no statutory basis for reading Parts 2 and 3 of the PWD application discretely.

[See paras. 43-46 & 63 of *Hudson*]

c) The evidence of the physician and assessor must be read in their entirety and in a broad way. Even if the physician or assessor does not tick a specific box on the PWD application form, his or her evidence must be reviewed in full, including narrative portions, to see if eligibility confirmation can be found elsewhere.

[See paras. 3-7, 41 & 51-54 of *Hudson*]

d) Significant weight must be placed on the evidence of the applicant, unless there is a legitimate reason not to do so.

[See paras. 64-65 of *Hudson*]

e) Any ambiguity in the interpretation of the *Employment and Assistance for Persons with Disabilities* legislation must be resolved in favour of the applicant.

[See paras. 35 & 62-63 of *Hudson*]

f) The *Employment and Assistance for Persons with Disabilities* legislation must be interpreted with a benevolent purpose in mind.

[See para. 62 of *Hudson*]

As the superior court in British Columbia, the Supreme Court's decision in *Hudson* is **binding** on the Health Assistance Branch, reconsideration adjudicators, and the Employment and Assistance Appeal Tribunal in making any decision as to whether an applicant meets the definition of "person with disabilities" in the *Employment and Assistance for Persons with Disabilities* legislation.

PROVISION OF PWD APPLICATION
CLIENT IN RECEIPT OF INCOME ASSISTANCE APPLYING FOR DISABILITY ASSISTANCE

Note:

- ***In deciding whether a client demonstrates the financial eligibility required to be provided a PWD application, please check both assets and income in this table.***
- ***A decision to refuse to provide a PWD application may be reconsidered.***
- ***If assets in excess of the PWD limit, an eligible client must be informed of the Trust program and RDSP exemption and referred to the Disability Assistance and Trust booklet and the Trust Query Submission Guidelines. Staff must not provide legal or investment advice to clients. [see Trusts topic]***

Assets/Income ***Note: Eligibility is determined month to month based on income and assets the client has received.***	**Provide PWD application** **Note: Must be "yes" for both assets and income**	**While completing an application for PWD designation or awaiting PWD decision, provide IA if all other eligibility requirements are met**
Assets under IA limit	Yes	Yes
Assets over IA limit, but less than PWD limit	Yes	Yes
Assets over PWD limit which are intended to be held in a trust or RDSP **Note**: Clients are provided 3 months (from the date the asset is received) to transfer assets into a trust or RDSP [see Trust policy for details] ***Note:** If assets are reported late or discovered by investigation, clients are determined ineligible for further assistance at that time. If asset is to be transferred into a trust, clients must establish the trust and have it reviewed and determined valid before they will be eligible for assistance. [see Trust topic - policy – Transferring Income or Assets into a Trust]	Yes	Yes*
Assets over PWD limit which are held in a trust, but pending review by the ministry	Yes	Yes
Assets over IA and PWD limits with no indication that the asset will be transferred into a trust or RDSP	No	No
Income exceeds IA rates but less than PWD rates	Yes	No
Income exceeds PWD rates – appears to be a temporary situation, which will be resolved within 6 months (e.g., seasonal or intermittent employment)	Yes	No
Income exceeds PWD rates – appears to be a permanent situation (e.g., receives CPP or pension or permanently employed)	No	No

PROVISION OF PWD APPLICATION
APPLICANT FOR DISABILITY ASSISTANCE

Note:

- ***In deciding whether an applicant demonstrates the financial eligibility required to be provided a PWD application, please check both assets and income in this table.***
- ***Applicant must first complete the intake process, sign the SD0080 and have an open GA file (whether in pay or not) before a PWD application can be adjudicated by Health Assistance Branch.***
- ***A decision to refuse to provide a PWD application may be reconsidered.***
- ***If assets in excess of the PWD limit, an applicant must be informed of the Trust program and RDSP exemption and referred to the Disability Assistance and Trust booklet and the Trust Query Submission Guidelines. Staff must not provide legal or investment advice to applicants. [see Trusts topic]***

Assets/Income ***Note: Eligibility is based on assets and income the applicant has received.***	**Provide PWD application** **Note: Must be yes to both assets and income**	**While completing an application for PWD designation or awaiting PWD decision, provide IA if all other eligibility requirements are met**
Assets under IA limit	Yes	Yes
Assets over IA limit but under PWD limit	Yes	Yes
Assets over PWD limit but are expected to be under PWD limit within 6 months	Yes	No
Assets over PWD limit which are intended to be held in a trust or RDSP **Note**: Applicants are provided 3 months (from the date the PWD application is provided) to transfer assets into a trust or RDSP [see Trusts topic for details]	Yes	Yes
Assets over PWD limit which are held in a trust, but pending review by the ministry	Yes	Yes
Assets over PWD limit with no indication that the asset will be transferred into a trust or RDSP	No	No
Income exceeds IA rates but less than PWD rates	Yes	No
Income exceeds IA and PWD rates – appears to be a temporary situation which will be resolved within 6 months. For example, seasonal or intermittent employment or transitioning from other sources of income, including: • 17 1/2-year-old applicant • 17 1/2-year-old applicant who is an At Home Medical Benefits recipient (may opt to sign an SD3183 release in place of completing a PWD Application • Child Services client – 18 1/2 year old (MCFD financially responsible until age19) • EI or EI medical applicant • Applicant in a facility • Applicant moving off reserve - not previously designated by INAC [see PWD Designation Application policy if designated by INAC]	Yes	No
Assets and Income in Excess - Applicant not financially eligible for PWD and the situation is not likely to change in the immediate future (within 6 months)	No	No
Applicant wanting to apply for PWD <u>for reasons other than receiving benefits under the *EAPWD Act*</u>	No	N/A

Consultation Process: Ministry of Social Development/ Community Advocates

Contact Information

1. Moving Forward Steering Committee ("MFSC"):

The Steering Committee is the overall umbrella group for the consultation process, discussing policy issues, raising systemic issues, etc at the provincial level. Advocates are represented from all 5 provincial regions.

Advocates' co-chair: Tish Lakes, Advocate and Executive Director
Okanagan Advocacy and Resource Society (OARS)
Tel (250) 979 0201, oars@telus.net

Ministry co-chair: Judy D'Gal, Director, Policy Interpretation &Stakeholder Relations, MSD
Tel: (250) 387-9271; judy.dgal@gov.bc.ca

2. Working Groups

The MFSC has 3 working groups that focus on specific issues. Membership in working groups is open to advocates whether or not they attend MFSC meetings.

a) Reconsideration and Appeal Rights:

Advocates' co-chair: Gillian Andrew, Poverty law advocate
Powell River Community Services Association
Tel (604) 485 0950; povertylaw@onelink.ca

Ministry co-chair: Cary Chiu, Manager, Appeals Section, MSD
tel (250) 356 1926; Cary.Chiu@gov.bc.ca

b) Health Benefits

Advocates' co-chair: Stacey Tyers, Advocate
Terrace & District Community Services Society
Tel (250) 635-3178; staceytyers@tdcss.ca

Ministry co-chair: Paul Beardmore, Director, Health Assistance Branch, MSD
Tel (250) 356 1746;
Paul.Beardmore@gov.bc.ca

c) Communications & Immigrant/Refugee, Racialized groups working group

Advocates' co-chairs: (a) Ros Salvador, Barrister and Solicitor, BCPIAC
Tel (604) 687 3063, rsalvador@bcpiac.com

AND:	(b) Gurpreet Pabla, Advocate Progressive Intercultural Community Services (PICS) Tel 604 596 7222, ext 123 gurpreet.pabla@pics.bc.ca
Ministry co-chair:	Judy D'Gal, Director, Policy Interpretation &Stakeholder Relations, MSD Tel: (250) 387-9271; judy.dgal@gov.bc.ca

3. Regional quarterly consultation calls

The Community Relations Service Quality manager for each MHS region organizes a consultation call with advocates in their area every 4 months, together with an advocate co-chair in each region. If you don't get notices of the consultation calls in your region, contact your local advocate co-chair:

Region 1 (Vancouver Island):	Gillian Andrew, Poverty law advocate Powell River Community Services Association Tel (604) 485 0950; povertylaw@onelink.ca
Region 2 (Vancouver Coastal):	Stephanie Smith, Advocate MOSAIC, Vancouver Tel 604 254 9626; ssmith@mosaicbc.com
Region 3 (Fraser)	Soraya Van Buskirk, Advocacy programs manager Newton Advocacy Group Society (NAGS) tel 604 547 0107; soraya@newtonadvocacygroup.ca
Region 4 (Interior)	Ashly Van Steele, Advocate Kamloops and District Elizabeth Fry Society (250) 314-1900; advocate@kamloopsefry.com
Region 5 (North).	Stacey Tyers, Advocate Terrace & District Community Services Society Tel (250) 635-3178; staceytyers@tdcss.ca

BC COALITION OF PEOPLE WITH DISABILITIES

CANADA PENSION PLAN DISABILITY BENEFITS

Applications
and
Reconsideration

INTRODUCTION

CPP DISABILITY CHECKLIST

- ✓ **Contributions**

If deemed disabled:

- December 2006 – 3 out of 6 years if applicant has 25 years of contributions
- January 1998 to present- 4 of 6 years
- January 1987 to December 1997- 2 of 3 or 5 of 10 years

✓Early Retirement (60-65)

- Disability benefits only available to those between 19 and 65.
- Cannot apply for CPP disability benefits if one becomes disabled after early retirement payments start.
- Cannot apply for disability benefits for a condition that arose before early retirement if in receipt of retirement benefits for 15 months or more.

✓Child Rearing Dropout

- Must have stopped working or reduced hours of work to raise a child under the age of 7
- Must have been in receipt of Family Allowance or Child Tax Credit
- Mother assumed to be primary care giver but she can transfer CRD to spouse if spouse was the one who stayed home to care for children

✓Credit Splitting

- Must be divorced or separated after January 1, 1978
- Different rules apply between January 1, 1978 and December 31, 1986
- Common-law couples not eligible prior to January 1, 1987
- Same sex couples not eligible prior to July 31, 2000
- Read Information that comes with application carefully
- Must have lived with former spouse/partner for 12 consecutive months
- Must be divorced, marriage annulled, or separated for 12 consecutive months
- Must apply within 36 months of the death of a former spouse
- According to Service Canada, a person cannot use credits to qualify for disability benefits if the disability arose prior to the divorce or separation. [*MHHR v. Woodcock* (2002 FCA 296); *MHRD v. Woodcock* (CP 14202 PAB Oct. 2000)]

✓Late applications (MQP Minimum Qualifying Period)

- A person can apply for disability benefits at any time but must prove that they were disabled when they last qualified for benefits. Disabilities that arise after the MQP are not considered
- Unless a person is deemed to have been incapacitated (not capable of forming the intent to apply), the maximum amount of retroactive benefits that can be paid is 11 months from the date of application

SEVERE AND PROLONGED

- **DISABILITY –** Legal Definition

  When person deemed disabled

  42 (2) For the purposes of this Act,

  (*a*) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,

  (i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and

  (ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of Indefinite duration or is likely to result in death;

THE FOCUS FOR CPP DISABILITY BENEFITS IS EMPLOYABILITY – NOT DAILY LIVING ACTIVITIES

Leading Case

Villani v. Canada (Attorney General)
[2001] FCA 24

CPP Application

- Question 5 – Asks the applicant the date they stopped working. If this date falls out of the MQP (a failed attempt to return to work for example) be prepared to address that.

- Question 16 – Asks the applicant the date they felt they were not able to work because of their disability. For most people this matches with Question 5. This date must fall within the MQP for applicant. Remember MQP is that date someone must be able to demonstrate they were unable to do any form of work because of their disability by.

- Question 19 – Asks the applicant to describe how their illness or impairment prevents them from working. Remember this is not just how they cannot do their old job. What are the symptoms that prevent retraining to do other types of work?

EXERCISE

22. Explain any difficulties/functional limitations you have with the following:

Sitting/Standing (How long?)	Seeing/Hearing
Walking (How Long and how far?)	Speaking
Lifting/Carrying (How much and how far?)	Remembering
Reaching	Concentrating
Bending (How much?)	Sleeping
Personal needs (Eating, washing hair, dressing, etc.)	Breathing
Bowel and bladder habits	Driving a car (how long?)
Household maintenance (Cooking, cleaning, shopping and similar activities)	Using public transportation

RECONSIDERATION/APPEALS

- TIME LIMITATIONS – 90 DAYS FOR EACH LEVEL OF APPEAL

Have client sign a letter requesting reconsideration or use HRSDC form.

Provide HRSDC authorization

- Reconsideration — Written submissions only. Can take more than four months.

REASONS PEOPLE ARE DENIED CPP-D

- Severe

A denial letter telling someone that their disability is not sufficiently severe to stop them from working may say something like this:

While you may not be able to do your previous job, we concluded that you should still be able to do some type of work. We understand that you have limitations. However, we concluded that t he information does not show that your limitations prevent you from doing some type of work.

- Prolonged

  This can happen if someone is waiting for treatment (ie. surgery) or if there is medical evidence suggesting that a full recovery is expected by a certain date.

- Not Enough Contributions

  If there are not sufficient contributions there is no basis for reconsideration. There are no provisions in the legislation that allow the Ministry to reconsider a decision on compassionate grounds.

Requesting the file.

- To request a file you will have to provide an Info Source Personal Request form.
- If you do not have the Info Source form in your office you can obtain them by calling 1-800-277-9914 or online at http://www.tbs-sct.gc.ca/tbsf-fsct/350-57-eng.pdf
- If you are requesting the file on behalf of a client include an authorization with an original signature.
- The Info Source form allows you to get the complete copy of the CPP Disability file

Reviewing the file

- 5 – 6 weeks after submitting the Info Source form you should have the full CPP file containing:

    - The application form
    - The doctor's medical report
    - The disability summary sheet explaining why HRSDC denied the disability claim.
    - All other documentation sent to HRSDC including additional medical information from doctors.

Getting additional medical information

- Can be used to address the specific points on which HRSDC based their denial.
- Family doctor vs. Specialists
- Note HRSDC will only pay for letters that they request. If your organization does not have the funds to cover any fees or costs it is important that the doctor and your client know this.

Writing a submission

- Include your client's name and social insurance number on each page.
- List the reasons for denial.
- Use the medical information in the file and any additional information gathered to address the reasons for denial.

USING CASE LAW

MNHW v. Densmore (CP 2389 Halifax, Nova Scotia April 28, 1993)

The issue is difficult because its resolution depends upon the view which the Board ultimately takes of the genuineness of what are strictly subjective symptoms. In effect, ***the judgment call***, made generally without the assistance of objective clinical signs, ***will be one of credibility on a case by case basis***, as to the severity of the pain complained of.

Mullaney v. MSD (CP24444 Toronto, Ontario February 22, 2007)

Before the Supreme Court of Canada in the case *Re: Nova Scotia (Workers' Compensation Board) v. Martin* [2003] SCC 54, the Court was persuaded beyond doubt that chronic pain was a legitimate medical condition and was entitled to constitutional protection as falling within the enunciated ground of "physical disability" within Subsection 15(1) of the Charter. In his judgment at paragraph 1 Gonthier, J. stated:

Chronic pain syndrome and related medical conditions have emerged in recent years as one of the most difficult problems facing workers' compensation schemes in Canada and around the world. There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. ***Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real.***

Villani v. Canada (Attorney General) [2001 Federal Court of APPEAL 24]

[38] This analysis of subparagraph 42(2)(a)(i) strongly suggests a legislative intention to apply the severity requirement in a 'real world' context. Requiring that an applicant be incapable *regularly* of pursuing any *substantially gainful* occupation is quite different from requiring that an applicant be incapable *at all times* of pursuing *any conceivable* occupation. … in my opinion, that ***Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation***.

Curnew v. MHRD (CP12886 Toronto, Ontario April 26, 2001)

[14] Chronic pain syndrome, like many other disabilities, creates difficulty in determining its exact onset. It is a progressive disability. It cannot be said that it first occurred only when some medical practitioner actually put a name upon it. ***All of the evidence must be looked at by the Board to make its decision of the date of onset. That date can be prior to the date of the minimum qualifying period even if no medical practitioner so-named it until afterwards.*** (See *Thompson v. The Minister of Employment and Immigration*, CCH Employment Benefits and Pension Guide Reports (1996), No. 8621, pp. 6168-6169.)

Leduc v. MNHW (CP 1376 Vancouver, British Columbia January 29, 1988)

The Board is advised by medical authority that despite the handicaps under which the Appellant is suffering, there might exist the possibility that he might be able to pursue some unspecified form of substantially gainful employment. In an abstract and theoretical sense, this might well be true. However, the Appellant does not live in an abstract and theoretical world. He lives in a real world, peopled by real employers who are required to face up to the realities of commercial enterprise.

The question is whether it is realistic to postulate that, given all of the Appellant's well documented difficulties, any employer would even remotely consider engaging the Appellant. This Board cannot envision any circumstances in which such might be the case. In the Board's opinion, the Appellant, Edward Leduc, is for all intents and purposes unemployable.

Tasse v. MSD (CP24087 Toronto, Ontario November 27, 2006)

[15] ***Does the fact that the Appellant returned to work for brief periods in 2005 and 2006 preclude her from obtaining a pension***? In my view it does not.

…

[20] The evidence adduced also raises another issue which needs to be addressed, namely, whether the amount of wages earned by the Appellant during her brief stints of employment following her stoppage of work in 2000, constitutes “a substantially gainful occupation.” Ms. Tasse worked a 32½ hour week on alternate weeks and received $7.75 per hour or $501.85 per month, for a period of six months. For the three month period in 2006, while employed at a nursing home her weekly take home pay calculated at 21½ hours per week at $7.75 amounted to $166.63 per week or $675.00 per month.

[21] **This meager sum is substantially below the "poverty line" as referred to by Statistics Canada.** Had her previous work prior to her disability occurring, been at the same hours and wage, this issue would not arise.

…

[23] Her family physician agrees that she is incapable of working longer hours. A disability is "severe" only if by reason thereof the person is incapable regularly of pursuing any substantially gainful occupation. (Emphasis added in original)

[24] “Regular” has been defined as ‘with consistent frequency.” The Oxford Dictionary defines “substantially” as “having substance, actually existing, not illusory.” The Webster Dictionary defines “gainful” as “profitable, lucrative.” In my view, the legislature, by prefacing the word “gainful” with substantially, **intended that the employment would be in excess of gainful.**

RESOURCES

Office of the Commissioner of Review Tribunals CPP/OAS - Book of Authorities

http://www.ocrt-bctr.gc.ca/dcn/scrBRintro-eng.aspx

- The CPP Book of Authorities database contains selected decisions made under the Canada Pension Plan (CPP). The database refers only to decisions made by the Pension Appeals Board, the Federal Court of Canada, the Federal Court of Appeal, and the Supreme Court of Canada.
- You can either browse a list of subject areas, or search cases by keyword and other criteria. Each case links to a printable version of the decision.

There are two ways to find a decision in the Tribunal's CPP Book of Authorities:

- Browse by Subject – SEE APPENDIX III PAGE 11
- Search by keyword

- **BC Coalition of People with Disabilities** http://www.bccpd.bc.ca
- **CHC Annotated Canada Pension Plan and Old Age Security Act – Purchased at** www.cch.ca
- **Pension Appeals Board** http://www.pab-cap.gc.ca (All Board decisions are posted on this site)
- **Review Tribunal web site** http://www.ocrt.gc.ca
- **Service Canada web site:** http://www.servicecanada.gc.ca
- **CPP Electronic Forms:**

  http://www.hrsdc.gc.ca/cgibin/search/eforms/index.cgi?app=list&group=CPP&dept=sc&lang=e

- **Canada Pension Plan Adjudicative Framework:**

  http://www.hrsdc.gc.ca/eng/isp/cpp/adjudframe/cppadjud.shtml

USING CASE LAW

Tribunals will only pay attention to certain types of decision. Previous Tribunal decisions are of little interest to them. Tribunal decisions are not published and have little, if any, persuasive value. Although Tribunals are not bound by Pension Appeals Board decisions they can be persuaded by them – the Tribunal Book of Authorities contains many PAB decisions. Tribunals are bound by decisions of the Courts.

Using case law in a submission can be a powerful tool. When making oral submissions at a hearing however, a little restraint might be wise. Provided that you have made a written legal argument, don't be overly legalistic in your closing remarks. The Chair is usually a lawyer and the OCRT has provided all Members with legal training. Assume that the Tribunal has read your written submission. Remind the Tribunal of the legal principal you are relying on and refer to the cases you have cited but focus your closing remarks on the facts not the law.

Always provide a citation for decisions that you use [ie *Tasse v. M SD* (PAB CP24087, November 27, 2006)]. The Tribunal's Book of Authorities has a link to all the leading cases. If you are using cases that are in the Tribunal's book, provide a citation but you do not have to provide a copy of the decision – make a note about where it can be found. A complete copy of any decision that is not in the Tribunal's book should be included with your submission.

Decisions of Interest

One of the leading CPP disability decisions is *Villani v. Canada (A.G.)* [2001] FCA 248 This decision is a must read for advocates. Two important passages are as follows:

> [29] Accordingly, subparagraph 42(2)(a)(i) of the *Plan* should be given a generous construction. Of course, no interpretive approach can read out express limitations in a statute. The definition of a severe disability in the *Plan* is clearly a qualified one which must be contained by the actual language used in subparagraph 42(2)(a)(i). However, the meaning of the words used in that provision must be interpreted in a large and liberal manner, and any

ambiguity flowing from those words should be resolved in favour of a claimant for disability benefits.

(c) The Appropriate Legal Test for Disability under the Plan

[37] Except for one case, none of the recent decisions of the Board has analyzed fully the text of subparagraph 42(2)(a)(i) of the *Plan*. That one occasion was the Board‟s relatively recent decision in *Patricia Valerie Barlow v. Minister of Human Resources Development*, CP 07017 (November 22, 1999). It is worth repeating the central passage of the Board‟s decision in that case:

> Is her disability sufficiently severe that it prevents her from regularly pursuing any substantially gainful occupation?
>
> To address this question, we deem it appropriate to analyze the above wording to ascertain the intent of the legislation:
>
> Regular is defined in the *Greater Oxford Dictionary* as “usual, standard or customary”.
>
> Regularly – “at regular intervals or times.”
>
> Substantial – “having substance, actually existing, not illusory, of real importance or value, practical.”
>
> Gainful – “lucrative, remunerative paid employment.”
>
> Occupation – “temporary or regular employment, security of tenure.”
>
> Applying these definitions to Mrs. Barlow’s physical condition as of December, 1997, it is difficult, if not impossible, to find that she was at age 57 in a position to qualify for any usual or customary employment, which actually exists, is not illusory, and is of real importance.

[38] This analysis of subparagraph 42(2)(a)(i) strongly suggests a legislative intention to apply the severity requirement in a “real world” context. Requiring that an applicant be incapable *regularly* of pursuing any *substantially gainful* occupation is quite different from requiring that an applicant be incapable *at all times* of pursuing *any conceivable* occupation. Each word in the

> subparagraph must be given meaning and when read in that way the subparagraph indicates, in my opinion, that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, it follows from this that the hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience.
>
> [39] I agree with the conclusion in *Barlow, supra* and the reasons therefore. The analysis undertaken by the Board in that case was brief and sound. It demonstrates that, on the plain meaning of the words in subparagraph 42(2)(a)(i), Parliament must have intended that the legal test for severity be applied with some degree of reference to the "real world". It is difficult to understand what purpose the legislation would serve if it provided that disability benefits should be paid only to those applicants who were incapable of pursuing any conceivable form of occupation no matter how irregular, ungainful or insubstantial. Such an approach would defeat the obvious objectives of the *Plan* and result in an analysis that is not supportable on the plain language of the statute.

Another important case is *Inclima v. A.G. Canada* (2003 FCA 117). This case was decided after *Villan*i. The Ministry often cites the following passage from this decision to argue that an Appeal should be denied because the Appellant has not made sufficient effort to look for work:

> [3}… an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but ***where***, as here, ***there is evidence of work capacity***, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition. (emphasis added)

Some of the original words have been bolded because they support the proposition that Appellants do not have to look for work if they are not capable of working.

For those who do try to work, the Ministry will often argue that any earnings after

a MQP is a sign that the Appellant is capable of gainful employment. In *Tasse v. M SD* (PAB CP24087, November 27, 2006) the Board examined the issue of what constitutes gainful employment and looked at the question of employment and entitlement to CPP disability benefits. The Board wrote at page 3:

> [7] To her credit in 2005, she resumed employment as a sales clerk, at Zehrs, a grocery store, which involved working 21.50 hours per week at an hourly rate of $7.75.
>
> [8] She was forced to return to work because she and her husband were in dire financial straits, as the husband was unemployed for some time. She was unable to continue at the end of the six months and resigned due to her health problems. She later worked for a three month period at a nursing home in 2006. Based on a 32 ½ hour work-week on alternate weeks at the same rate of pay, i.e. $7.75 per hour.
> …
>
> [15] Does the fact that the Appellant returned to work for brief periods in 2005 and 2006 preclude her from obtaining a pension? In my view it does not. The Federal Court of Appeal has held that it is the responsibility of the Appellant to attempt to return to work at a lighter, sedentary type of employment, if they cannot return to their original job. The Appellant is required to show that he or she has made an attempt to do so, and has been refused due to disability, or if successful, are unable to continue because of their incapability to continue. See *Inclima v. Canada (Attorney General)* 2003 FCA 117.
>
> …
>
> [20] The evidence adduced also raises another issue which needs to be addressed, namely, whether the amount of wages earned by the Appellant during her brief stints of employment following her stoppage of work in 2000, constitutes "a substantially gainful occupation." Ms. Tasse worked a 32½ hour week on alternate weeks and received $7.75 per hour or $501.85 per month, for a period of six

months. For the three month period in 2006, while employed at a nursing home her weekly take home pay calculated at 21½ hours per week at $7.75 amounted to $166.63 per week or $675.00 per month.

[21] This meager sum is substantially below the "poverty line" as referred to by Statistics Canada. Had her previous work prior to her disability occurring, been at the same hours and wage, this issue would not arise.

[22] Different considerations however are present in this appeal. Ms. Tasse was previously working a regular 40hour week for a period of approximately ten years. She subsequently was capable of sporadic employment at different jobs, with reduced hours.

[23] Her family physician agrees that she is incapable of working longer hours. A disability is "severe" only if by reason thereof the person is incapable regularly of pursuing any substantially gainful occupation. (Emphasis added in original)

[24] "Regular" has been defined as „with consistent frequency." The Oxford Dictionary defines "substantially" as "having substance, actually existing, not illusory." The Webster Dictionary defines "gainful" as "profitable, lucrative." In my view, the legislature, by prefacing the word "gainful" with substantially, intended that the employment would be in excess of gainful.

[25] The Appellant has established that she has a combination of both physical and mental disabilities i.e. bipolar disorder and chronic fatigue.

[26] In addition I find that on incontrovertible evidence that she lacks the capacity to pursue with consistent frequency any substantially gainful occupation, due to disabilities. The Appellant therefore succeeds in her appeal.

Chronic pain is one of those conditions that often results in a hearing because there are often few objective tests to explain its cause. The issue comes down to one of credibility which can only be tested through oral

evidence. The Board in *Mullaney v. MSD* (CP24444 February 2007) wrote:

> [25] Before the Supreme Court of Canada in the case *Re: Nova Scotia (Workers' Compensation Board) v. Martin* [2003] SCC 54, the Court was persuaded beyond doubt that chronic pain was a legitimate medical condition and was entitled to constitutional protection as falling within the enunciated ground of "physical disability" within Subsection 15(1) of the Charter. In his judgment at paragraph 1 Gonthier, J. stated:
>
> > Chronic pain syndrome and related medical conditions have emerged in recent years as one of the most difficult problems facing workers" compensation schemes in Canada and around the world. There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real. While there is at this time no clear explanation for chronic pain, recent work on the nervous system suggests that it may result from pathological changes in the nervous mechanism that result in pain continuing and non-painful stimuli being perceived as painful. These changes, it is believed, may be precipitated by peripheral events, such as an accident, but may persist well beyond the normal recovery time for the precipitating event. Despite this reality, since chronic pain sufferers are impaired by a condition that cannot be supported by objective findings, they have been subjected to persistent suspicions of malingering on the part of employers, compensation officials and even physicians … [Emphasis added in the original.]

At times there may not be a clear diagnosis for a condition. In B.K. v. MHRSD (CP25269 - January 4, 2008) the Board wrote:

> [8] Her concentration and memory are both very poor. This in my

> view was quite obvious as she gave her evidence. She was unable to continue a thought for more than a few seconds. She was also diagnosed as having a major depressive disorder in 2001 with a GAF score of 55-60 which is not that of a well functioning person...
>
> [10] A great deal of focus has been placed on the fact that there has been no definite diagnosis of MS. Dr. M. Hohol her main neurologist while unable to give a definite diagnosis has not excluded its possibility…
>
> [17] Clearly she is suffering from a multiplicity of problems both now and as of December 2002. Whether she has MS or not is in my view not relevant. A definitive diagnosis is not required. The fact is that these health problems are real and prolonged. Mrs. BK is not employable now nor was she in 2002.
>
> [18] This woman now and in 2002 could not function either physically or mentally. She is now and was then incapable of regularly pursuing any substantially gainful occupation.
>
> [19] The appeal is allowed ..

"Real world" considerations as out in *Villani* (age, education, English literacy skills, etc.) are often important when determining the appellant's capacity to work or to be retrained.

In *K.A v. MHRSDC* (CP25289 PAB December 2007) the Board decided:

> [15] In considering Mrs. KA‟s condition it must be remembered that she has only attended school to Grade 8 in her native country of Guyana. Her language skills in English are very limited. Her work experience involved a

> labour intensive job which she can no longer do because of her disabling condition. In 2002 she completed a program which was intended to qualify her for work more suitable to her condition. This was not successful and she did not obtain re-employment.
>
> [16] Taking into account the evidence of the Appellant and that of her daughter who testified as a corroborative witness, it is my opinion that Mrs. KA was in January 2003, incapable regularly of pursuing any substantially gainful occupation and that she has continued to be thus disabled since then. The evidence also supports the conclusion that her disability is prolonged in that it is likely to be long continued and of indefinite duration.
>
> [17] The appeal is therefore allowed with the date of onset of the disability deemed to be 15 months prior to the date of application for benefits being March 2005.

In P.R. v. MHRSDC (CP25115 PAB January 2008) the Appellant was 60 years old, had a grade 8 education, and English was not her first language. The Board wrote:

> [17] It has been submitted on behalf of the Minister that Mrs. P.R. has not made any effort to retrain or to obtain employment that might accommodate her condition. It has been held in prior decisions that in order to establish a severe disability applicants must not only show a serious health problem, but where there is evidence of work capacity, must show effort at obtaining and maintaining employment has been unsuccessful by reasons of the health condition. (*Inclima v. Canada (Attorney General)* [2003] FCA 117.)
>
> [18] With respect to work capacity, Mrs. P.R. stated that she tried to return to her job as a packager but was not able to continue because of her medical problems. She also stated that when it was known that she was not going to get better that she thought she was too old to learn new skills.
>
> [19] Mrs. P.R. came to Canada with limited education and limited ability to speak or to write in English. Because of work and family responsibilities she has not improved her abilities in these areas.

[20] In my view, given her age, medical condition and limited education and language skills, it would not be realistic to expect her to retrain.
I found her to be an honest witness and that she did not exaggerate or embellish her difficulties.

[21] Taking into account all of the evidence, I find that the Appellant does suffer from a disability that is severe which renders her incapable of regularly pursuing any substantially gainful occupation and that such condition is prolonged and has persisted since her fall at the end of November 2001.

[22] The appeal is allowed and I would determine the date of onset of the disability to be 15 months prior to the date of her application in October
2004.

BC COALITION OF PEOPLE WITH DISABILITIES

CANADA PENSION PLAN DISABILITY BENEFITS

Review Tribunal

INTRODUCTION

Assessing the Merits of Your Client's Case

There are no provisions in the *Canada Pension Plan and Old Age Securities Act* that give a Tribunal the power to grant an appeal on compassionate grounds.

- If your client does not have sufficient contributions to the Plan, the Tribunal will have no option but to deny the appeal.
- If your client has no medical evidence to show that she/he was disabled when she/he last qualified for benefits, the Tribunal will have no option but to deny the appeal.
- If your client has been receiving early retirement benefits for more then fifteen months or became disabled after receiving early retirements, the Tribunal will have no option but to deny the appeal.

The Review Tribunal Panel and the Hearing

Review Tribunal hearings are set up and scheduled by the Office of the Commissioner of Review Tribunals (OCRT).

The Review Tribunal is made up of 3 members chosen by the Commissioner from a panel of several hundred people appointed by the federal government. They are independent from the Ministry of Human Resources and Skills Development Canada (HRSDC). The Chair, who is responsible for conducting the hearing, is usually a lawyer. In appeals involving disability benefits, one of the other members will be a health professional, usually a doctor or nurse.

The Tribunal has the power to:

- Grant the appeal and award the full amount of retroactivity your client is entitled to or,
- allow the appeal in part but award less retroactive payments then your client was hoping for or,
- decide that it has no jurisdiction (legal authority) to rule on the issue under appeal or,
- deny the appeal: decide your client is not eligible for benefits

These decisions are made by applying CPP legislation to the facts of each case.

Starting an Appeal

You or your client must file an appeal to a Review Tribunal in writing within 90 days of receiving the Reconsideration denial letter from the Ministry of Human Resources and Skills Development Canada (HRSDC). If you are filing an appeal on behalf of your client you will need to provide the Tribunal with an Authorization to Disclose form signed by your client (http://www.ocrt-bctr.gc.ca/frm-fmr/atd-add-eng.pdf).

Unlike a reconsideration a Tribunal can be requested by fax.

Late Appeals

The Commissioner of Review Tribunals has the authority to extend the appeal period under certain circumstances.

The Federal Court in Canada (*Attorney General)* and *Robin Pentney* and the *Office of the Commissioner of Review Tribunals*, 2006 FC 96 concluded that the criteria established in Canada (*Minister of Human Resources Development Canada)* v.*Gattellaro*, *2005 FC 883* are relevant, but are not the only considerations which must be taken into account by the Commissioner when deciding on an application to extend the appeal period.

The criteria established in Gattellaro are:

a) A continued intention to pursue the application or appeal;

b) The matter discloses an arguable case;

c) There is a reasonable explanation for the delay; and

d) There is no prejudice to the other party in allowing the extension.

If you are aware at the time of submitting the appeal request, that the 90-day appeal period has expired, it is recommended that you address each of the factors noted above and any other information you feel is relevant in your letter of appeal.

OCRT Response

Provided that you have sent a copy of the decision letter and have requested the appeal within the 90 days given, the OCRT should send you a letter of acknowledgement within a week or two of receiving the appeal request. If you do not receive a letter acknowledging the appeal within a month, you should contact the Tribunal to confirm that it has received the request.

The Hearing File

Hearing materials used to be bound, indexed, and numbered but the Tribunal stopped this practice In October 2011.

The information will be sent to you in a blue folder. Your client will not be provided with a copy of the folder or any subsequent correspondence. It will be up to you to keep your client up to date about what is happening with the appeal.

Make copies of all documents that you send. It is the representative's responsibility to keep track of all documents and bring them to the hearing.

You should keep the following questions in mind as you review the file:

- Is there information in the file that you were not aware of?
- Is there any important information that has been left out?
- What information supports the appeal?
- What information creates doubt about the appeal?
- Do the HRSDC adjudication notes give you more insight into why the application was turned down?

Time Lines

The estimated hearing date will be six months from the date that you receive the hearing file.

The Tribunal has developed a rule that requires all documentation to be provided two months before the hearing. This gives you four months to gather additional information and prepare a submission.

If there are reasons to think that this may not be enough time, let the Tribunal know so that it can change the anticipated hearing date.

Obtaining Additional Information

- Letters from doctors and specialists.
- Information from any new health professionals
- Information from vocational specialists that explains your client is a poor candidate for retraining.

Submit all your additional information at once with your submission rather then as it comes in.

Writing a submission

1. Prepare a ***brief*** biography of your client - place of birth, early family life, education, work history, etc. Create a picture of your client so that the Tribunal can get a sense of who he/she is.
2. Details leading up to the application for CPP disability benefits:
3. Address the Minimum Qualifying Period.Double check your client's record of earnings. Indicate whether your client agrees or disagrees with the Ministry's date.
4. Details about your client's medical condition(s) and list their current medications.
5. Which health professionals have your client seen and when?6. Details of the treatments your client has tried and how effective they have been.
7. Why your client's disability is long term and of indefinite duration (prolonged).
8. Why your client's disability is severe and how it has stopped him/her from working. Relate this to the MQP if it is a date in the past.
9. Why doing a different kind of a job or being retrained is not a realistic option.
10. Conclusion: summarize the most important points.
11. Use case law if appropriate.

USE CASE LAW
See Appendix

Research Resources

- The Tribunal has a book of authorities that has been put together by its legal department for use by Tribunal Members. Take a look at the index to see if there might be cases that deal with your client's disability or other issues in the appeal.

- *Annotated Canada Pension Plan and Old Age Security Act* published by CHC

- The Pension Appeals Board also publishes its decisions.

Witnesses

You are allowed to invite witnesses who can give testimony in support of your client's appeal. Given that hearings are scheduled to last an hour and a half, the number of witnesses should be limited to one or two at most.

The OCRT does not pay *any* costs for witnesses.

If someone does agree to testify, be sure to speak to them before the hearing. You do not want to be surprised. Be aware that a witness should expect to answer questions from the panel members and the HRSDC representative.

Do not use a witness unless the person supports the appeal.

The Hearing

It is always a good idea to call your client the day before the hearing to make sure they will be there.

Allow extra time so that you arrive at the hearing early.

The Chair will check to see that everyone has a complete Hearing File, including any information that was sent to the OCRT after the Hearing File was put together.

If you have any last minute information for the panel consider make sure that you bring five copies.

Tips for when you are at the Review Tribunal hearing

- It is normal to feel nervous. Take deep breaths. Pour yourself and your client a glass of water before things get started.
- Encourage your client to be their self.
- If this is your first hearing let the Tribunal know. Be honest about your lack of experience. They will help you out.
- Panel members cannot give you medical or legal advice about the appeal.
- Stay focused on the reason you are there: to explain why you think your client meets the eligibility criteria for CPPD.

- Make sure that your client is prepared to answer some difficult questions. Panel members may zero in on the weak parts of the appeal.
- Be respectful to everyone at the hearing.
- Always follow the direction given by the Chair.
- It is often very difficult to know what the panel members are thinking. Do not make assumptions, other than assuming that the panel has an open mind.

During the Hearing

You will be asked to present your case first.

If you have a witness who is also a support person for your client, have the witness testify first

Try to approach the hearing as if it were a conversation.

You don't have to feel responsible for running the entire hearing. You will always have a chance to ask your client questions that the Tribunal may have missed.

You will be given the opportunity to summarize your client's position at the end of the hearing.

The Review Tribunal Decision

After you and the HRSDC representative have left the meeting room, the panel members will discuss in private all the information.

The panel will decide whether there is enough evidence for them to rule in favour of your client. They will provide written reasons for their decision.

The Review Tribunal's decision is sent to the OCRT. The OCRT will then send the decision to you and the HRSDC. The OCRT tries to ensure that appellants receive their decision within eight weeks of the hearing.

REOPENING A TRIBUNAL DECISION BASED ON NEW INFORMATION

Three basic questions:

- Was the new information is existence at the time of the original hearing but was not previously discoverable?
- Could the new information be reasonably expected to affect the outcome of the previous decision?
- Did the Appellant exercise due diligence in obtaining this new information?

Withdrawal of CPP Disability Benefits

This type of appeal can be difficult.

The Ministry will investigate earnings that exceed the Year's Basic Exemption ($ 4, 830 in 2011) and could conclude that the amount is sufficient enough to deem the recipient no longer disabled in accordance with s. 42(2) of the *Act*. Disability benefits could be suspended and the Ministry could decide that a recipient has been overpaid. The Ministry could ask an individual to repay thousands of dollars.

The Tribunal has no authority to hear an appeal based on the amount of overpayment that the Ministry may have asked for (*Swalwell v. MHRD* August 2001 CP 11228).

The only issue that can be appealed is the Ministry's conclusion that the appellant is no longer disabled.

In an appeal of a decision where the Ministry determines that a CPP disability benefit recipient is no longer disabled, the burden shifts to the Ministry. The Ministry must prove that its decision was correct.

Consider the merits of the appeal. Do the facts demonstrate that this person is capable of gainful employment?

Often the Ministry will make a decision that a person is no longer disabled based on income alone.

If the income is relatively low and there is evidence that an employer has provided substantial accommodation, the Ministry may not be able to defend its position (***Alexander v. MHRD*** March 2000 CP 9448).

Sometimes it may be necessary for the Ministry to request the appellant undergo an Independent Medical Exam (*Doyle v. MHRD* June 2001CP 16627).

Pension Appeals Board (PAB)

Pension Appeals Board — No automatic right to appeal – leave to appeal application required. Formal oral hearing before 3 Judges. Can take more than a year.

RESOURCES

Office of the Commissioner of Review Tribunals CPP/OAS - Book of Authorities

http://www.ocrt-bctr.gc.ca/dcn/scrBRintro-eng.aspx

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- You can either browse a list of subject areas, or search cases by keyword and other criteria. Each case links to a printable version of the decision.

There are two ways to find a decision in the Tribunal's CPP Book of Authorities:

Browse by Subject or Search by keyword

- **BC Coalition of People with Disabilities** http://www.bccpd.bc.ca

- **CHC Annotated Canada Pension Plan and Old Age Security Act – Purchased at** www.cch.ca

- **Pension Appeals Board** http://www.pab-cap.gc.ca (All Board decisions are posted on this site)

- **Review Tribunal web site** http://www.ocrt.gc.ca

- **Service Canada web site:** http://www.servicecanada.gc.ca
- **CPP Electronic Forms:**

http://www.hrsdc.gc.ca/cgibin/search/eforms/index.cgi?app=list&group=CPP&dept=sc&lang=e

- **Canada Pension Plan Adjudicative Framework:**

http://www.hrsdc.gc.ca/eng/isp/cpp/adjudframe/cppadjud.shtml

Social Insurance Number

22. Explain any difficulties/functional limitations you have with the following:

Sitting/Standing (How long?)	Seeing/Hearing
Walking (How Long and how far?)	Speaking
Lifting/Carrying (How much and how far?)	Remembering
Reaching	Concentrating
Bending (How much?)	Sleeping
Personal needs (Eating, washing hair, dressing, etc.)	Breathing
Bowel and bladder habits	Diving a car (how long?)

Social Insurance Number

Household maintenance (Cooking, cleaning, shopping and similar activities)	Using public transportation .

All About the Disability Tax Credit

Pursuing financial security for Canadians with Disabilities

November 2011

Ability Tax Group LLP

RDSP resource centre

Intaxication…

Euphoria at getting a tax refund, which lasts until you realize it was your money to start with

(The Washington Post's Mensa Invitational – 2011)

Workshop Contents

- Tax credits, refundable credits, deductions and benefits
- Why should a person apply for the DTC?
- The application process
  - T2201
  - Qualified medical practitioner
  - Who qualifies
  - What to watch out for

Credits, Refundable Credits, Deductions and Benefits

Credit = an amount that reduces taxes owing

- Usually a set amount, value is the same irrespective of income, no value if person has no taxable income
- E.g. Disability Tax Credit

Refundable Credit = a credit that reduces taxes owing but, if there is still credit remaining when taxable income is nil, results in a refund to the tax filer

- E.g. Refundable Medical Expense Supplement

Credits, Refundable Credits, Deductions and Benefits (cont.)

Deduction = an expense incurred that is deducted from income and reduces taxable income

- Usually requires receipts, is worth more to higher income earners
- E.g. Child Care Deduction

Benefit = a social benefit that is administered through the income tax system

- E.g. Canada Child Tax Benefit

Why should a person apply for the Disability Tax Credit?

- Direct tax savings
- Related tax savings and benefits
- Eligibility for the Registered Disability Savings Plan

Direct Tax Savings

Disability Amount = Disability Tax Credit = DTC

The DTC is intended as a “fairness” measure to help offset the additional expenses associated with a severe disability

The amount deducted is determined by taking a fixed amount ($7,239 for 2010, but periodically indexed for inflation) multiplied by the lowest tax rate (federal and provincial)(as a result varies from province to province)

Results in:

- Tax savings of $1,443 in BC for 2010
- Tax savings of $13,955 in BC for 2001 - 2010

DTC Supplement Under - 18

The amount deducted is determined by taking a fixed amount ($4,223 for 2010, but periodically indexed for inflation) multiplied by the lowest tax rate (federal and provincial)

- Tax savings of $842 in BC in 2010
- Tax savings of $8,174 in BC for 2001 through 2010
- May be reduced if child care or attendant care expenses were claimed

Transfer of the DTC

Some or all of the Disability Amount can be transferred:

- When the person with the DTC has no taxable income
- To a spouse, common-law partner, parent, grandparent, child, grandchild, brother, sister, aunt, uncle, nephew, niece
- Who provides support (food, shelter, clothing)

Related Tax Savings and Benefits

Federal trend to using the Disability Tax Credit to qualify for various national credits and benefits.

Attendant Care Deduction

- Expenses can be claimed for yourself, a spouse or common-law partner or a dependent
- Expenses are amounts paid to group homes, care homes, nursing homes, special schools or institutions
- Entire amount for nursing home, for care or care and training in a special school or institution – otherwise the salaries and wages paid for attendant services
- **Can not claim the Disability Amount if claiming more than $10,000 in attendant care as medical expenses**

Working Income Tax Benefit

Refundable tax credit for eligible low income individuals and families

- Maximum benefit is $1,173 (single) or $1,862 (family)
- Full amount with income below $11,731 (single) or $15,811 (family) and partial amount to income $18,631 (single) or $26,764 (family)
- Must earn at least $4,750 per year
- Generally need to be 19 years of age

WITB – Disability Supplement

- **Must be eligible for the DTC**
- Maximum benefit of $525/year per person
- Must have working income over $2,295
- Full amount to income $18,632 (single) or $21,720 (family)
- Partial amount to income $26,762 (single) or $29,850 (family)

Canada Child Tax Benefit

- A tax-free monthly payment made to eligible families to help them with the cost of raising children under age 18
- $103.00 for each child under 7; $110.00 for each child 7 to 11; $123.00 for each child 12 to 15; and $130.33 for each child 16 or 17
- Reduced when adjusted family net income is more than $40,970

Canada Child Tax Benefit
(continued)

- National Child Benefit Supplement – a tax free benefit of up to $174 for the first child, $154 for the second child and $146.50 for additional children
- Reduced when income is above $23,855
- **Child Disability Benefit – a tax free benefit of up to $205.83/month for families qualifying for the CCTB and caring for a child under 18, who is eligible for the Disability Amount**
- Reduced when adjusted net family income exceeds $40,970

Children's Fitness Amount

- Up to $500 per child for fees paid in a prescribed program of physical activity
- Child must be under 16 or **under 18 with DTC**
- **For children qualifying for the DTC an additional $500 can be claimed provided a minimum of $100 is paid on registration or membership fees for a prescribed program of physical activity**
- If an amount qualifies equally for child care fees it must be claimed there first – any unused portion can be claimed as the children's fitness amount

Children's Fitness Amount
(continued)

- A prescribed program must:
  - Be ongoing (eight weeks or five consecutive days)
  - Be supervised & suitable for children

  Require a significant amount of physical activity
- For children claiming the disability amount movement in a recreational context
- Motorized vehicles, unsupervised, school programs are not eligible

Children's Arts Amount

- Up to $500 per child for fees paid in a prescribed program of artistic, cultural, recreational or developmental activity
- Child must be under 16 or **under 18 with DTC**
- **For children qualifying for the DTC an additional $500 can be claimed provided a minimum of $100 is paid on registration or membership fees for a prescribed program of physical activity**
- If an amount qualifies equally for child care fees it must be claimed there first – any unused portion can be claimed as the children's fitness amount

Children's Arts Amount
(continued)

A prescribed program must:

- Be an ongoing program of eight weeks, where 90% of the activities are eligible, or of 5 days, where 50% of the daily activities are eligible)
- Be a membership of a minimum eight consecutive weeks where more than 50% of all activities are eligible
- Be supervised & suitable for children

Children's Arts Amount
(continued)

Eligible activities:

- contribute to the development of creative skills or expertise in artistic or cultural activities;
- provide a substantial focus on wilderness and the natural environment;
- help children develop and use particular intellectual skills;
- includes structured interaction among children where supervisors teach or help children develop interpersonal skills; or
- provides enrichment or tutoring in academic subjects.

Home Buyer's Amount

- Claim up to $5,000 for the Home Buyers' Tax Credit if you or your spouse or common-law partner acquire a qualifying home
- You did not live in a home you or your spouse owned in the past four years

Home Buyer's Amount
(continued)

- Qualifying home:
  - Single family houses & semi-detached houses
  - Townhouses & condominiums
  - Apartments in duplexes, etc.
  - A share in a coop if it comes with an equity interest
- **Persons qualifying for the DTC or homes purchased for a person qualifying for the DTC don't need to meet the first-time home buyer test**

Registered Disability Savings Plan

- Generous government incentives for saving
- Government contributions for people who can't afford to contribute
- Saving in an RDSP doesn't reduce provincial social assistance

Eligibility

- Canadian Residents
- Must be prior to December 31 of beneficiary's 59th year
- **Beneficiary must qualify for the disability tax credit**

Lower incomes|no contributions

- Government will contribute up to $1,000 yearly ($24,183 - $41,544)
- Lifetime max of $20,000 to age 49

People who make contributions

When family income is below $83,088

- Government will match contributions:
  - 3 times your contribution on the first $500 each year
  - 2 times your contribution on the next $1000 each year
- up to $3,500 yearly
- Lifetime max of $70,000 to age 49

4 things to remember

- Generous government incentives
- Exempt for determining eligibility for disability income benefits
- Anyone can contribute to a persons RDSP
- Funds in an RDSPs can be used for any purpose

What is the Disability Tax Credit

- A federal tax credit received by people with "severe and prolonged impairments"
- No age limit
- The DTC may be claimed by the qualifying person themselves or by a parent or unpaid caregiver
- The DTC may be claimed retroactively for up to 10 years

What is a Severe and Prolonged Impairment?

Impairment has lasted or expected to last for a year

There must be:

- even with the use of therapy, devices and medication
- a “marked” restriction that affects people’s ability to carry out a single basic activity of daily living; or
- “marked” = not able to perform activity all or substantially all the time or it takes an inordinate amount of time to complete.
- a “significant” restriction that affects people’s ability to carry out more than one basic activity of daily living

Activities of Daily Living

Activities of daily living = walking, feeding, dressing, hearing, speaking, elimination, vision, mental functioning

Mental functioning includes:

- adaptive functioning
- memory, and
- Problem solving, goal-setting, and judgement, taken together.

Life Sustaining Therapies

Life sustaining therapies must:

- Support a vital function
- Take a person away from normal, everyday activities at least three times a week for a total of 14 hours a week.

Denials

People frequently being denied

- Mental functioning – mental illnesses, learning disabilities, mild developmental disabilities
- Intermittent illnesses – AIDS, MS, fibromyalgia, arthritis

Dealing with Denials

If there is new medical evidence, a review can be requested.

If you disagree with the decision, the decision can be appealed.

Appeals, whether the person has taxable income or not, can now be filed in tax court.

Ability Tax Group

- We are a full service tax firm, specializing in taxes for Canadians with disabilities and their families
- Our services include tax filing, tax reviews and adjustments, disability tax applications and appeals

Social Fee Structure

Advantages to contingency fees

- Clients are NEVER out of pocket
- No success – no fee
- Clients are ALWAYS ahead financially

Contingency fees are a problem when people have no taxable income → Easy Access Program

The RDSP Resource Centre

- Information on the RDSP
- Qualification for the DTC
- About to launch new Easy Access RDSP Program – qualification services at no cost to people who don't have taxable income or a qualified person to whom they may transfer the DTC

RDSP resource centre

SUITE 345 - 3665 KINGSWAY AVENUE
VANCOUVER, B.C. V5R 5W2
www.rdspresource.ca

EASY-ACCESS RDSP

FREE QUALIFYING SERVICE
for people WITHOUT
taxable income!

COMING SOON!

Ability Tax Group LLP

RDSP resource centre

For services and information

Telephone:	604-630-0333	604-637-6616
Fax:	604-630-0332	604-637-6617

Tax Inquiries: info@abilitytax.ca

RDSP Inquiries: info@rdspresource.ca

Personal email: jack@rdspresource.ca

Address: #345 – 3665 Kingsway Avenue,
Vancouver, BC V5R 5W2

Ability Tax Group LLP

RDSP resource centre

Thank you for your time

Ability Tax Group LLP

RDSP resource centre

Additional ATG/RRC slides

Ability Tax Group

"If only I could find an accountant who knows disability taxes…"

- We are a full service tax firm, specializing in taxes for Canadians with disabilities and their families
- Our services include tax filing, tax reviews and adjustments, disability tax applications and appeals

Ability Tax Group LLP

RDSP resource centre

Ability Tax Group - fees

- *Our fees* – Yes, we have fees (and applicable taxes!) How we charge depends on the service.
  - Tax filing – flat fee
  - Tax reviews and adjustments – a choice of a flat fee or a contingency fee
  - Disability tax applications – a contingency fee
  - Appeals – a choice of a flat fee or a contingency fee.

Ability Tax Group - fees

- *Contingency fees –*
- No Risk - we bear all of the up-front costs and people only have to pay if we are successful.
- The fees come out of their refund so there is no chance that they will have a bill that they can't pay
- Our contingency varies, from 20% for Disability Tax Credit applications and tax adjustments for members of partner organizations to 30% for appeals, which are labour intensive and much higher risk.

The RDSP Resource Centre

- Information on the RDSP
- Qualification for the DTC - at no cost to people who don’t have income or a person to whom they may transfer the DTC
- Contributions to people’s RDSPs
- Partnership with PLAN – collaborating and sharing revenue

Welfare and Assets

Alison Ward, Barrister and Solicitor, Community Legal Assistance Society, prepared November 22, 2011 (and revised December 20, 2011)

Welfare eligibility issues commonly arise in relation to assets. While each case is slightly different, in general there are three kinds of problems:

1. The Ministry of Social Development ("MSD") refuses someone welfare, or cuts their benefits off, because MSD says they have too many assets.

   Specific legal issues arise where:

   a. The person owns property that they don't live in, but which the property is very hard or impossible to sell (e.g. bare land that is in a flood plain);

   b. The person owns property jointly and the co-owner will not cooperate with a sale (e.g. a matrimonial home, or other); or

   c. The person is on the legal title (either sole or joint) to property but feels that they don't "really own it" (lack of beneficial interest in the property).

2. A client on welfare receives a lump sum of money. How will this affect their benefits? What options do they have?

3. MSD says that a client is not eligible for benefits for a period of time because they have "disposed of assets."

This presentation reviews the *Employment and Assistance* (EA) and *Employment and Assistance for Persons with Disabilities* (EAPD) legislation, and policy, in relation to these three categories of problems, and offers suggestions for dealing with each.

Section 1

MSD refuses someone benefits, or cuts off their benefits, saying they have too many assets

Introduction

This section of the paper examines the definition of "asset" in the welfare legislation. It offers suggestions for how advocates may approach three categories of cases where MSD finds someone ineligible for welfare due to excess assets.

a. A person owns property but is not able to sell it in the short term and needs time to be able to sell it, (either because they own it jointly and the co-owner will not cooperate with a sale, or for some other reason);

b. a person owns property that they don't live in, but the person is not able to sell the property (e.g. bare land that is in a flood plain and there is no market for it; a jointly owned matrimonial property that the person is cannot sell because they cannot get legal aid, cannot hire a lawyer, and cannot represent themselves in court);

c. A person is on the legal title to property (either sole or joint) but feels that they don't "really own it." In other words, they do not have a "beneficial interest" in the property.

What unites all three of these issues is that they raise questions as to whether something is, in fact, someone's "asset" for the purposes of welfare eligibility.

Legal definition of "asset" in the welfare legislation

"Asset" is defined in section 1 of the EA and EAPD Regulations as follows:

> *"asset" means*
>
> *(a) equity in any real or personal property that can be converted to cash,*
>
> *(b) a beneficial interest in real or personal property held in trust, or*
>
> *(c) cash assets.*

The rest of this section examines what subsections (a) and (b) of this definition mean.

(a): "*equity* in any real or personal property *that can be converted to cash*"

- ***What is equity?***

Equity refers to the net value of an asset (the market value of a thing, minus any debt that the person owes on the thing). Let's say someone owns a house that they do not live in. The evidence shows the house would sell for $200, 000, but the person owes a mortgage of $230,000 on the house. Because the house is worth less than the debt owed on the house, the person does not have any equity in the house. In this case, because there is no equity in the house, the house is simply not an "asset" for MSD's purposes (based on subsection a of the definition of asset).

To take another example, let's say someone buys a boat for $7 000. They pay $500 down, and take out a secured loan for $6500 for the rest of the purchase price. They then have equity of $500 in the boat. If the amount of equity in the property is below the client's general asset exemption level, you can arge the asset is therefore exempt. If there is no equity in a property, it is simply not an "asset" for MSD's purposes.

- ***What is "equity <u>that can be converted to cash</u>"***

What is meant by equity that "can be converted to cash?" Another way to phrase this is basically whether the thing in question can be sold.

It is sometimes possible to argue that a thing cannot be sold and is therefore not a person's "asset" for welfare purposes (even though they own the thing, legally).

MSD's policy on this issue is at http://www.gov.bc.ca/meia/online_resource/verification_and_eligibility/assets/policy.html (in the assets topic, under "eligibility"). The Online Resource says:

> *Assets are only assets if they can be converted to cash. All assets have an intrinsic monetary value; therefore, the term convert refers to the "ability" to sell the asset. The decision as to whether the asset is convertible is the responsibility of the case manager to make based on information provided by the applicant or recipient.*
>
> *In all circumstances, the onus rests with the applicant or recipient to provide reasonable documented evidence that the asset could not be sold.*

Examples of situations in which property cannot be sold (or at least, not sold quickly)

A. *Jointly owned property: The person owns property jointly and the co-owner will not cooperate with a sale (e.g. a matrimonial home, or other)*

Ministry policy on jointly owned assets is at http://www.gov.bc.ca/meia/online_resource/verification_and_eligibility/assets/policy.html #6 It provides:

> ***Jointly Owned Assets***
>
> *When it is determined that an asset that is jointly owned cannot be disposed of because the other owner will not co-operate, the Supervisor may deem the asset not available. This decision is valid for a six-month period and may be extended for a maximum of two years.*

This policy on jointly owned assets is an interpretation of the definition of "asset" and whether there is "*equity in any real or personal property that can be converted to cash.*" (that is, there is no section in the welfare legislation that spefically allows MSD to deem an asset to be "not available.").

MSD's policy recognizes that it can take time to sell jointly owned property (i.e. to "convert it to cash") because sale requires either the joint owners co-operation, or an order from the Supreme Court of BC (if the property is in BC) that the property be sold.

The policy provides that a jointly owned property can be exempted for a maximum of two years. That time frame is policy only. If after two years your client has not been able to

sell a jointly owned property despite efforts to do so, you can take the position that the property is still not an "asset" and should continue to be exempted, by presenting documentation that shows that your client is (still) not able to sell that property and that, as the property cannot be converted to cash, it is not her "asset."

If there is no equity in a jointly owned property, you will want to argue that the property is simply not the person's asset at all (due to the absence of equity) rather than arguing that the person should be simply given time to sell the jointly owned property.

B. *Other examples where a property cannot be sold quickly (despite the person's reasonable efforts)*

MSD's policy on jointly owned assets is just one example of how the phrase "equity.... that can be converted to cash" can be interpreted.

If your client presents with another fact pattern in which the property cannot be sold quickly, because the evidence shows that it will take time for the property to sell (for whatever reason), you can argue by analogy to the policy on jointly-held assets that MSD should likewise deem this property not to be an asset (as it is not available) for a period of time, to give the person time to sell it.

C. *Examples where a property cannot be sold*, at all

There may be other situations where you can argue that something is not an "asset" for MSD's purposes because it cannot be sold at all (i.e. cannot be converted to cash).

Think of a situation, for example, where someone owns bare land in a remote location, but the land has had serious envionmental damage or is experiencing climate change and has now become, basically, a swamp. Can that property be sold? How do you show that it can, or can't?

What if your client owns real property in another country where they know no one, cannot afford to hire a real estate agent, and cannot afford to travel there to sell it themselves. Practically speaking, can that property be converted to cash? The answer to that will depend on the strength of the evidence you can assemble.

Trying to establish that a given thing cannot be sold will involve assembling a lot of evidence. In all cases, first, your client need to show that they have *tried* to sell the land. To take the case of the remote swampland, copies of listing agreements with real estate agents the person has had list the property, will be helpful evidence. A letter from a real estate agent setting out the condition of the land and giving an appraisal value, and commenting on the strength or slowness of the market in that area would be helpful too. Are other neighbouring properties in the same state? Have their owners tried to sell them? If so, gather evidence of those listings, how long they have been on the market, and the fact they have not sold. Are there governmental or engineering reports available anywhere commenting on the condition of the land in the area in which the client's property is located?

It may also be possible to argue that a jointly owned asset cannot be sold, because it is a practical impossibility.

For example, let's say a client owns a matrimonial home jointly with their ex-partner in another province (say, New Brunswick). The person is receiving welfare as MSD has exempted the jointly owned asset for two years to give the client time to sell it. There is equity of $40 000 in the house in New Brunswick.

Is it possible to argue that in some cases, a jointly-owned matrimonial home like this is not an "asset" as it cannot be sold? Yes. To make such an argument, you would want to look for *evidence* of three main points:

1. *the person is not eligible for legal aid to help them pursue property division*

   In our example, the client applied for legal aid and obtained a letter from legal aid in New Brunswick confirming she is not elgible for legal aid to help with property division.

2. *the person cannot hire a lawyer to help them pursue property division*

   It is not enough to simply assume the person cannot afford to hire a lawyer. You need <u>evidence</u> that they cannot do so.

   In our example, the client contacted a lawyer in New Brunswich and tried to hire them on a contingency fee, but the lawyer said the client's likely share of the equity in the property was not enough to support the lawyer's contingency fee. The client obtained a letter from the lawyer, confirming the lawyer's opinion, and also confirming that to take the case without a contingency fee, the lawyer would need a retainer (downpayment) of at least $2000.00.

3. *the client is not able to pursue property division through self-representation*

   Whether it is reasonable to expect a client to pursue property division by representing themselves in court is a question of fact that will differ from case to case.

   In our example, as the property was located in New Brunswick, the client would have had to leave BC and travel to New Brunswick in order to represent herself in court (which would in turn make her ineligible for welfare in BC). She gave MSD evidence that she could not afford to travel to New Brunswick.

   In other cases, if the property is located in BC, and the person is not able to pursue property division (for example, due to a history of abuse, power imbalance, language, literacy or other barriers), consider whether you can get a letter from a lawyer confirming what self-representation in court would entail (this will vary depending on the complexity of each case), setting out the steps the client would need to take, and setting out the lawyer's view as to whether it would be reasonable to expect the client to self-represent in this case given the barriers this particular client has to doing so.

If you are able to assemble supportive evidence on all those points the client would have a good legal argument that a jointly-owned matrimonial home is not an asset for MSD's purposes, because the person is <u>not able</u> to convert the equity in it to cash.

The question of whether equity in a given property can be converted to cash (i.e. whether it is an asset) can be taken to both reconsideration and appeal.

(b): *a beneficial interest in real or personal property held in trust"*

A thing is only a person's asset if the person has a beneficial interest in it. To repeat, the EA and EAPD Regulations define "asset" to include:

> *(b) a beneficial interest in real or personal property held in trust*

If a person does not have a beneficial interest in property, then that property is not their "asset" for MSD's purposes.

What is meant by "beneficial interest" in property?

Legally speaking, "ownership" may be more complicated than you might at first suspect.

Think about the following situation: your sister really wants to buy a car. You know she can afford to make car payments, but she can't get a car loan because she has bad credit. You have good credit, and you trust her, so you agree to buy a car, with the car loan in your name. You don't pay a penny toward the car. You both agree that your sister will make all of the payments, and be the only one who ever drives it. Your sister does both, and it all works out as you'd hoped.

In this situation, who owns the car?

The law's answer to this question is that, in a sense, you and your sister both own the car. But you have different kinds of ownership of it. You are the legal owner of the car (because the car is legally registered in your name). And your sister is the beneficial owner of the car (because she paid for the car and because you both intended she would be the one to have the benefit of the car).

The law recognizes at least two kinds of ownership:

a) **legal ownership**: legal ownership is determined purely by who is named as the owner on the registered legal title to a property (i.e. at the Land Title Office if dealing with real estate, at the Motor Vehicle Registry if dealing with a vehicle, etc); **and**

b) beneficial ownership: beneficial ownership is about who owns a property in the sense of having all the benefits of ownership, regardless of who may be named as the "legal owner" of a property on paper. A lay person might say that a beneficial owner is the person who "really owns" something, regardless of who might have legal title to it.

To take another example, if I buy a house for my own use, then I will be both the legal owner of the house (my name will be registered on title to the house at the Land Title Office), and I will also be the beneficial owner of the house.

As the beneficial owner of the house, I can do whatever I want with the house (subject to noise and other bylaws). For example, I have the right to move into the house, live in it however I like, rent it out it I want, get 10 roommates if I want, paint the house a hideous colour, plant strange things in the garden if I feel like it, tear up the front lawn, replace all the carpets, and even tear it down the house if I like. My neighbours might not be happy about any of this, but they would have not right to stop me from doing any of this. Beneficial ownership of a property includes the right to use the property as the beneficial owner wants.

Such a situation where I purchase a house for my own use is clear, but in other cases legal ownership and beneficial ownership can be entirely separate.

For example, sometimes a parent who owns a house adds an adult child to the title of their house as joint tenant (i.e. co-owner) purely for estate planning purposes. That is, the parent puts the adult child on joint title to the house so that, when the parent dies, legal title to the house will pass directly to the adult child (as joint tenant). However, the parent *does not intend* that the adult child would actually have the right to act as the owner while the parent is still alive. For example, the parent does not intend that the adult child have the right to move into the house while the parent is still alive (even if the parent does not want them to), or be entitled to rent the house out, or paint it their favourite colour, or replace the parent's favourite plants, or do any of the other things that a person who is the "real owner" (beneficial owner) of a house has the right to do.

In other words, the adult parent may transfer joint legal title (i.e. legal ownership) to the adult child, without intending that the adult child have beneficial ownership of the house while the parent is still alive. In such a case, until the parent died, the adult child would have legal ownership of the property, but would <u>not</u> have beneficial ownership of the property while their parent was alive. The parent would remain the beneficial owner of the property until their death (even though the adult child was also a legal owner). After the parent's death, the adult child would become the beneficial owner of the house (as well as the legal owner).

How do you determine whether or not someone has beneficial ownership of property?

"Beneficial ownership" is not legally required to be registered anywhere in writing. Therefore, it can sometimes be hard to determine (or prove) who the beneficial owner of a property is.

In welfare advocacy, questions about whether a client is a beneficial owner of a property usually arises in cases where, for whatever reason, the client's name has been put on the legal title of a house (although it could be another kind of property too, like a car, or a boat, etc). However, the client does not feel that they "really own" the property (they do not think they are the beneficial owner of it). Legally speaking, MSD may say the person is not eligible for welfare because they own a house that they do not live in.

The issue for the advocate then becomes, is the house the client's asset? That is, do they have "beneficial ownership" of the house, or do they merely have legal title to the house (without having a beneficial interest in it).

In every case where this issue arises, what will determine who the beneficial owner of a property is, are:

a) the **intention of the parties at the time that the property was put into the name of the client (or other legal owner),** and

b) what the law has to say about something called a "**presumption of advancement**."

Let's return to the example above, wherein a parent put an adult child's name on joint title to the parent's house, for estate planning purposes, without intending the child to have the house until the parent died.

Pretend that that adult child now comes to see you. They explain that MSD has cut off their welfare benefits because they own a house they do not live in, and therefore have assets in excess.

As the advocate in a case like this, how can you show what the parent intended when they put the adult child on title to the house? How, if need be, would you prove that intention to MSD or the Employment and Assistance Appeal Tribunal ("EAAT") in an appeal?

Whether you are working with a reconsideration request or appeal, the key will be for the advocate to **obtain evidence of the intention of the parties** (here, the parent and the adult child) **at the time that the transaction occurred** (here, when the parent put the property into the name of the adult child).

Gathering Evidence of the intention of the parties

The Supreme Court of BC has said that when someone is arguing that they don't have a beneficial interest in a property that they are on legal title to, that person **must supply sworn evidence (by affidavit or statutory declaration) to support their position.**

Therefore, when you are working with a client who is on legal title to a property but says they do not really own it, the advocate must have the parties swear statutory declarations about what they intended when the client's name was put on the property. A sample template for a statutory declaration is attached to this handout as **Appendix A.**

In preparing a client's case for an initial application to MSD, a request for reconsideration or an appeal to the EAAT, you should therefore have the client and anyone who put property into the client's name swear statutory declarations setting out how it came to be that the client was put on title to a given property, and what both the client and the other person (e.g. parent) intended to happen when this was done.

Seek help drafting the statutory declaration if you need guidance in what it should include. It should, however, canvass the following issues:

- When did the other person put the client on legal title to the property?
- Why did the other person put the client on legal title to the property?
- When the other person put the client on legal title to the property, did the parent or other person intend for the client to really own the property and have the use of it now? Or was title transferred for some other reason?
- For example, did the other person intend the client to have the right to move into (or otherwise use) all or part of the property now, even against the other person's wishes? Did the other person intend the client to have the right to rent out all or part of the property now, even against the other person's wishes? (these are both rights that a beneficial owner would have).
- What did the client understand about the other person's intentions? Did the client know they had been put on legal title or was it done without their knowledge?

Also consider whether there may be other people who can provide evidence about what the parties intended when they entered into the transaction. For example, a parent may have put an adult child onto the title to their house after consulting with a lawyer for advice about their Will or estate planning. If a lawyer or other person can speak to the reasons behind why a client was put on legal title to something, and what was intended by that, get that person to provide a letter setting that out or (ideally) a statutory declaration setting out that information.

Legal concept: does a presumption of advancement apply in the case?

This is a tricky legal concept. Basically if I own a house (or other thing) and I put another person's name on legal title – for free - to my property, in some situations the law will presume that I intend to give that other person a gift of the beneficial interest in that property. Such a presumption (of outright gift) is called a "presumption of advancement."

In other situations, where I do the same thing, the law will not presume that I intended to give the other person an outright gift of the beneficial interest in the property. In such situations, the law will instead presume that the other person is just holding the property for me as a trustee (i.e. as a legal owner without beneficial interest in the property) and that I retain the whole beneficial interest in the property.

In 2007, the Supreme Court of Canada decided an important case called *Pecore* v *Pecore.* In that case, a parent had added his adult daughter's name to his bank accounts while he was alive. The issue the court had to decide was whether or not there is a legal "presumption of advancement" when a parent puts an adult child on title to something. Extracts from the Supreme Court of Canada's decision in Pecore v Pecore are attached to this handout and marked **Appendix B.**

Historically, the law presumed that when a parent put their child (of any age) on joint title to anything, the parent intended to give that child both legal and beneficial interest in the property.

The Supreme Court of Canada changed that law in the *Pecore* case in 2007. The Court decided that, in modern society, there is no good legal reason to presume that a parent

who puts an *adult* child on joint legal title to something necessarily presumes to make them a gift of the beneficial ownership in the property. *Pecore* determined that in such a case, the law does not *presume* that the adult child is the beneficial owner of that property, but rather presumes that the parent only intended to give bare legal title to the adult child, and that the parent retains beneficial ownership. However, where a parent puts a minor child on title to a property, there is still a legal presumption that the parent intends to give the minor child beneficial interest in the property (as well as legal title to it).

Legal presumptions are odd things. They are assumptions that the law makes about certain situations, in a factual void. The presumption of innocence is an example of a legal presumption. Without knowing any of the facts about a criminal case, the law always presumes that someone is innocent.

However, like any assumption, a legal presumption can be changed by actual evidence. For example, in criminal law, a person is only presumed to be innocent until they are proven to be guilty (by the evidence in the trial). Once there is evidence of the person's guilt, the presumption of innocence no longer applies.

Where the presumption of advancement applies (i.e. where the law *presumes* that a person intended to give someone else beneficial ownership of a thing), that presumption can likewise be displaced by showing actual evidence about what the parent or other person *actually intended* (despite the law's presumptions) when they put another person on joint title to a property.

So, for example, if Mr. Smith puts his adult son Joe on joint title to his house, the law *presumes* he did not intend to make Joe the beneficial owner of the house before Mr. Smith died. However, by gathering evidence like statutory declarations of what Mr. Smith in fact intended in his own mind it may be possible to prove that Mr. Smith actually *did* want to give Joe beneficial ownership of the house while Mr. Smith was still alive.

In other words, evidence of what people actually intended can displace a legal presumption.

It is very important to know if a presumption applies in a case you are working on, because it will affect how much evidence you will need to gather to do a good job of presenting your client's case.

See attached **Appendices C to E** for **sample submissions to MSD in cases involving adult children on joint title to property**, and more information about trusts.

Hardship benefits and assets in excess

If your client is not successful in establishing that a given property cannot be sold (i.e. if MSD decides there is equity in it, and that the equity can be converted to cash), or that your client does not have a beneficial interest in the asset, your client may still be eligible for hardship benefits from MSD if they have dependent children, and assets in excess.

This form of hardship benefits is repayable. Still, it may tide a client over a difficult period of time. Hardship benefits for assets in excess are usually limited to three

conseutive months, to give the client time to sell the asset. However, MSD policy provides that a district supervisor may approve hardship assistance beyond the three months in exceptional circumstances.

Section 46 of the *Employment and Assistance Regulation* (and section 41 of the EAPD Regulation) provide:

> **Family units that have excess assets**
>
> ***46*** *The minister may provide hardship assistance to a family unit that is not eligible for income assistance because the assets of the family unit exceed the applicable limit under section 11 (2) [asset limits] if*
>
> *(a) the minister considers that undue hardship will otherwise occur,*
>
> *(b) the applicant provides the type of security specified by the minister for the repayment of the hardship assistance,*
>
> *(c) the applicant satisfies the minister that*
>
> *(i) the assets that caused the family unit to be ineligible are not immediately available to meet the family unit's basic needs, and*
>
> *(ii) every effort has been made and continues to be made to sell the assets, and*
>
> *(d) the family unit*
>
> *(i) includes one or more dependent children, or*
>
> *(ii) includes only persons who have reached 65 years of age or persons who have persistent multiple barriers to employment (*or includes only person who are 65 and over if the family unit receives PWD benefits – Alison *).*

If your client is still not able to sell the property in question after making diligent efforts to sell it (and after receiving hardship benefits for several months), your client may want to consider reapply for regular benefits if they can now show MSD (via evidence of all their attempts to sell the property, and the amount of time that has passed without a sale) that the asset in question really can't be sold quickly, and that MSD should exempt it as an asset for a period of time, to allow them to receive regular benefits while they continue to try and sell the property.

Section 2

A client receives a lump sum of money. How will this affect their welfare benefits? What options do they have?

Clients may receive lump sums of money from several sources. Some examples include:

- An ICBC settlement;
- An inheritance;
- Life insurance proceeds from a deceased loved one;
- A gift from a friend or family member;
- A residential schools settlement;
- Retroactive CPP benefits;
- A family law settlement or court order for property division.

All clients of MSD must report their receipt of all such funds to MSD as soon as possible. If they do not, they risk being assessed overpayments, and the possibility of prosecution for fraud. They also risk losing the opportunity to try to structure their situation so that their ongoing benefits from MSD are affected as little as possible.

There are many rules in the welfare legislation that affect clients who receive lump sums of money. Whenever a client tells you that they have received, or will be receiving, a lump sum of money, there are three questions that you must ask yourself:

1. Will MSD see this money as income in the month in which the client receives it, or is there an argument that it is exempt income?

2. Will MSD see this money as an asset in the month(s) following your client's receipt of it, or is there an argument that it is an exempt asset?

3. If the answer to question 2 is that MSD will see the money as a non-exempt asset, what options does the client have for structuring their affairs so that their particular goals are best met (which may include the goal of trying to limit the impact on their ongoing benefits as little as possible).

Question 1: Will MSD see this money as income in the month in which the client receives it, or is there an argument that it is exempt income?

The answer to this question will vary in each case, depending on the source that your client received (or will receive) the money from. You need to check the welfare legislation carefully each time to determine if the particular type of funds is considered exempt income:

- A full listing of income exemptions is found in Schedule B to the *EA Regulation* and *EAPD Regulations;*

- The income exemptions for hardship benefits (either regular or PWD hardship) are slightly different than the income exemptions for income assistance and disability assistance. For a full list of the income exemptions for hardship benefits, see section 6 of Schedule D to the EA and EAPD Regulations.

Example:

Your client Martha receives a residential schools settlement. Residential schools settlements are considered exempt income, except money paid as income replacement in the settlement, under EA Regulation section 11(1)(v) and EAPD Regulation section 10(1)(v). So, if Martha's residential school settlement does *not* include an amount for income replacement, then it will not be considered income in the month in which it is received. So Martha will not lose her benefits for one month due to excess income. Nonetheless, Martha must still report to MSD that she has received these funds.

There are two rules about income exemptions that are sometimes overlooked:

- a "one time," or isolated, gift is not considered to be income, but an asset at the time it is received. A one-time gift that is below your client's asset exemption level will not affect their ongoing benefits, although the client must still report their receipt of these funds to MSD.

  This is not found in the EA and EAPD legislation, but is based on a 1996 decision of the BC Supreme Court case called *Morris v Income Assistance Tribunal.* MSD's policy on one-time gifts is found in the Online Resource at http://www.gov.bc.ca/meia/online_resource/verification_and_eligibility/assets/policy.html#6 under "loans, credit and gifts."

- "A criminal injury compensation award or other award" is exempted as unearned income up to a family unit's asset exemption level, by section 7(c) of Schedule B to the EA and EAPD Regulations. This section provides room to argue that an award, such as an ICBC settlement or monetary award from the RTB or eviction compensation, should be considered exempt income.

If the legislation classifies your client's funds as non-exempt income, your client will be off benefits for one month, due to receiving income in excess.

What will happen after that one month will depend on the welfare rules about assets.

Question 2: In the months after your client receives the money, is it considered non-exempt asset? Or is there an argument that it is an exempt asset?

MSD considers money to be "income" in the month that it is received. In months after that, MSD considers the funds to be an "asset." Assets are classified either as being "exempt," or "non-exempt."

Some types of payments are specifically exempted as assets by legislation. If exempt funds are used to purchase other things (assets), those assets in turn become exempt; the exemption passes from the funds to the assets.

Payments that are not specifically exempted as assets, can become exempt if the person intends to put them into a disability trust or RDSP, and advises MSD of their intention.

To determine if the funds your client has received are exempt assets, as with question 1, you will have to carefully check the welfare legislation to see how your client's situation fits within it.

- A full listing of asset exemptions is found in sections 11, 12 and 13 of the EA Regulation (for income assistance and PPMB benefits); and in section 10, 11 and 12 of the EAPD Regulation (for PWD benefits);

- The asset exemptions for hardship benefits (either regular or PWD hardship) are slightly different than the asset exemptions for income assistance and disability assistance. For a full list of the asset exemptions for hardship benefits, see section 6 of Schedule D to the EA and EAPD Regulations.

If the funds your client received are <u>not</u> considered an exempt asset, remember that your client is allowed to have non-exempt assets up to their asset exemption level, and still receive monthly benefits. The asset exemption level varies depending on the size of their family unit and whether the client receives income assistance/PPMB or PWD benefits.

Example:

To continue with Martha's case as an example, a residential schools settlement is also considered to be an exempt asset, except money paid as income replacement in the settlement; (see EA Regulation section 11(1)(v) and EAPD Regulation section 10(1)(v)). So, if Martha receives a residential school settlement that does not include an amount for income replacement, then it will not be considered income *or* an asset, and she will not be cut off benefits for any length of time.

Spending Exempt Funds: assets bought with exempt funds become exempt assets

If your client receives funds that are exempt as assets (like a residential schools settlement), if your client wants, s/he can use those exempt funds to buy *other* things, including assets that would not normally be considered an exempt asset for someone receiving welfare benefits. **The exemption that was attached to the funds passes to**

the asset. For example, if someone uses exempt residential schools funds to purchase a $10 000 boat, the boat becomes an exempt asset.

Client's who choose to do this must be very careful to **keep detailed written records and receipts of what they bought, and where the funds to buy it came from.** This is done so that the client can prove to MSD that any assets that are normally considered non-exempt, were purchased directly with the exempt funds.

For example, let's say Martha uses some of her exempt residential schools settlement funds to buy a second vehicle worth $8 000 (which is normally considered a non-exempt asset). Unless Martha can show MSD that she purchased the second vehicle using exempt funds from her residential schools settlement, MSD will likely view the second vehicle as an excess asset, and tell Martha they are no longer eligible for benefits because of it.

Therefore, it may be a very good idea for a client to **keep exempt funds in a separate bank account**, so they can more easily show what the exempt funds were used to purchase.

For relevant policy, see the Online Resource at http://www.gov.bc.ca/meia/online_resource/verification_and_eligibility/assets/policy.html under "compensation payments."

Question 3: **If the funds are not exempted as an asset, what options does the client have for structuring their affairs so that their particular goals are best met (which may include the goal of trying to limit the impact on their ongoing benefits as little as possible)?**

If a client reports to an Employment and Assistance Worker ("EAW") that they have received a lump sum of money, it seems to be quite common for an EAW to tell the person that they will be off welfare now, and that they must live off the money at a rate of no more than $2 000 per month. Sometimes the EAW will even give a time frame saying, for example, "you received $10,000 so don't come back to this office for at least 5 months."

The information from the EAW in this example is **not correct**.

A. Options not involving Trusts and RDSPs

Any welfare recipient who receives a sum of money that is not exempt as an asset and that is over their asset exemption limit, has **at least three options** in addition to simply living off the funds. **Any combination of these options can be used.** They can:

- **Use some or all of the funds to pay just debts.**

"Just debts" means debts that a person can prove (in writing) that they owe. For example, credit card debts, student loans, etc. A debt to a family member that was never properly documented in writing should NOT be paid in most cases; **and/or**

- **Use some or all of the funds to buy <u>exempt</u> assets.**

A full list of exempt assets is found in section 11 of the EA Regulation (for income assistance and PPMB); section 10 of the EAPD Regulation (for PWD benefits) and section 6 of Schedule D to the EA and EA Regulations (for regular hardship or PWD hardship benefits).

You should review the complete list of exempt assets with each client who is deciding how they should manage a lump sum that they have received.

Exempt assets include a home that you live in and a vehicle (subject to the equity limits in a vehicle if they apply to your client). But buying a car, or putting down payment on a home, or buying necessary household items are not the only options for exempt assets. <u>Some exempt assets, such as a Registered Educations Savings Plan, or pre-paid funeral costs, may be of great interest to your client, so you should review the full range of exempt assets with them so they can make an informed decision about what they want to do with the money they have received</u>; **and/or**

- Keep non-exempt assets up to their asset exemption level (e.g. a single person on income assistance is eligible for benefits again once they have non-exempt assets of up to $1500 left; a single person with the PWD designation has an asset exemption level of $3 000).

Example:

Ray is a single person on income assistance who receives a $10 000 inheritance. He could use $4 000 of it to pay just debts, spend $4 500 on an exempt asset such as an RESP, live off the funds for one month (spending $2 000), and then receive income assistance again once his remaining non-exempt assets are $1500 or less. If he buys the RESP and pays the debts *in the same month that he received the funds as income, he* should be off benefits for only one month due to income in excess (since in the following month they would not have assets in excess of the allowable levels). If he buys the RESP and pays his debts in the month *after* he received the funds as income, he should be off benefits for only two months (i.e. one month for income in excess, and one month for assets in excess).

Record Keeping

If a person chooses to pay just debts or purchase exempt assets, it is <u>essential</u> that they keep clear and thorough records, and copies of all receipts and proofs of payment. This is so that they can show MSD how they spent the funds they received. If they pay debts, they must also be able to show MSD documents that prove to MSD that they in fact owed the money they paid.

If a client does not keep careful records and cannot prove to MSD how they spent the funds, MSD is likely to say that the client is not eligible for benefits because they disposed of assets, either without adequate consideration, or in order to make themselves eligible for benefits (refer to section 14 of the *EA Act* and section 13 of the *EAPD Act)*.

For more information on allegations about disposing of assets, see section 3 below.

B. Disability Trusts and Registered Disability Savings Plans (RDSPs)

In addition to any or all three options above, certain clients also have the option of putting some or all of the funds they have received into a disability trust or RDSP.

Who can have an RDSP as an exempt asset?

To qualify to open an RDSP, a person must first qualify for the Disability Tax Credit through the Canada Revenue Agency. In addition, the person must be under age 60 (contributions to an RDSP can only be made until the end of the calendar year in which the person turns 59). For more information about RDSPs and the disability tax credit, see http://www.rdsp.com/

Money in an RDSP is considered an exempt asset for people on income assistance, PPMB and PWD (including all forms of hardship benefits).

Who can have a disability trust as an exempt asset?

A disability trust is considered an exempt asset (and certain withdrawals exempt as income) for the following groups of people:

- a person with the PWD designation *(refer to EAPD Reg s 12);*

- an applicant or a recipient who has applied for the PWD designation and is waiting for a decision on their application; OR a person who satisfies the minister that they "have a genuine intention" to apply for PWD designation.

  In these cases, a disability trust is an exempt asset for the person while they apply for and/or receive income assistance, hardship or assistance or PPMB benefits. *(Refer to EA Reg s 13(2)(a)).*

- a person receiving accommodation or care in a private hospital (i.e. a private hospital licensed under the *Hospital Act), other* than a drug or alcohol treatment centre. This is the case whether the person is eligible for income assistance, PPMB or PWD benefits) *(refer to EA Reg s 13 and EAPD Reg s 12)* and;

- a person receiving accommodation or care in a special care facility, other than a drug or alcohol treatment centre. This is the case whether the person is eligible for income assistance, PPMB or PWD benefits. (Note: a "special care facility" is a facility that is a licensed community care facility under the Community Care and Assisted Living Act or a specialized adult residential care setting approved by the minister (if no such license is required by the Community Care and Assisted Living Act) *(refer to EA Reg s 13 and EAPD Reg s 12).*

Funds intended for a Trust or RDSP are exempt assets

If a person receives a lump sum and wants to put all or part of it into a trust or RDSP, they must advise MSD of this. Under MSD policy, MSD will still treat that lump sum as income in the month received (unless it is otherwise exempt), so the person will be off benefits for one month because of income in excess.

However, MSD will exempt the funds as an asset for two months after that, if the person intends to put them into an RDSP or disability trust. The purpose of that two month exemption is to give the person time to get a trust set up, or qualify for the disability tax credit so they can start an RDSP. At the end of the two month exemption, MSD will review the client's situation. If the RDSP or trust has not been finalized by then, MSD has the discretion to continue exempting the funds to enable the person to finish setting that us.

MSD policy on transferring money into a trust or RDSP is attached, and is also at http://www.gov.bc.ca/meia/online_resource/verification_and_eligibility/trusts/policy.html#5

More on Trusts

How and when is a disability trust created?

A disability trust is a contract that is usually drafted by a lawyer. The contract creates the disability trust. A disability trust can be created at any time, either

- before the person receives funds that they are expecting;
- when the person receives funds; or
- any time after the person has received funds.

A disability trust can also be created in a Will (this is called a "testamentary trust"). If you have a client on PWD benefits who tells you they think their parents will leave them money, you should tell your client that her parents should see a lawyer who knows something about welfare law, so that they can get legal advice about whether it is a good idea for them to create a testamentary trust for their disabled daughter in their Will. If a person inherits property through a testamentary trust, the property goes directly into the trust and does not pass through their hands. Therefore they remain eligible for welfare throughout the inheritance.

How much money can be in a disability trust?

There are two types of disability trusts: discretionary trusts, and non-discretionary trusts. In a discretionary trust, the trustees have complete discretion about how the trust funds are spent. In a non-discretionary trust, the beneficiary (client) of the trust funds retains some control over how the trust funds are spent.

The welfare legislation (section 13 of the EA Regulation, and section 12 of the EAPD Regulation) states that usually a maximum of $100 000 can be in a non-discretionary disability trust. However, the minister can authorize a non-discretionary trust for more than $100 000, if it is expected that the person's disability related costs will be over $100 000 in their lifetime.

There is no limit on the amount of money than can be in a discretionary trust. A person is allowed to have both a discretionary trust, and a non-discretionary trust.

What can money in a disability trust be used for?

Money can be withdrawn from a disability trust to pay for certain categories of disability-related costs, without the person's monthly benefits being affected. The person must report all income received from a disability trust to MSD. It is a good idea to have any planned withdrawals from a disability trust, pre-approved by MSD.

The types of disability- related costs that can be paid for by a trust are found in section 12 of the EAPD Regulation, and section 13 of the EA Regulation. Note that under the EA Regulation, the categories are a bit more restricted than is the case for a person with disabilities. Under both the EA and EAPD Regulation, there is a limit on the amount that the trust can spend each calendar year on items or services that MSD considers necessary to promote the person's independence. That limit, of $5 484 per calendar year, is found in section 7(d) of Schedule B to the EA and EAPD Regulations.

It may be possible to use money in a disability trust for purposes other than disability-related costs; this will depend on how the specific trust is drafted. If such withdrawals are possible, MSD will not consider any money withdrawn from the trust for these purposes to be exempt income (i.e. the person's receipt of monthly benefits will be affected, at least for one month).

More on RDSPs

How much money can be in an RDSP?

The overall lifetime limit for an RDSP is $200 000. There is no annual limit on amounts that can be contributed to an RDSP in a given year.

What can money in an RDSP be used for?

Money withdrawn from an RDSP is considered exempt income for people on income assistance, PPMB and PWD (including all forms of hardship benefits). There are no welfare rules limiting how money withdrawn from an RDSP can be used. RDSP withdrawals do not affect welfare eligibility.

Other resources for disability trusts and RDSPs

For more information about disability trusts, see:

- "How to Create a Trust," a useful booklet by the Voice of the Cerebral Palsied of Greater Vancouver at http://www.vcpgv.org/home/publications
- The BC Coalition of People with Disabilities Helpsheet 8 about trusts and PWD benefits: http://www.bccpd.bc.ca/helpsheet8.htm
- The Planned Lifetime Advocacy Network (PLAN) can also provide information about trusts and a referral service to lawyers who know about setting up disability trusts. See http://plan.ca/
- The Coast Foundation in Vancouver can assist with setting up disability trusts for people who have mental health disabilities. See http://coastmentalhealth.com/trust.html

For more information about RDSPs, see:

- The RDSP Resource Centre website, affiliated with PLAN, is at http://rdsp.com ;
- the BC Coalition of People with Disabilities has several RDSP related resources at http://www.bccpd.bc.ca/rdsp.htm
- Canada Revenue Agency website at http://www.cra-arc.gc.ca/tx/ndvdls/tpcs/rdsp-reei/menu-eng.html

Section 3

MSD says that a client is not eligible for benefits for a period of time because they have "disposed of assets."

Section 14 of the *Employment and Assistance Act* (and section 13 of the *Employment and Assistance for Persons with Disabilities Act)* provide:

14 *(1) The minister may take action under subsection (3) if, within 2 years before the date of application for income assistance or hardship assistance or at any time while income assistance or hardship assistance is being provided, an applicant or a recipient has done either of the following:.....*

(b) disposed of real or personal property for consideration that, in the minister's opinion, is inadequate.

(2) A family unit is not eligible for income assistance for the prescribed period if, within 2 years before the date of application for income assistance or hardship assistance or at any time while income assistance or hardship assistance is being provided, an applicant or a recipient has done either of the following:

(a) disposed of real or personal property to reduce assets;

(3) In the circumstances described in subsection (1), the minister may

(a) reduce the amount of income assistance or hardship assistance provided to or for the family unit by the prescribed amount for the prescribed period, or

(b) declare the family unit of the person ineligible for income assistance or hardship assistance for the prescribed period.

If MSD finds that a client disposed of assets either for "inadequate consideration", or to reduce assets, MSD may either declare the client ineligible for benefits, or reduce their benefits, for various period of time determined in the EA and EAPD Regulations.

What does this section mean?

"Consideration" is a concept from contract law. It refers to what two parties involved in a contract exchange. If I buy a bag of rice for $5.00, the $5.00 is the "consideration" I give the store in that transaction, and the rice is the consideration the store gives me in exchange. **Disposing of an asset for "inadequate consideration" means giving something away for free, or selling it for less than it is worth.**

Similarly, section 14(2) says a person can be sanctioned by MSD if they "dispose of "property "to reduce assets." The sanction that applies under this section is double the sanction that applies to the sanction that applies to disposing of an asset for inadequate consideration. This indicates it is a serious allegation. In order for MSD to properly find that someone has "disposed of property to reduce assets," MSD must be able to show that the person got rid of assets by *intentionally* giving them away or selling them for less than they were worth, and that they did this *intentionally, specifically in order to* qualify for benefits from MSD.

MSD often makes mistakes in interpreting these sections of the legislation. If a client reports to an Employment and Assistance Worker ("EAW") that they have received a lump sum of money, it seems to be quite common for an EAW to tell the person that they will be off welfare now, and that they must live off the money at a rate of no more than $2 000 per month, "or else they will be considered to have disposed of assets." Sometimes the EAW will even give a client a time frame saying, for example, "you received $10,000 so don't come back to this office for at least 5 months."

Such advice is seriously flawed. A client receiving a lump sum of money has all of the options outlined in section 2 of this paper.

But where do the EAW's misunderstanding and $2 000 per month "rule" come from? Under section 31 of the EA Regulation, and section 27 of the EAPD Regulation, MSD may declare a client ineligible for benefits for one month for each $2 000 in assets that MSD thinks the client disposed of for inadequate consideration, or to reduce their assets. See Appendix F (extract from LSS's *Your Welfare Rights)* for a chart of consequences (penalties) that MSD may apply for disposing of assets for inadequate consideration or to reduce assets.

EAWs who misunderstand the meaning of "disposing of assets for inadequate

consideration" and "to reduce assets" often think that those sections somehow mean that a client can only use assets to live off at the rate of $2 000 or less per month. Such EAWs are just wrong.

However, the possibility that MSD could claim that a client has disposed of assets for inadequate consideration, or reduced their assets to make themselves eligible for benefits, highlight the importance of keeping careful records when a client has received a lump sum and is exercising options outlined in section 2 for using that sum of money. **A client who can show that they used their non-exempt funds to buy exempt assets and/or to pay justly owing debts (and who can provide proof they in fact paid those debts) cannot be said to have disposed of assets for inadequate consideration, or to reduce their assets.**

Clients with **addiction and/or mental health issues** may raise particular issues with regard to MSD allegations that they have disposed of assets for inadequate consideration. For example, a person who is addicted to street drugs and receives a lump sum inheritance may spend thousands of dollars on street drugs. Or, a person with a gambling addiction who receives an ICBC settlement may lose thousands of dollars in a casino. Have such clients disposed of assets for inadequate consideration? I think the answer is "no."

In such situations is it important that you develop enough trust for the client to disclose to you what they did, roughly, with the money they received. The most difficult situation to deal with is one where a client will not tell you what they spent some or all of a lump sum of money on. If MSD does not know what money was spent on, they may assume it was disposed of improperly. If you have no information from the client about what they did with the money, you will not be able to help the client deal with MSD's allegation. *Any information from the client is better than none when it comes to allegations that a person has disposed of assets for inadequate consideration or to make themselves eligible for benefits.*

On the other hand, let's say a client with a drug addiction tells you they spent a $10 000 inheritance on cocaine. That is information you can work with and should not lead MSD to allege that the client disposed of assets for inadequate consideration or to make themselves eligible for welfare. *Spending $10 000 on $10 000 worth of cocaine is not disposing of an asset for inadequate consideration – it is a fair market value exchange.* Nor should it be considered to be intentionally disposing of property to reduce assets to qualify for welfare. It would be difficult for MSD to allege that a person embroiled in addiction spent money on drugs not because they were addicted, but because they wanted to make themselves eligible for welfare benefits. Further, under the Human Rights Code, MSD has a duty to accommodate a person's disability up to the point of undue hardship. If a disability (including addiction) quite clearly caused certain behaviour, MSD should not sanction the client for the behavior.

Other situations where disposal of assets may be alleged

Sometimes a client, in frustration and lacking good advice about their welfare issue, may have their name removed from title to a property that they did not have a beneficial interest in. This may happen, for example, where MSD insists that an adult child who is on title to their parent's house for estate planning purposes, is not

eligible for welfare due to assets in excess. If that client does not get property advice and is not able to persuade MSD that the house is not their asset as they do not have a beneficial interest in it, the client may in desperation, try and "fix" the situation by having the parent remove the adult child from legal title to the house.

Rather than fixing the situation, this complicates the welfare issue. That is, MSD may now say that the client is not eligible for benefits as they have disposed of assets to make themselves eligible for benefits. However, an advocate should be able to help. If the client can gather evidence (as described in section 1c above) to show that the house never was her asset, as she never had a beneficial interest in it, then she cannot be said to have disposed of that supposed "asset" for inadequate consideration.

Welfare and Assets

Alison Ward, Barrister and Solicitor, Community Legal Assistance Society, prepared for November 22, 2011 (and revised December 20, 2011)

List of Appendices

a) Sample template for statutory declaration.

b) Extracts from Supreme Court of Canada decision in *Pecore v Pecore (is a parent who puts an adult child on title to property is presumed to have given them beneficial interest? Can that presumption be rebutted? How?)*

c) Sample submission to MSD – adult child put on title to property by parent for estate planning purposes. Does the adult child have excess assets if they don't live in the house?

d) Sample submission to MSD – adult child put on joint title to property by parent for estate planning purposes. If the adult child lives in the house, can they receive shelter benefits from MSD for rent that they pay to their parent?

e) "Types of trusts," extract from textbook *Waters' Law of Trusts in Canada* (3rd ed) 2005, Thomson Carswell

f) Extract from LSS's *Your Welfare Rights* (pp 89 to 90): "Getting rid of assets" section, and "Penalties for getting rid of assets (chart)

Appendix A

CANADA **PROVINCE OF** **BRITISH COLUMBIA**	))))))	**In the matter of .....**

TO WIT:

I, (legal name of client), (occupation), of (address), in the City of XXX, in the Province of British Columbia DO SOLEMNLY DECLARE:

1. I am the applicant / appellant in this case (state other means of knowledge), and as such I have personal knowledge of the things I declare in this statutory declaration. Where I declare that I know something based on information and belief, I believe it to be true.

2. set out numbered paragraphs relating client's evidence, and attaching any exhibits as appropriate

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 by virtue of the *Canada Evidence Act*.

DECLARED BEFORE ME at the City of XXX, in the Province of British Columbia, this xx day of March, 2011.	))))))	_____ (name of client)
_____ A Commissioner for Taking Affidavits Within British Columbia	))	

Appendix B

Pecore v Pecore, 2007 SCC 17, [2007] 1 S.C.R. 795 SCC

(at http://www.canlii.org/en/ca/scc/doc/2007/2007scc17/2007scc17.html)

Pecore v Pecore is a 2007 decision of the Supreme Court of Canada. It the leading Canadian case about situations where parents give legal title to something to an adult child; and what presumptions are made about who has a beneficial interest in the thing in that situation, and how resulting trusts arise.

Below are some highlights of the case which may help you in understanding the case, and which it may be useful to cite in some submissions.

Extracts from the Supreme Court of Canada's judgment in Pecore v Pecore:

Paragraph 4

Equity.... recognizes a distinction between legal and beneficial ownership. The beneficial owner of property has been described as "the real owner of property even though it is in someone else's name": *Csak v. Aumon* (1990), 69 D.L.R. (4th) 567 (Ont. H.C.J.), at p. 570.

Paragraph 20

A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner: see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 362. While the trustee almost always has the legal title, in exceptional circumstances it is also possible that the trustee has equitable title: see *Waters' Law of Trusts*, at p. 365, noting the case of *Carter v. Carter* (1969), 70 W.W.R. 237 (B.C.S.C.).

Paragraph 21

Advancement is a gift during the transferor's lifetime to a transferee who, by marriage or parent-child relationship, is financially dependent on the transferor: see *Waters' Law of Trusts*, at p. 378. In the context of the parent-child relationship, the term has also been used because "the father was under a moral duty to advance his children in the world": A. H. Oosterhoff et al., *Oosterhoff on Trusts: Text, Commentary and Materials* (6th ed. 2004), at p. 575 (emphasis added).

Paragraph 22

In certain circumstances which are discussed below, there will be a presumption of resulting trust or presumption of advancement. Each are rebuttable presumptions of law: see e.g. *Re Mailman Estate*, [1941] S.C.R. 368, at p. 374; *Niles v. Lake*, 1947 CanLII 5 (S.C.C.), [1947] S.C.R. 291; *Rathwell v. Rathwell*, 1978 CanLII 3 (S.C.C.), [1978] 2 S.C.R. 436, at p. 451; J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 115. A rebuttable presumption of law is a legal assumption that a court will make if insufficient evidence is adduced to displace the

(B)

presumption. The presumption shifts the burden of persuasion to the opposing party who must rebut the presumption: see Sopinka et al., at pp. 105-6.

Paragraph 23

For the reasons discussed below, I think the long-standing common law presumptions continue to have a role to play in disputes over gratuitous transfers. The presumptions provide a guide for courts in resolving disputes over transfers where evidence as to the transferor's intent in making the transfer is unavailable or unpersuasive. This may be especially true when the transferor is deceased and thus is unable to tell the court his or her intention in effecting the transfer. In addition, as noted by Feldman J.A. in the Ontario Court of Appeal in *Saylor v. Madsen Estate* 2005 CanLII 39857 (ON C.A.), (2005), 261 D.L.R. (4th) 597, the advantage of maintaining the presumption of advancement and the presumption of a resulting trust is that they provide a measure of certainty and predictability for individuals who put property in joint accounts or make other gratuitous transfers.

Paragraph 24

The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: see *Waters' Law of Trusts*, at p. 375, and E. E. Gillese and M. Milczynski, *The Law of Trusts* (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.

Paragraph 34

Next, does the presumption of advancement apply between parents and adult independent children? A number of courts have concluded that it should not. In reaching that conclusion, Heeney J. in *McLear v. McLear Estate* (2000), 33 E.T.R. (2d) 272 (Ont. S.C.J.), at Paragraphs. 40-41, focussed largely on the modern practice of elderly parents adding their adult children as joint account holders so that the children can provide assistance with the management of their parents' financial affairs:

Just as Dickson J. considered "present social conditions" in concluding that the presumption of advancement between husbands and wives had lost all relevance, a consideration of the present social conditions of an elderly parent presents an equally compelling case for doing away with the presumption of advancement between parent and adult child. We are living in an increasingly complex world. People are living longer, and it is commonplace that an ageing parent requires assistance in managing his or her daily affairs. This is particularly so given the complexities involved in managing investments to provide retirement income, paying income tax on those investments, and so on. Almost invariably, the duty of assisting the ageing parent falls to the child who is closest in geographic proximity. In such cases, Powers of Attorney are routinely given. Names are "put on" bank accounts and other assets, so that the child can freely manage the assets of the parent.

(B)

Given these social conditions, it seems to me that it is dangerous to presume that the elderly parent is making a gift each time he or she puts the name of the assisting child on an asset. The presumption that accords with this social reality is that the child is holding the property in trust for the ageing parent, to facilitate the free and efficient management of that parent's affairs. The presumption that accords with this social reality is, in other words, the presumption of resulting trust.

Paragraph 36

....given that a principal justification for the presumption of advancement is parental obligation to support their dependent children, **it seems to me that the presumption should not apply in respect of independent adult children** (*emphasis added*). As Heeney J. noted in *McLear*, at Paragraph. 36, parental support obligations under provincial and federal statutes normally end when the child is no longer considered by law to be a minor: see e.g. *Family Law Act*, s. 31. Indeed, not only do child support obligations end when a child is no longer dependent, but often the reverse is true: an obligation may be imposed on independent adult children to support their parents in accordance with need and ability to pay: see e.g. *Family Law Act*, s. 32. Second, I agree with Heeney J. that it is common nowadays for ageing parents to transfer their assets into joint accounts with their adult children in order to have that child assist them in managing their financial affairs. **There should therefore be a rebuttable presumption that the adult child is holding the property in trust for the ageing parent to facilitate the free and efficient management of that parent's affairs** (*emphasis added*).

Paragraph 38

The remaining question is whether the presumption of advancement should apply in the case of adult dependent children. In the present case the trial judge, at Paragraphs. 26-28, found that Paula, despite being a married adult with her own family, was nevertheless dependent on her father and justified applying the presumption of advancement on that basis.

Paragraph 39

The question of whether the presumption applies to adult dependent children begs the question of what constitutes dependency for the purpose of applying the presumption. Dependency is a term susceptible to an enormous variety of circumstances. The extent or degree of dependency can be very wide ranging. While it may be rational to presume advancement as a result of dependency in some cases, in others it will not. For example, it is not difficult to accept that in some cases a parent would feel a moral, if not legal, obligation to provide for the quality of life for an adult disabled child. This might especially be the case where the disabled adult child is under the charge and care of the parent.

Paragraph 40

....I am therefore of the opinion that the rebuttable presumption of advancement with regard to gratuitous transfers from parent to child should be preserved but be limited in application to transfers by mothers and fathers to minor children.

B

Paragraph 41

There will of course be situations where a transfer between a parent and an adult child was intended to be a gift. It is open to the party claiming that the transfer is a gift to rebut the presumption of resulting trust by bringing evidence to support his or her claim.

Paragraph 43

.....The evidence required to rebut both presumptions, therefore, is evidence of the transferor's contrary intention on the balance of probabilities.

Paragraph 55

Where a gratuitous transfer is being challenged, the trial judge must begin his or her inquiry by determining the proper presumption to apply and then weigh all the evidence relating to the actual intention of the transferor to determine whether the presumption has been rebutted *(emphasis added).* It is not my intention to list all of the types of evidence that a trial judge can or should consider in ascertaining intent. This will depend on the facts of each case. However, I will discuss particular types of evidence at issue in this appeal and its companion case that have been the subject of divergent approaches by courts.

Appendix C

Parent puts adult child on title to property for estate planning purposes

Sample submission

This submission was developed for the following situation:

A mother owned a house in the countryside. She put her adult son on joint title to the house with her for estate planning purposes (so he would inherit it when she died). The son did not live in the house. MSD alleged the house was not an exempt asset, and that the adult son was not eligible for benefits because of assets in excess.

Issue: Whether the house in which Mr. Adult Son lives is his "asset" under the EA legislation.

Facts: *This section must be custom tailored to the case you are working with. At any level of reconsideration or appeal (and even at the application level with MSD) seriously consider having your client and the other party to the transaction provide statutory declarations (i.e. sworn written evidence, like an affidavit, setting out what their intentions were at the time they arranged for how legal title of the property would be held. Despite who is on legal title, who did they intend to "really own" (or benefit from) the house now? Why? If the Issue goes to the EAAT, statutory declarations are required.*

Argument

a) Mr. Adult Son holds joint legal title to a house that he does not live in. However, has no beneficial interest in the property; he holds it as a bare trustee for his mother, Ms. Mother.

Where a parent such as Ms. Mother gratuitously names their adult child as a joint tenant on the legal title of an asset, there is a legal presumption that, although the adult child holds bare legal title to the asset, the adult child does **not** have a beneficial interest in the asset, and rather holds the asset as a bare trustee for their parent (see *Pecore v Pecore*, 2007 SCC 17, copy attached).

In other words, there is a legal presumption that the adult child holds the property on a resulting trust for their parent. There is no legal presumption that the adult child has received a share in the house as a gift.

In the words of the majority decision of the Supreme Court of Canada in *Pecore v Pecore* at paragraph 4:

> *Equity.... recognizes a distinction between legal and beneficial ownership. The beneficial owner of property has been described as "the* real owner *of property even though it is in someone else's name": Csak v. Aumon, (1990), 69 D.L.R. (4th) 567 (Ont. H.C.J.), at p. 570* [emphasis added].

And, at paragraph 36:

> *There should therefore be a rebuttable presumption that the adult child is holding the property in trust for the ageing parent to facilitate the free and efficient management of that parent's affairs*

Legally, then, Mr. Adult Son must be presumed as joint tenant to be holding the property in trust for Ms. Mother. The legal presumption is that all of the beneficial interest in the house belongs to Ms. Mother.

Again in the words of the majority decision of the Supreme Court of Canada in *Pecore v Pecore*, at paragraph 20:

> *A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner: see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., Waters' Law of Trusts in Canada (3rd ed. 2005), at p. 362.*

And at paragraph 24:

> *The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: see Waters' Law of Trusts, at p. 375, and E. E. Gillese and M. Milczynski, The Law of Trusts (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.*

Although MSD seeks to argue that Mr. Adult Son has a beneficial interest in the property, MSD has not offered any evidence to rebut the legal presumption that Mr. Adult Son has no beneficial interest in the property.

To the contrary, in its initial decision, MSD accepts as a fact that:

a) Mr. Adult Son does not receive the rental income of the house;
b) Mr. Adult Son does not pay the mortgage, taxes, fees or any utilities (other than phone, cable and internet).
c) Mr. Adult Son is not exercising a position as a landlord/owner.

It is submitted that MSD has accepted that there is no evidence to rebut the presumption that Mr. Adult Son does not have any beneficial interest in the house, and that accordingly he is not a real owner of the house. Ms. Mother is the real owner of the property, even though it is also in Mr. Adult Son's name (see *Pecore v Pecore*, op cit, at paragraph 4).

While not legally required to do so (since resulting trust is legally presumed), Mr. Adult Son and Ms. Mother have provided extensive evidence to confirm that they clearly did not intend Mr. Adult Son to have a beneficial interest in the property until such time as Ms. Mother passes away *(then briefly review the evidence you've provided to this effect).*

Remedy Sought:

It follows that Mr. Adult Son is does not have a beneficial interest in the house in question and, as such, it is not his "asset" under section xxx of the EA/EAPD legislation.

Appendix D

Parent puts adult child on title to property for estate planning purposes. Adult child lives in the house: eligibility for shelter benefits for rental payments?

Sample submission

This submission was developed for the following situation:

A mother owned a house in the city; she had clear title and did not owe a mortgage on it.. She put her adult son on joint title to the house with her for estate planning purposes (so he would inherit it when she died). The son lived in the house and received PWD benefits for support and shelter; he pald his mother "rent" even though he was on legal title to the house as an owner. MSD found out that he was a legal owner, and alleged the son had a huge overpayment for the shelter benefits he had received while on legal title to the house.

Facts: *This section must be custom tailored to the case you are working with. At any level of reconsideration or appeal (and even at the application level with MSD) seriously consider having your client and the other party to the transaction provide statutory declarations (i.e. sworn written evidence, like an affidavit, setting out what their intentions were at the time they arranged for how legal title of the property would be held. Despite who is on legal title, who did they intend to "really own" (or benefit from) the house now? Why? If the issue goes to the EAAT, statutory declarations are required.*

Argument

a) Mr. Adult Son has no beneficial interest in the property; he holds it as a bare trustee for his mother, Ms. Mother.

Where a parent such as Ms. Mother gratuitously names their adult child as a joint tenant on the legal title of an asset, there is a legal presumption that, although the adult child holds bare legal title to the asset, the adult child does **not** have a beneficial interest in the asset, and rather holds the asset as a bare trustee for their parent (see *Pecore v Pecore*, 2007 SCC 17, copy attached).

In other words, there is a legal presumption that the adult child holds the property on a resulting trust for their parent. There is no legal presumption that the adult child has received a share in the house as a gift.

In the words of the majority decision of the Supreme Court of Canada in *Pecore v Pecore* at paragraph 4:

> *Equity.... recognizes a distinction between legal and beneficial ownership. The beneficial owner of property has been described as "the* real owner *of property even though it is in someone else's name": Csak v. Aumon, (1990), 69 D.L.R. (4th) 567 (Ont. H.C.J.), at p. 570* [emphasis added].

And, at paragraph 36:

> *There should therefore be a rebuttable presumption that the adult child is holding the property in trust for the ageing parent to facilitate the free and efficient management of that parent's affairs*

Legally, then, Mr. Adult Son must be presumed as joint tenant to be holding the property in trust for Ms. Mother. The legal presumption is that all of the beneficial interest in the house belongs to Ms. Mother.

Again in the words of the majority decision of the Supreme Court of Canada in *Pecore v Pecore*, at paragraph 20:

> *A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner: see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., Waters' Law of Trusts in Canada (3rd ed. 2005), at p. 362.*

And at paragraph 24:

> *The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: see Waters' Law of Trusts, at p. 375, and E. E. Gillese and M. Milczynski, The Law of Trusts (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.*

Although MHSD seeks to argue that Mr. Adult Son has a beneficial interest in the property, MHSD has not offered any evidence to rebut the legal presumption that Mr. Adult Son has no beneficial interest in the property.

To the contrary, in its initial decision, MHSD accepts as a fact that:

a) Mr. Adult Son does not receive the rental income of the house;

b) Mr. Adult Son does not pay the mortgage, taxes, fees or any utilities (other than phone, cable and internet).
c) Mr. Adult Son is not exercising a position as a landlord/owner.

It is submitted that MHSD has accepted that there is no evidence to rebut the presumption that Mr. Adult Son does not have any beneficial interest in the house, and that accordingly he is not a real owner of the house. Ms. Mother is the real owner of the property, even though it is also in Mr. Adult Son's name (see *Pecore v Pecore*, op cit, at paragraph 4).

While not legally required to do so (since resulting trust is legally presumed), Mr. Adult Son and Ms. Mother have provided extensive evidence to confirm that they clearly did not intend Mr. Adult Son to have a beneficial interest in the property until such time as Ms. Mother passes away (then briefly review the evidence you've provided to this effect).

b) Mr. Adult Son is entitled to payment of shelter benefits as a bare trustee of the property

Because he holds the property on a resulting trust in favour of his mother, Mr. Adult Son - in the words of the Supreme Court of Canada in *Pecore v Pecore* at paragraph 20, "is under an obligation to return it to the original title owner" (his mother), if she were to demand it back from him.

Because he has no beneficial interest in the house, Mr. Adult Son he is not a real owner of it. As stated by the Supreme Court of Canada in paragraph 4:

> *The beneficial owner of property has been described as "the* real owner *of property even though it is in someone else's name": Csak v. Aumon, (1990), 69 D.L.R. (4th) 567 (Ont. H.C.J.), at p. 570* [emphasis added].

The *Employment and Assistance* legislation elsewhere recognizes that the house does not really belong to Mr. Adult Son. Section 1 of the *Employment and Assistance for PerAdult Sons with Disabilities Regulation* defines "asset" as follows:

> *"asset" means*
>
> *(a) equlty in any real or personal property that can be converted to cash,*
>
> *(b) a beneficial interest in real or personal property held in trust, or*
>
> *(c) cash assets;*

That is, because he has no beneficial interest in the property, and is not entitled to sell the house because he is holding it in trust for Ms. Mother, the welfare legislation recognizes that the house is not Mr. Adult Son's asset. In other words, that he does not really own the house, although his mother put his name on legal title to it, free of charge.

Ms. Mother, as the real owner of the house, has been charging Mr. Adult Son monthy rent of $525, which he has paid. She has issued him rent receipts to confirm these payments.

Ms. Mother is legally entitled to charge Mr. Adult Son rent to occupy the house, as he does not hold any equitable title or beneficial interest in it. For example, he has no right, as a bare trustee, to occupy the house. He gains the right to occupy the house only by payment of rent to Ms. Mother, thereby purchasing the right to occupy the house as a tenant.

Section 5 of Schedule A to the *Employment and Assistance for Persons with Disabilities Regulation* says:

---

5 (1) For the purpose of this section, utility costs for a family unit's place of residence include only the following costs:

(a) fuel for heating;

(b) fuel for cooking meals;

(c) water;

(d) hydro;

(e) garbage disposal provided by a company on a regular weekly or biweekly basis;

(f) rental of one basic residential single-line telephone.

(2) When calculating the actual monthly shelter costs of a family unit, only the following items are included:

(a) rent for the family unit's place of residence;

(b) mortgage payments on the family unit's place of residence, <u>if owned by a person in the family unit;</u> [emphasis added];

(c) a house insurance premium for the family unit's place of residence if owned by a person in the family unit;

(d) property taxes for the family unit's place of residence if owned by a person in the family unit;

(e) utility costs;

(f) the actual cost of maintenance and repairs for the family unit's place of residence if owned by a person in the family unit and if these costs have received the minister's prior approval.

Mr. Adult Son lives as a family unit of one. He is not the real owner of the property in question, but rather a bare trustee of it, holding it on resulting trust in favour of his mother. He is under a legal obligation to put the house in his mother's name only, if she so demands. As such, the house he lives in is not "owned by a person in (his) family unit" and as such he is not entitled to have mortgage payments for it covered by MHSD.

The purpose of shelter benefits is to allow a recipient to buy the right to occupy a place as their residence . Mr. Adult Son does not have the right to occupy the house as a bare trustee of it. To have the right to legally occupy the house, he is required to pay rent to the house's real owner, Ms. Mother. As a renter, he is therefore entitled to payment of shelter benefits for rent under Schedule A.

Remedy Sought:

It follows that Mr. Adult Son is, and has been, entitled to the payment of maximum shelter benefits for his rental payments to Ms. Mother.

Appendix E

WATERS' LAW OF TRUSTS IN CANADA

Third Edition

By

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I. EXPRESS, IMPLIED, RESULTING, AND CONSTRUCTIVE TRUSTS

A trust can come into existence in one of two ways. It is either clear from a person's words or acts that there is an intention to settle property by way of a trust, or the law imposes trust machinery in a given situation to ensure that property passes from one party to another. What we are therefore concerned with is discovering the intention of a person, or the circumstances under which the law will deem a trust to arise in order to secure some result the law considers equitable. If we are looking for such an intention, we may find that oral or written words state quite clearly that certain property is to be subject to a trust. The words, however, may not be clear; we then have to examine them carefully in order to determine whether there is indeed an intention to make property subject to a trust. We have to infer intention. On the other hand, if we wish to know whether the law requires A to hold certain property for B, regardless of intention, we have to discover what the circumstances are in which the law imposes this requirement, and then whether A and B come within one of those circumstances.

Since the seventeenth century, common law courts have employed various terms to describe those distinct situations and the terms which have become familiar are "express trusts," "implied trusts," "resulting trusts" and "constructive trusts." But the courts have differed quite considerably in the ambit of meaning which they have associated with those terms, and since the nineteenth century, when writers began to compose treatises on the law of trusts, they have introduced further refinements into the use of those terms. Today, however, though the differences of usage still exist, and the student of trust law will observe those differences in judgments and non-judicial writing, there is no dispute that trusts arise either by intention or by

imposition of law. The differences exist as to the naming of one or another particular type of trust.[1]

In very large measure, therefore, whether a trust is to be called express, implied, resulting or constructive is only of academic importance; practitioners in the field are prepared to adopt the generally adopted current meaning of those terms, and leave it at that. There are instances, however, where the distinction can be of practical importance and these instances spring from the employment by statute of these terms. At one time limitation Acts, for example, made different legal results follow from whether a trust arose from the intention of a party, or by imposition of law. Much nineteenth-century case law flowed from this, and considerable judicial discussion, often of a confusing nature, took place to decide whether particular trusts were of this or that kind. Such limitation provisions have now been repealed, however, and contemporary trust law with its generally agreed use of terms is little bothered with the few Acts that do still attach differing legal results to the varying types of trust.[2] Modern litigation is more concerned with the rules that apply to what is agreed to be a trust of a certain type, such as pension trusts and income trusts.

In the common usage of today, the terms "express" and "implied"[3] refer to the intention of the alleged settlor. If he clearly and specifically says that certain property is to be held in trust, then he has created an express trust. Similarly, if his language has to be construed in order for its legal meaning to be discovered, and it is found that the maker of the statement intended a trust, then he has created a trust arising by implied intent.[4] The nature of a resulting trust is still the subject of some discussion, however; is it a trust which is concerned with the intent of the transferor of the property, or does it describe a trust obligation imposed by law? The reader will have noticed that the adjective "resulting" describes *what happens* to the property subject to the trust. Unlike the words "express" and "implied," it does not reveal a concern with the intent of the transferor, nor on the other hand does it show whether it comes into existence because the courts have imposed the trust obligation. Property "results" when it goes back to the transferor, and that can happen either because in certain circumstances the transferor impliedly intends the property to be returned to

---

[1] E.g., the question might be, is the trust which arises in these particular circumstances to be described as an implied trust, a resulting trust, or a constructive trust? Express trusts will usually be immediately recognizable as such.

[2] See further, chapter 25, Part IV C.

[3] However, this is a term which is also associated with those circumstances where the law lays down that because he has no personal entitlement to property, A shall hold on trust for B. Caution must always be exercised in the use of the term "implied trust"; because of the range of situations which it is used to describe, it can be confusing. See, e.g., D.J. Hayton, *Underhill and Hayton: Law Relating to Trusts and Trustees*, 16th ed. (London: Butterworths, 2003) at 54.

[4] This is the "precatory trust", where expressions of wish or desire are construed in the context to mean that the transferor intended a trust. Whether precatory language reveals an intention or otherwise to create a trust is a question of construction for the court. It is also possible to say, however, that once the trust obligation has been construed to be the intention of the transferor, that gives rise to an express trust.

himself, or because in those circumstances the court imposes an obligation upon the holder of the property to return it to the transferor.[5]

A resulting trust occurs (1) where A purchases property and has it transferred into the name of B, or into the joint names of himself and B, (2) where A transfers property to B or into the names of himself and B, (3) where the purposes set out by an express or implied trust fail to exhaust the trust property. In this third situation, the trust may give a life interest to X, but say nothing as to what is to happen to capital and interest on X's death. Or a trust may have as its purpose provision for a young couple entering marriage, and for the children of the marriage. The trust purpose fails because the marriage never takes place. Again the trust terms may fail because the object is not sufficiently certain or it is illegal or against public policy.

Now in deciding whether the resulting trust is a product of intent or the imposition of law, it is possible to say that A in the first two of the above situations, and the settlor in the third, intend the property to be returned either immediately in the first instance or on failure of the purposes in the third situation. Alternatively, it is possible to say that some resulting trusts arise from intent, *others* from the law's imposition. The first two situations are truly matters arising from the implied intent of A, though here A's intent is construed from what he does, not from what he says. But where A's objects fail for uncertainty, illegality or public policy, the law is bringing about an equitable result by declaring that property goes back to the settlor. It might also be said in the situation where the marriage fails to take place, or the settlor has omitted to say what is to happen when the life tenant dies, that the law again imposes a trust in favour of the settlor. But the marriage and omission situations are arguably the kind of circumstance in which the settlor could have foreseen what has happened, and his consequent silence can reasonably be said to reveal intent. As a third line of analysis it could be said that in all resulting trust situations where A or the settlor has said nothing, his silence is irrelevant, and the court secures an equitable result by requiring the holder to hold on trust for A or the settlor, as the case may be.

Leading works take different views on this. The sixteenth edition of *Underhill and Hayton: Law Relating to Trusts and Trustees* is of the opinion that all trusts arising from intention, whether it is expressed or implied, are express trusts.[6] In the twelfth edition,[7] all three resulting trust situations were regarded by *Underhill* as trusts arising out of intent, and therefore to be express, except that where failure takes place for some reason of law, for example, lapse, uncertainty of objects, or illegality, the editor considered the trust obligation to be imposed by law. These for *Underhill* were therefore constructive trusts. In the fifteenth edition,[8] the present editor adopted the distinction drawn in *White v. Vandervell Trustees Ltd.*[9] between

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[5] The court's motivation in doing this is to secure a more equitable outcome between parties. See, e.g., *Todd v. Webster* (1976), 15 N.B.R. (2d) 343 (N.B. Q.B.), where both intention and equity led the court to speak of the "implied and actual" trustee.

[6] *Supra*, note 3, at 53-54.

[7] *Underhill's Law Relating to Trusts and Trustees*, 12th ed. (London: Butterworths, 1970) at 9-11.

[8] D. J. Hayton, *Underhill and Hayton: Law Relating to Trusts and Trustees*, 15th ed. (London: Butterworths, 1995), at 42. This was not carried forward in the sixteenth edition, *supra*, note 3, at 54-55.

[9] (sub nom. *Re Vandervell's Trust (No. 2)*), [1974] 1 Ch. 269, [1974] 3 All E.R. 205 (Eng. C.A.).

presumed and automatic resulting trusts. The first two situations described above thus arise from presumed intent, while the third is automatic. Though some automatic resulting trusts are also intended, all of them occur by operation of law.[10] Constructive trusts, too, are described as occurring by operation of law, but here the theme is described as arising from the unconscionability of the trustee's continued retention.

The seventeenth edition of *Lewin on Trusts* divides trusts into two broad types: express trusts and trusts arising by operation of law. It notes that "trusts arising by operation of law comprise resulting, implied and constructive trusts."[11] There is much force in the argument that all trusts other than express trusts should be classified as arising by operation of law, but it necessarily groups together a number of different forms of trust, and carries us very little way forward in the analysis of these various terms.[12] It is useful to remember, however, that the debate is one of terminology and classification. It is settled law which factual situations give rise to resulting trusts.[13]

The constructive trust arises when the court imposes trust machinery in order to describe A's obligation to transfer property to B. There are many examples of this type of trust; perhaps the most familiar is the vendor's liability towards the purchaser of land between contract and conveyance, and the obligation of a fiduciary to give up proprietary advantage acquired through the employment of his office. The trust is "constructive" because, regardless of anyone's intent, the law constructs a trust in order to enforce the obligation. In Canada that obligation is now recognized as arising out of unjust enrichment and "good conscience".[14] It is surely confusing to employ the term constructive trust to mean a trust arising from implied or construed intent. This has been done in Canada,[15] which is a matter for regret because this is one trust term upon which there is agreement.[16]

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[10] Lord Browne-Wilkinson, in an *obiter* statement in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*, [1996] 2 All E.R. 961 (U.K.H.L.) at 991, questioned the distinction drawn by Megarry, J. between presumed and automatic resulting trusts. At 990-91 he commented that, "[b]oth types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties. A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention."

[11] John Mowbray *et al.* (eds.), *Lewin on Trusts*, 17th ed. (London: Sweet and Maxwell, 2000) at 14.

[12] Express and implied intent are distinguished only by the character of the evidence of the intent. Express and implied trusts are therefore of the same species; contrasted with them are trusts owing nothing to intent. This seems to be a more promising analysis of what the various terms express, implied, presumptive, constructive and resulting are attempting to state.

[13] For example, the three resulting trust circumstances described in the text are the circumstances referred to in the judgment of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*, *supra*, note 10, at 990-92.

[14] *Becker v. Pettkus* (1980), 117 D.L.R. (3d) 257 (S.C.C.); *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, 146 D.L.R. (4th) 214, 17 E.T.R. (2d) 89 (S.C.C.).

[15] "Constructive trust" means, in this context, a trust construed from words, spoken or written, to be the intention of the speaker or instrument-maker.

[16] *Snell's Principles of Equity*, 30th ed. (London: Sweet & Maxwell, 2000) at 122, notes, however, that the term constructive trust has been employed in England also to include implied trusts.

Appendix F

Getting rid of assets or not going after income

Before you apply for welfare and while you get benefits, you are supposed to try to support yourself in any other way possible. You cannot refuse to accept assets, income, or other means of support in order to get welfare. You must also pursue (try to get) any available asset, income, or means of support. (For example, if someone owes you money, you have to ask for it.) In addition, you cannot dispose of any asset or property, which means you cannot give it away or sell it for less than it is worth.

If you dispose of assets in any of these ways, or refuse to pursue or accept any means of support, the ministry could apply a penalty.

If the amount is less than $2,000, the ministry will not apply a penality.

If the amount involved is more than $2,000, the ministry may reduce or cut off your benefits for a period of time. The penalties they may apply will depend on what they believe you did and the facts of your specific case. The ministry has some discretion in deciding which penalties to apply. You can also challenge their decision. Talk to an advocate for help with your situation if an EAW says they may apply penalties against you.

The table on the next page has some examples to help explain how penalties work.

Employment plans and obligations

As soon as the ministry approves you for benefits and opens a file for you, they will decide whether you have "employment-related obligations" (see page 94 for more information). They might also make you sign and follow an employment plan.

This plan is an agreement you make with the ministry when you apply for welfare that lists what you agree to do to find a job or to increase your chances of being hired. This can include attending a ministry job placement or training program. An employment plan is based on your training, education, and work history. It does not have to include a job search, and in some cases you may only be required to improve your skills in certain areas or work on your résumé.

Make sure you understand what you are agreeing to when you sign an employment plan. Ask questions about anything you do not understand. If you cannot speak or read English very well, ask for an interpreter or bring someone with you who can help you understand English.

Appendix F.

Penalties for getting rid of assets or not going after income

Situation	Possible penalties	Example
If you turned down income, an asset, or other means of support, and it is no longer available	• Your benefits could be reduced by $100 per month for each adult in your family for one calendar month for each $2,000 that you did not accept or pursue, OR • Your benefits could be cut off for one month for each $2,000 that you did not accept or pursue.	If you were single and your relative offered to give you $6,000 to help you out, you refused it, and now they have spent the money, your benefits could be cut off or reduced by $100 for 3 months.
If you turned down or did not try to get income, an asset, or other means of support, and it is still available	• Your benefits could be reduced by $100 per month for each adult in your family until you take reasonable steps to pursue the means of support, OR • Your benefits could be cut off until you take reasonable steps to pursue the means of support.	If your former employer owed you $4,000 in unpaid wages and severance pay, and you were single, your benefits could be cut off or reduced by $100 per month until you try to collect that money somehow. (For example, you could file a complaint with the Employment Standards Branch or take your former employer to court.)
If you sold something for less than its actual or market value, or if you gave it away	• Your benefits could be reduced by $100 per month for each adult in your family unit. The reduction will last for one calendar month for each $2,000 that you lost when you undersold or gave away your asset, OR • Your benefits could be cut off for one calendar month for each $2,000 that you lost when you undersold or gave away your asset.	If you and your spouse sold a $10,000 car for $6,000, you gave up $4,000 worth of its value. That means your family's benefits could be reduced by $200 per month — or cut off — for 2 months.
If you intentionally sold or gave away assets to make your family eligible for welfare	• Your benefits could be cut off for 2 months for each $2,000 worth of assets that you got rid of.	If you gave away $6,000 to your sister to become eligible for welfare, your benefits could be cut off for 6 months.

(disposal for "inadequate consideration")
EA Act s 14(1)(b)
EAPD Act s 13(1)(b)

(disposal of property to reduce assets
EA Act s 14(2)(a)
EAPD Act s 13(2)(b).

10. Other

Legal Services Society
British Columbia
www.legalaid.bc.ca

THE LAW FOUNDATION OF BRITISH COLUMBIA

Working Effectively with Clients Who Have Mental Health Issues

Provincial Advocates Conference

November 23, 2011

Working Effectively with Clients Who Have Mental Health Issues

Workshop Overview:

- *A brief overview of mental health conditions and related symptoms*
- *Self-reflection exercise*
- *Identifying & Addressing Barriers to Service in Agency Practice*
- *Working with Challenging Behaviours-Improving Responses and Outcomes*
- *Case Scenarios*

Working Effectively with Clients Who Have Mental Health Issues

Workshop Objectives:

- *To address gaps in knowledge and applied skills regarding mental health by addressing the behavioural, cognitive and other challenges that come with working with persons with mental health issues.*
- *Provide information on mental health generally as well as addressing relevant issues such as reducing barriers to service, effective case management and improving responses to challenging behaviours.*

Working Effectively with Clients Who Have Mental Health Issues

A brief overview of common mental health conditions and symptoms

Depression:

Is a mood disorder characterized by impaired behaviour and cognition and changes in mood.

Symptoms:

- *Feelings of worthlessness and hopelessness*
- *Sleep Problems: Falling or staying asleep/Oversleeping*
- *Trouble concentrating or making decisions*
- *Loss of interest in activities*
- *Overwhelming feelings of sadness*
- *Changes in weight or appetite*
- *Social avoidance/isolation*
- *Irritability*
- *Loss of energy/fatigue*
- *Hallucinations/Delusions: in extreme cases*
- *Thoughts of death or suicide*

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Bipolar Disorder:

Is a diagnostic category describing a class of mood disorders characterized by episodes of mania (elevated mood) and depression or mixed states (depression/mania simultaneously) with periods free of symptoms.

Bipolar I (at least 1 manic episode & one or more depressive episodes

Bipolar II: (Predominantly depressive episodes with milder hypomanic episodes)

Cyclothymic Disorder: Chronic fluctuating moods-bypomania & depression

Symptoms:

- *Excessively high or elevated mood*
- *Extreme irritability or anger*
- *Impulsive decision making*
- *Racing thoughts*
- *Rapid speech*
- *Restlessness/High levels of energy*
- *Feeling little need for sleep*
- *Extremely short attention span*
- *Seeing or hearing things that other people aren't experiencing*

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Anxiety Disorders:

an excessive, irrational dread of everyday situations. Categorized as the following:

- **Generalized Anxiety Disorder (GAD)** :

  exaggerated worry and tension, even when there is no apparent reason for concern

- **Obsessive-Compulsive Disorder (OCD)**

  unwanted and intrusive thoughts (obsessions) that compel repeated performance of ritualistic behaviors and routines (compulsions) to try and ease anxiety

- **Panic Disorder/Agoraphobia**

  the abrupt onset of intense fear that reaches a peak within a few minutes and includes some of the following symptoms: feeling of imminent danger & doom, need to escape, heart palpitations, shortness of breath, nausea, fear of dying or going crazy

Working Effectively with Clients Who Have Mental Health Issues

- **Post Traumatic Stress Disorder**:

  Occurs in people who have experienced a traumatic event

  Symptoms include:

  Re-experiencing the traumatic event through flashbacks, nightmares and distressing recollections of the event

  Emotional numbness

  Avoidance of places, activities and people associated with the event

  Difficulty sleeping, concentrating

  Feeling jumpy, easily irritated or angered

- **Social Anxiety Disorder**

  Extreme fear of being scrutinized and judged by others in social or performance situations leading to extreme distress and isolation

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Schizophrenia & psychotic disorders:

- Schizophrenia:

  Positive symptoms:

  Hallucinations: seeing, hearing, feeling things others do not see, hear or feel

  Delusions: false beliefs that are not part of the person's culture and do not change regardless of truth or logic

  Thought disorders: unusual or dysfunctional ways of thinking. Disorganized thinking. Neologisms.

  Negative symptoms:

  Flat affect: where a person's face does not move or he or she talks in a dull or monotonous voice

  Lack of pleasure in everyday life

  Lack of ability to begin and sustain planned activities

  Cognitive symptoms:

  Poor "executive functioning" (the ability to understand information and use it to make decisions)

  Trouble focusing or paying attention

  Problems with "working memory" (the ability to use information immediately after learning it)

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- **Schizoaffective Disorder**:

  Psychotic symptoms-hallucinations, paranoid thoughts along with a mood disturbance, such as depressed or manic mood

  Depressive type vs. Bipolar type

- **Delusional Disorder:**

  Circumscribed symptoms of non-bizarre delusions, but with the absence of prominent hallucinations and no thought disorder, mood disorder, or significant flattening of affect found in schizophrenia

  6 subtypes: erotomanic, grandiose, persecutory, jealous, somatic & mixed

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Personality Disorders:

a group of psychiatric conditions in which a person's chronic behaviors, emotions, and thoughts are very different from their culture's expectations and cause serious problems with social and occupational functioning

- ***Anti-social personality disorder**: persistent social rule-breaking, deceitfulness, offending behaviour, irresponsibility, lack of remorse and failure to plan ahead*
- ***Avoidant personality disorder**: lifelong pattern of feeling very shy, inadequate, and sensitive to rejection*
- ***Dependant personality disorder**: a chronic condition in which people depend too much on others to meet their emotional and physical needs*
- ***Histrionic personality disorder**: act in a very emotional and dramatic way that draws attention to themselves*

Working Effectively with Clients Who Have Mental Health Issues

- ***Narcissistic personality disorder***: *an inflated sense of self-importance and an extreme preoccupation with self*
- ***Obsessive-compulsive personality disorder***: *preoccupation with rules, orderliness, and control*
- ***Paranoid personality disorder***: *long-term distrust and suspicion of others, but does not have a full-blown psychotic disorder such as schizophrenia*
- ***Schizoid personality disorder***: *person has a lifelong pattern of indifference to others and social isolation. It does not cause hallucinations, delusions, or complete disconnection from reality.*
- ***Schizotypal personality disorder***: *trouble with relationships and disturbances in thought patterns, appearance, and behavior. Odd beliefs and behaviours but no positive symptoms found in schizophrenia.*

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- ***Borderline Personality Disorder:*** *characterized by unstable relationships, unstable emotions, unstable behaviour, unstable sense of identity and awareness problems.*
- *Unstable behaviours: acting on impulses and urges even where harmful-self-harm, suicide attempts, risky behaviours*
- *Unstable emotions: extreme anxiety, depression, irritability, anger and boredom*
- *Unstable relationships: seeing others as all good or all bad, intense avoidance of abandonment*
- *Unstable sense of identity: not knowing self, feeling empty*
- *Awareness: sensations or feelings not founded in reality*

Working Effectively with Clients Who Have Mental Health Issues

Identifying & Addressing Barriers to Service in Agency Practice

Common Barriers to Service:

STIGMA

- *People experience prejudice and discrimination (in medical care, housing etc.) and thus avoid asking for services*
- *They have negative feelings about themselves, have low self-esteem and can be prey to believing negative stereotypes generated by society and media*
- *They tend to avoid seeking help and to keep symptoms and substance use secret*
- *They tend to minimize the impact of their illness on their functioning*
- *They experience social isolation or limited support networks*
- *Depression and loss of hope for recovery or that taking action will result in positive, efficacious outcomes*

Working Effectively with Clients Who Have Mental Health Issues

REDUCING STIGMA IN SERVICE PROVISION:

- *Understand why stigma exists and make efforts to challenge & counteract it in your own lives and working practice.*
- *Sometimes stigma is based on fear. Stigma can also be based upon the fact that mental illness may affect the social skills or appearance of the person, making others feel the person is difficult to relate to. Or one might have a perception of poor prognosis and/or attribute responsibility for lack of wellness, assuming that discipline, will power and desire to get better are sufficient to address the presenting mental health problems.*
- *Practice accessible and inclusive service provision. Services provided must be non-judgmental and empathic and client centered. An advocate must always see the service user as a person first. Be able to put yourself in the shoes of your client and appreciate their experience from their perspective.*
- *Adequate time must be devoted to working individually with your client to build trust and to facilitate honesty about stigma and how it may be affecting disclosure.*
- *Self-empowering clients to act on their own behalf and to take steps to assist in the resolution of their case/issue is also important in addressing stigma. Empowerment can improve a person's self-image and concept of identity and can contradict stereotypes they themselves or others may have about capacity to act.*

Working Effectively with Clients Who Have Mental Health Issues

Fragmented Services:

- *By the time someone reaches your door, they may have attempted to access a number of other services and been turned away. This can lead to high levels of frustration and hopelessness. It is important therefore, that the services you provide be as low barrier as possible.*

Increasing Access:

- *Services should be immediate, accessible and client centered*
- *Drop-In services mean that help is more readily available*
- *People are informed as soon as possible if there are not eligible for services and provided accurate information about other relevant services.*
- *People should be treated as individuals first*
- *Non-judgemental and unconditional services-an individual may be experiencing extreme distress and the advocate may be the only person the individual sees who is independent from the mental health system/who is not providing treatment and monitoring of mental health symptoms.*
- *The intake and informed consent forms are brief*
- *Additional time is allowed for face to face service delivery*
- *Advocates should be familiar with other agencies that provide expertise in the provision of services to persons with mental illness so that appropriate referrals can be made when needed.*

Working Effectively with Clients Who Have Mental Health Issues

Barriers to Communication:

- *Some the barriers people with mental illness face to obtaining advocacy services may be imposed by the illness itself and its specific symptoms. When people are struggling with symptoms, they may be unable to identify or articulate what services they need, may speak tangentially/incoherently, may shift from one topic to another at will, talk about several issues as once or be unable to focus.*
- *Most mental illnesses will cause impairments in attention and concentration, memory and ability to recall information, motivation, executive and planning skills and will also significantly impair social/communication skills. All of the above will also impair the client's ability to follow up.*

Working Effectively with Clients Who Have Mental Health Issues

- ***Reducing barriers to communication and follow up***:
- *Take time to learn about various mental illnesses so that you know what to expect and can put communication barriers in context.*
- *Most importantly!! you will need additional time to work effectively with the client. This will include at the initial assessment/intake phase and through to any case advocacy you take on.*
- *You must be willing to take the time to build trust with the client whenever possible. The relationship must be characterized by consistency and trust.*
- *Allow time for the person to tell their story/vent/express for 10-15 minutes before asking structured questions*
- *You may need to repeat questions/instructions several times before they are truly understood. Use active listening skills to ensure understanding. Open-ended questions, paraphrasing, parroting.*
- *Use short, clear direct sentences and questions. Long, involved questions may be difficult to follow as some mental illnesses make concentrating difficult.*
- *Cover one topic or give only one direction at a time.*

Working Effectively with Clients Who Have Mental Health Issues

- *Be compassionate and empathetic in your approach. Be willing to experience the person's situation from their frame of reference. You don't have to agree with the person but simply communicate that you appreciate how they feel.*
- *You may need to document and write down everything in simple steps.*
- *Do want you can to keep the stimulation level as low as possible. This is especially important where symptoms of anxiety or psychosis are present.*
- *Ensure follow up. Calling, writing letters. Sending documentation directly to third party.*
- *Maintain a positive attitude.*

Working Effectively with Clients Who Have Mental Health Issues

- *Other Helpful Practices:*
- *Being client centered in your approach. Meeting people where they are at, moving at their pace, with PATIENCE.*
- *Validating a person's feelings and choices.*
- *Setting clear boundaries and managing expectations at the outset.*
- *Consistent practices among volunteers, staff and management*
- *Maintaining equanimity-staff practice self-control, calm and good communication*
- *Practice non-attachment to outcomes.*
- *Emphasizing strengths. Lots of reinforcement for simple steps*
- *Practicing self care: breathe, take a break, practice work-life balance, set realistic goals, take care of mind and body*

Working Effectively with Clients Who Have Mental Health Issues

- ***Working with Challenging Behaviours:***
- *Do not make unrealistic promises about what services you can provide or outcomes you can achieve. Be honest and realistic about limitations of service/time delay*
- *Deal with emotional response by modelling calm. When person loses focus, reframe the issue to get behind why person is asking for help-"Let's look at your goals. What will achieving this outcome get for you?"*
- *Demonstrate empathy when cannot assist. "I can see you are upset, stressed by your experience"*
- *Echo/paraphrase person's concerns. Express empathy appropriately and acknowledge emotions. Acknowledge point of view without agreeing with it. Use the language of cooperation-"we could look at it this way". "How can we resolve this".*

Working Effectively with Clients Who Have Mental Health Issues

- *Define key issues at the outset and stay focused on them.*
- *Treat any complaints seriously. Try and focus on the issue being presented rather than just the behaviour or emotions.*
- *Communicate clearly. Ask the person if they understand what you are saying.*
- *Use direct language. Tell them clearly what you can or cannot do.*
- *Be consistent in your approach to the person.*
- *Use a neutral tone and pitch. Be non reactive. Try to remain calm.*
- *Always be conscious of your own emotional and physical safety.*

Working Effectively with Clients Who Have Mental Health Issues

Hostile/aggressive behaviours:

- ***Follow any existing protocols regarding safety and potential threats in the workplace-two staff, meeting place, duress alarms etc.***
- *Determine if the anger is constructive/reasonable and appropriately directed. If so, allow venting for a specific period of time. Provide clarity about the time you have available for venting and stick to it. Allow the client to express feelings and then provide information/strategies for follow up if appropriate.*
- *If anger is abusive, advise of need for respect and consequences if continues. For example, will hang up, be asked to leave and come back when calm. Be clear about boundaries and enforce consequences.*
- *Do not try and reason with a person who is extremely angry. Do not react or verbally defend yourself. Adopt a non-threatening, but firm physical stance. Hold arms at the side of your body, with palms open. Stand at a distance. Breathe deeply and speak slowly in a moderate voice.*
- *Use name frequently. Focus on them with empathy, acknowledging feelings and needs. Ask open ended questions. Agree where you can. Reassure concerns are important.*

Working Effectively with Clients Who Have Mental Health Issues

Clients who may be excessively dependent:

- *Be clear at the outset about what services you do and do not offer. People need structure and fair setting of limits. Be consistent and maintain clear expectations.*
- *Set out each persons' tasks clearly. Provide person with specific tasks to complete to self-empower. Provide honest and genuine appreciation when completed.*
- *Articulate and keep to time limitations. For example…*
- *Use your team for continuity of care & to avoid burnout.*
- *Learn how to tolerate hostility without retaliating or withdrawing. Start with & maintain positive tone. Say nothing. Model expected behaviour.*

Working Effectively with Clients Who Have Mental Health Issues

Clients with depression:

- *Maintain a positive attitude. Maintain morale and sense of hope.*
- *Break information and next steps down into basic, simple instructions.*
- *Use genuine, heartfelt admiring statements to empower.*
- *Follow a self-empowerment model. Give clients tasks to take on that are achievable. Good for self-esteem.*

Working Effectively with Clients Who Have Mental Health Issues

Clients Who Regularly Miss Appointments:

- *Identify barriers to meeting schedule-poor sleeping-perhaps afternoon appointments preferable? Child care or transportation issues?*
- *If client cannot make appointments, identify file will be closed and that it can be re-opened when client is ready*
- *Set a specific time (once a week/once every two weeks) and advise client you will be available for a specific amount of time. You will be there regardless and if they show up, great. If not, you will attend to other work. No judgment.*

Working Effectively with Clients Who Have Mental Health Issues

Clients with psychosis/paranoia:

- *Important to understand and acknowledge distress and likely feelings of terror.*
- *Reduce stimuli in the environment.*
- *Identify with, rather than argue with the person. It is unhelpful to challenge delusions directly. Delusions are usually extremely fixed and difficult to change.*
- *However, try not to agree with/collude with beliefs expressed. Provide alternative explanations based on your own experience. Reassure them clearly and calmly by letting them know you understand they may see things in a particular way but you believe there is no problem or threat.*
- *"I know you think security guards are following you, but I don't think this is true." "You have no need to worry, you have done nothing wrong, so your landlord has no reason to go into your apartment."*
- *Ask for documentary or other evidence to support allegations. Indicate advice/follow up limited if no back up to support claims.*
- *Encourage person to seek help, not because of paranoia but because of specific circumstances they are experiencing and their named distress.*

Working Effectively with Clients Who Have Mental Health Issues

Case Scenario #1:

You are working with a client who has a history of anger management problems, anxiety, depression and substance abuse. He has been banned from his local grocery store for alleged threatening behaviour. He has requested your help in pursuing a human rights complaint. In the course of your work together, he has become increasingly frustrated in his interactions with you. He frequently swears and interrupts you and at your last appointment, he threw his paperwork across your desk and told you to shut up when you tried to explain the reasoning behind your questions and decisions. You and the client have not been successful in resolving his concerns and no other agency/individual will take on his human rights complaint. He is now demanding you represent him.

Working Effectively with Clients Who Have Mental Health Issues

Case Scenario #2

You are helping a person with a PWD application. He have been diagnosed with schizophrenia but does not agree with the diagnosis. He is not sure he wants any mental health information added to the application. He also believes that he has a serious medical condition the physician is ignoring and has stated that the physician refuses to provide a proper referral for treatment because he is closely related to a former service provider who "has it out for him and has been trying to get him for years". He says he won't complete the PWD form until his medical condition is acknowledged. He wants to make a complaint about the physician.

Useful Mental Health Links and Resources

- *Canadian Collaborative Mental Health Initiative: Pathways to Healing: A Mental Health Toolkit for First Nations People:*
  http://www.ccmhi.ca/en/products/toolkits/documents/ EN_PathwaystoHealing.pdf

- *Canadian Mental Health Association, BC Division: Concurrent Disorders: Mental Disorders and Substance Abuse Problems*
  http://www.heretohelp.bc.ca/publications/factsheets/concurrent

- *Cross Cultural Mental Health: Visions: BC's Mental Health Journal:*
  http://www.cmha.bc.ca/resources/visions/cross-cultural

- *Canadian Mental Health Association: Suicidal Behaviour: How to Respond:*
  http://www.cmha.bc.ca/files/8-suicidal_behaviour.pdf

- *Centre for Addiction and Mental Health Working with Immigrant Women: Issues and Strategies for Mental Health Professionals:*
  http://www.camh.net/Publications/Resources_for_Professionals/Working_Immigrant_Women/index.html

- *Centre for Addiction and Mental Health: First stage trauma treatment: A guide for mental health professionals working with women:*
  http://www.camh.net/Publications/Resources_for_Professionals/First_stage_trauma/index.html

- *Mental Health Organizations & Websites in Canada:*
  http://www.mentalhealthcommission.ca/English/Pages/organizations.aspx

- *2008 Family Law Duty Counsel Proceedings: Mental Health Issues-Excerpted from Mental Illness First Aid* (CMHA Vancouver-Burnaby Branch) 2008
  http://www.lss.bc.ca/assets/lawyers/mentalHealth_web.pdf

Human Rights Code, R.S.B.C. 1996, c. 210
and applicable sections of the _Administrative Tribunals Act_, S.B.C. 2004, c. 45

Unofficial Consolidation*

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**This is not an official version of the Human Rights Code. This version consolidates amendments to the Code which were contained in other statutes. They are: Miscellaneous Statutes Amendment Act (No. 3), 1999, S.B.C. 1999, c. 39, ss. 24-30, effective September 30, 1999; Human Rights Code Amendment Act, 2002, S.B.C. 2002, c. 62, ss. 1 to 26, effective March 31, 2003; Residential Tenancy Act, S.B.C. 2002, c.78, s. 108, effective January 1, 2004; Administrative Tribunals Appointment and Administration Act, S.B.C. 2003, c. 47, ss. 33-34, effective February 13, 2004; Administrative Tribunals Act, S.B.C. 2004, c. 45, ss. 104-106, effective October 15, 2004; Attorney General Statutes Amendment Act, 2007, S.B.C. 2007, c. 14, s. 35, effective October 18, 2007 and Human Rights Code (Mandatory Retirement Elimination) Amendment Act, 2007, S.B.C. 2007, c. 21, effective January 1, 2008. The applicable sections of the Administrative Tribunals Act have been amended by Attorney General Statutes Amendment Act, 2004, S.B.C. 2004, c. 57, ss. 1 and 5, effective October 21, 2004; and Attorney General Statutes Amendment Act, 2007, S.B.C. 2007, c. 14, ss. 1 - 3, effective October 18, 2007.*

Human Rights Code

Definitions

1 In this Code:

"age" means an age of 19 years or more;

"chair" means the member designated under section 31 (1) (a) as the chair of the tribunal;

"collective agreement" means a collective agreement as defined in the *Labour Relations Code;*

"complainant" means a person or group of persons that files a complaint under section 21;

"complaint" means a complaint filed under section 21;

"discrimination" includes the conduct described in section 7, 8 (1) (a), 9 (a) or (b), 10 (1) (a), 11, 13 (1) (a) or (2), 14 (a) or (b) or 43;

"employers' organization" means an organization of employers formed for purposes that include the regulation of relations between employers and employees;

"employment" includes the relationship of master and servant, master and apprentice and principal and agent, if a substantial part of the agent's services relate to the affairs of one principal, and **"employ"** has a corresponding meaning;

"employment agency" includes a person who undertakes, with or without compensation, to procure employees for employers or to procure employment for persons;

"intervenor" means a person allowed under section 22.1 to intervene in a complaint;

"member" means a person appointed under section 31 (1) (b) as a member of the tribunal;

"occupational association" means an organization, other than a trade union or employers' organization, in which membership is a prerequisite to carrying on a trade, occupation or profession;

"panel" means a panel designated under section 27.1 (1) (b);

"party", with respect to a complaint, means the complainant and the person against whom the complaint is made and any person that the tribunal adds as a party;

"person" includes an employer, an employment agency, an employers' organization, an occupational association and a trade union;

"trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers;

"tribunal" means the British Columbia Human Rights Tribunal continued under section 31.

Discrimination and intent

2 Discrimination in contravention of this Code does not require an intention to contravene this Code.

Purposes

3 The purposes of this Code are as follows:

(a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;

(b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;

(c) to prevent discrimination prohibited by this Code;

(d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;

(e) to provide a means of redress for those persons who are discriminated against contrary to this Code.

Code prevails

4 If there is a conflict between this Code and any other enactment, this Code prevails.

Education and information programs

5 The minister is responsible for developing and conducting a program of public education and information designed to promote an understanding of this Code.

Research and public consultations

6 The minister may

(a) conduct or encourage research into matters relevant to this Code, and

(b) carry out consultations relevant to this Code.

Discriminatory publication

7 (1) A person must not publish, issue or display, or cause to be published, issued or displayed, any statement, publication, notice, sign, symbol, emblem or other representation that

(a) indicates discrimination or an intention to discriminate against a person or a group or class of persons, or

(b) is likely to expose a person or a group or class of persons to hatred or contempt

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or that group or class of persons.

(2) Subsection (1) does not apply to a private communication, a communication intended to be private or a communication related to an activity otherwise

permitted by this Code.

Discrimination in accommodation, service and facility

8 (1) A person must not, without a bona fide and reasonable justification,

(a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or

(b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or class of persons.

(2) A person does not contravene this section by discriminating

(a) on the basis of sex, if the discrimination relates to the maintenance of public decency or to the determination of premiums or benefits under contracts of life or health insurance, or

(b) on the basis of physical or mental disability or age, if the discrimination relates to the determination of premiums or benefits under contracts of life or health insurance.

Discrimination in purchase of property

9 A person must not

(a) deny to a person or class of persons the opportunity to purchase a commercial unit or dwelling unit that is in any way represented as being available for sale,

(b) deny to a person or class of persons the opportunity to acquire land or an interest in land, or

(c) discriminate against a person or class of persons regarding a term or condition of the purchase or other acquisition of a commercial unit, dwelling unit, land or interest in land

because of the race, colour, ancestry, place of origin, religion, marital status, physical or mental disability, sexual orientation or sex of that person or class of persons.

Discrimination in tenancy premises

10 (1) A person must not

(a) deny to a person or class of persons the right to occupy, as a tenant, space that is represented as being available for occupancy by a tenant, or

(b) discriminate against a person or class of persons regarding a term or condition of the tenancy of the space,

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or lawful source of income of that person or class of persons, or of any other person or class of persons.

(2) Subsection (1) does not apply in the following circumstances:

(a) if the space is to be occupied by another person who is to share, with the person making the representation, the use of any sleeping, bathroom or cooking facilities in the space;

(b) as it relates to family status or age,

(i) if the space is a rental unit in residential premises in which every rental unit is reserved for rental to a person who has reached 55 years of age or to 2 or more persons, at least one of whom has reached 55 years of age, or

(ii) a rental unit in a prescribed class of residential premises;

(c) as it relates to physical or mental disability, if

(i) the space is a rental unit in residential premises,

(ii) the rental unit and the residential premises of which the rental unit forms part,

(A) are designed to accommodate persons with disabilities, and

(B) conform to the prescribed standards, and

(iii) the rental unit is offered for rent exclusively to a person with a disability or to 2 or more persons, at least one of whom has a physical or mental disability.

Discrimination in employment advertisements

11 A person must not publish or cause to be published an advertisement in connection with employment or prospective employment that expresses a limitation, specification or preference as to race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age unless the limitation, specification or preference is based on a bona fide occupational requirement.

Discrimination in wages

12 (1) An employer must not discriminate between employees by employing an employee of one sex for work at a rate of pay that is less than the rate of pay at which an employee of the other sex is employed by that employer for similar or substantially similar work.

(2) For the purposes of subsection (1), the concept of skill, effort and responsibility must, subject to factors in respect of pay rates such as seniority systems, merit systems and systems that measure earnings by quantity or quality of production, be used to determine what is similar or substantially similar work.

(3) A difference in the rate of pay between employees of different sexes based on a factor other than sex does not constitute a failure to comply with this section if the factor on which the difference is based would reasonably justify the difference.

(4) An employer must not reduce the rate of pay of an employee in order to comply

with this section.

(5) If an employee is paid less than the rate of pay to which the employee is entitled under this section, the employee is entitled to recover from the employer, by action, the difference between the amount paid and the amount to which the employee is entitled, together with the costs, but

(a) the action must be commenced no later than 12 months from the termination of the employee's services, and

(b) the action applies only to wages of an employee during the 12 month period immediately before the earlier of the date of the employee's termination or the commencement of the action.

Discrimination in employment

13 (1) A person must not

(a) refuse to employ or refuse to continue to employ a person, or

(b) discriminate against a person regarding employment or any term or condition of employment

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

(2) An employment agency must not refuse to refer a person for employment for any reason mentioned in subsection (1).

(3) Subsection (1) does not apply

(a) as it relates to age, to a bona fide scheme based on seniority, or

(b) as it relates to marital status, physical or mental disability, sex or age, to the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan, whether or not the plan is the subject of a contract of insurance between an insurer and an employer.

(4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

Discrimination by unions and associations

14 A trade union, employers' organization or occupational association must not

(a) exclude any person from membership,

(b) expel or suspend any member, or

(c) discriminate against any person or member

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or member, or because that person or member has been convicted of a criminal or summary conviction offence that is unrelated to the membership or

intended membership.

Complaints

21 (1) Any person or group of persons that alleges that a person has contravened this Code may file a complaint with the tribunal in a form satisfactory to the tribunal.

(2) and (3) [repealed]

(4) Subject to subsection (5), a complaint under subsection (1) may be filed on behalf of

(a) another person, or

(b) a group or class of persons whether or not the person filing the complaint is a member of that group or class.

(5) A member or panel may refuse to accept, for filing under subsection (1), a complaint made on behalf of another person or a group or class of persons if that member or panel is satisfied that

(a) the person alleged to have been discriminated against does not wish to proceed with the complaint, or

(b) proceeding with the complaint is not in the interest of the group or class on behalf of which the complaint is made.

(6) A member or panel may proceed with 2 or more complaints together if a member or panel is satisfied that it is fair and reasonable in the circumstances to do so.

Time limit for filing a complaint

22 (1) A complaint must be filed within 6 months of the alleged contravention.

(2) If a continuing contravention is alleged in a complaint, the complaint must be filed within 6 months of the last alleged instance of the contravention.

(3) If a complaint is filed after the expiration of the time limit referred to in subsection (1) or (2), a member or panel may accept all or part of the complaint if the member or panel determines that

(a) it is in the public interest to accept the complaint, and

(b) no substantial prejudice will result to any person because of the delay.

Intervenors

22.1 A member or panel may, at any time after the complaint is filed and on the terms specified by the member or panel, allow any person or group of persons to intervene in the complaint, whether or not that person or group would be affected by an order made by the member or panel under section 37.

Deferral of a complaint

25 (1) In this section and in section 27, **"proceeding"** includes a proceeding authorized by another Act and a grievance under a collective agreement.

(2) If at any time after a complaint is filed a member or panel determines that another proceeding is capable of appropriately dealing with the substance of a complaint, the member or panel may defer further consideration of the complaint until the outcome of the other proceeding.

Dismissal of a complaint

27 (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:

(a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;

(b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;

(c) there is no reasonable prospect that the complaint will succeed;

(d) proceeding with the complaint or that part of the complaint would not

(i) benefit the person, group or class alleged to have been discriminated against, or

(ii) further the purposes of this Code;

(e) the complaint or that part of the complaint was filed for improper motives or made in bad faith;

(f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;

(g) the contravention alleged in the complaint or that part of the complaint occurred more than 6 months before the complaint was filed unless the complaint or that part of the complaint was accepted under section 22 (3).

(2) If a member or panel dismisses a complaint or part of a complaint under subsection (1), that member or panel must inform the following persons of the decision in writing and give reasons for the decision:

(a) the complainant;

(b) the person against whom the complaint was made, if that person had been given notice of the complaint;

(c) any other party;

(d) an intervenor.

Assignment of complaints

27.1 (1) For the purposes of making a decision or order in respect of a complaint, the chair may assign the complaint to

(a) a single member designated by the chair, or

(b) a panel of 3 members designated by the chair.

(2) If a panel is designated under subsection (1) (b), the chair must designate one of the members of the panel to preside.

Evidence

27.2 (1) A member or panel may receive and accept on oath, by affidavit or otherwise, evidence and information that the member or panel considers necessary and appropriate, whether or not the evidence or information would be admissible in a court of law.

(2) Nothing is admissible in evidence before a member or panel that is inadmissible in a court because of a privilege under the law of evidence.

(3) Despite section 4, subsection (1) of this section does not override an Act expressly limiting the extent to which or purposes for which evidence may be admitted or used in any proceeding.

(4) A member or panel may direct that all or part of the evidence of a witness be heard in private.

Powers to make rules and orders respecting practice and procedure

27.3 (1) The tribunal may make rules respecting practice and procedure to facilitate just and timely resolution of complaints.

(2) Without limiting subsection (1), the tribunal may make rules as follows:

(a) respecting the holding of prehearing conferences and requiring the parties to attend a prehearing conference in order to discuss issues relating to a complaint and the possibility of simplifying or disposing of issues;

(b) respecting disclosure of evidence, including but not limited to prehearing disclosure and prehearing examination of a party on oath or solemn affirmation or by affidavit;

(c) specifying the form of notice to be given to a party by another party or by the tribunal requiring a party to diligently pursue a complaint and specifying the time within which and the manner in which the party must respond to the notice;

(d) respecting service of notices and orders, including substituted service;

(e) requiring a party or an intervenor to provide an address for service or delivery of notices and orders;

(f) providing that a party's or an intervenor's address of record is to be treated as an address for service;

(g) respecting procedures for matters under sections 22, 25 and 27;

(h) respecting mediation and other dispute resolution processes, including, without limitation, rules that would permit or require mediation of a complaint, whether the mediation is provided by a member or by a person appointed, engaged or retained under section 33;

(i) respecting procedures for formal offers to settle a complaint;

(j) respecting the amendment of a complaint or a response to a complaint;

(k) respecting the addition of parties to a complaint;

(l) respecting applications under section 42 (3).

(3) In order to facilitate the just and timely resolution of a complaint, a member or panel, on their own initiative or on application of a party or an intervenor, may make any order for which a rule could be made under subsection (1) or (2).

Dismissal for failure to pursue complaint

27.5 If, under the rules, a party has been given notice requiring the party to diligently pursue a complaint and the party fails to act on the notice within the time allowed, then on the request of another party or on its own initiative, a member or panel may dismiss the complaint.

Assisting parties to settle

27.6 A member or a person appointed, engaged or retained under section 33 may assist the parties to a complaint, through mediation or any other dispute resolution process, to achieve a settlement.

Enforcement of settlement agreements

30 (1) If there has been a breach of the terms of a settlement agreement, a party to the settlement agreement may apply to the Supreme Court to enforce the settlement agreement to the extent that the terms of the settlement agreement could have been ordered by the tribunal.

(2) The right to enforce a settlement agreement under subsection (1) cannot be waived.

(3) A provision of a settlement agreement that purports to waive the right to enforce the agreement under subsection (1) is void.

Human Rights Tribunal

31 (1) The British Columbia Human Rights Tribunal is continued consisting of the following individuals appointed by the Lieutenant Governor in Council after a merit based process:

(a) a member designated as the chair;

(b) other members appointed after consultation with the chair.

(2) All members hold office for an initial term of 5 years and may be reappointed for additional terms of 5 years.

Application of *Administrative Tribunals Act*

32 Sections 1, 4 to 10, 17, 29, 30, 34 (3) and (4), 45, 46, 46.1(3) to (9), 48 to 50, 55 to 57, 59 and 61 of the *Administrative Tribunals Act* apply to the tribunal.

Staff of the tribunal

33 (1) Employees necessary to carry out the powers and duties of the tribunal may be appointed under the *Public Service Act*.

(2) The tribunal may engage or retain consultants or specialists that the tribunal considers necessary to carry out the powers and duties of the tribunal and may determine their remuneration.

(3) The *Public Service Act* does not apply to the retention, remuneration or engagement of consultants or specialists under subsection (2).

Remedies

37 (1) If the member or panel designated to hear a complaint determines that the complaint is not justified, the member or panel must dismiss the complaint.

(2) If the member or panel determines that the complaint is justified, the member or panel

(a) must order the person that contravened this Code to cease the contravention and to refrain from committing the same or a similar contravention,

(b) may make a declaratory order that the conduct complained of, or similar conduct, is discrimination contrary to this Code,

(c) may order the person that contravened this Code to do one or both of the following:

(i) take steps, specified in the order, to ameliorate the effects of the discriminatory practice;

(ii) adopt and implement an employment equity program or other special program to ameliorate the conditions of disadvantaged individuals or groups if the evidence at the hearing indicates the person has engaged in a pattern or practice that contravenes this Code, and

(d) if the person discriminated against is a party to the complaint, or is an identifiable member of a group or class on behalf of which a complaint is filed, may order the person that contravened this Code to do one or more of the following:

(i) make available to the person discriminated against the right, opportunity or privilege that, in the opinion of the member or panel, the person was denied contrary to this Code;

(ii) compensate the person discriminated against for all, or a part the member or panel determines, of any wages or salary lost, or expenses incurred, by the contravention;

(iii) pay to the person discriminated against an amount that the member or panel considers appropriate to compensate that person for injury to dignity, feelings and self respect or to any of them.

(3) An order made under subsection (2) may require the person against whom the order is made to provide any person designated in the order with information respecting the implementation of the order.

(4) The member or panel may award costs

(a) against a party to a complaint who has engaged in improper conduct during the course of the complaint, and

(b) without limiting paragraph (a), against a party who contravenes a rule under section 27.3 (2) or an order under section 27.3 (3).

(5) A decision or order of a member or panel is a decision or order of the tribunal for the purposes of this Code.

(6) The member or panel must inform the parties and any intervenor in writing of the decision made under this section and give reasons for the decision.

Modification of orders

38 (1) Until an order made under section 37 (2) (c) or (d) (i) has been fully implemented, any party or a person designated in the order may apply to the member or panel that made the order, or to a member or panel designated by the chair, for a modification of that order on the grounds that the order is no longer appropriate because of unforeseen circumstances.

(2) The member or panel may vary or rescind the order after determining that the order

(a) has not been fully implemented, and

(b) is no longer appropriate because of unforeseen circumstances.

(3) In varying an order under subsection (2), the member or panel may exercise any of the powers under section 37 (2) (a), (c) or (d).

Enforcement of remedies

39 (1) If an order is made under section 37 (2) (a), (c) or (d) or (4) or 38 (2), the party in whose favour the order is made or a person designated in the order may file a certified copy of the order with the Supreme Court.

(2) An order filed under subsection (1) has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the Supreme Court.

Annual report

39.1 (1) As soon as practicable after the end of the fiscal year of the government, the tribunal must submit to the minister an annual report on the activities of the tribunal.

(2) The minister must promptly lay the report before the Legislative Assembly if it is in session or, if it is not in session when the report is submitted, within

15 days after the beginning of the next session.

Disclosure

40 (1) [repealed]

(2) Any information received by any person in the course of attempting to reach a settlement of a complaint is confidential and may not be disclosed or admitted in evidence except with the consent of the person who gave the information.

Exemptions

41 (1) If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a physical or mental disability or by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons.

(2) Nothing in this Code prohibits a distinction on the basis of age if that distinction is permitted or required by any Act or regulation.

Special programs

42 (1) It is not discrimination or a contravention of this Code to plan, advertise, adopt or implement an employment equity program that

(a) has as its objective the amelioration of conditions of disadvantaged individuals or groups who are disadvantaged because of race, colour, ancestry, place of origin, physical or mental disability, or sex, and

(b) achieves or is reasonably likely to achieve that objective.

(2) [repealed]

(3) On application by any person, with or without notice to any other person, the chair, or a member or panel designated by the chair, may approve any program or activity that has as its objective the amelioration of conditions of disadvantaged individuals or groups.

(4) Any program or activity approved under subsection (3) is deemed not to be in contravention of this Code.

Protection

43 A person must not evict, discharge, suspend, expel, intimidate, coerce, impose any pecuniary or other penalty on, deny a right or benefit to or otherwise discriminate against a person because that person complains or is named in a complaint, gives evidence or otherwise assists in a complaint or other proceeding under this Code.

Style of cause for proceedings

44 (1) A proceeding under this Code in respect of a trade union, employers' organi-

zation or occupational association may be taken in its name.

(2) An act or thing done or omitted by an employee, officer, director, official or agent of any person within the scope of his or her authority is deemed to be an act or thing done or omitted by that person.

Technical defects

45 A proceeding under this Code is not invalid because of any defect in form or any technical irregularity.

Delegation of powers

46 (1) to (3) [repealed]

(4) The chair may, in writing, delegate to one or more of the members any of the chair's powers or duties under this Code, except the power to delegate under this section.

(5) A delegation made under this section may be revoked, and does not prevent the person who delegated the power from exercising that power.

(6) A delegation may be made subject to any terms the person delegating considers appropriate.

(7) If the person who delegated the power ceases to hold office, the delegation continues in effect so long as the delegate continues in office or until the delegation is revoked by the person who succeeds the person who delegated the power.

(8) A person purporting to exercise a power because of a delegation made under this section must, when requested to do so, produce evidence of the person's authority to exercise the power.

Time limits

47 Despite the fact that a period prescribed under section 49 (2) (b) has expired and the period has not been extended in accordance with the regulations, this Code continues to apply to the complaint to which the period relates, and

(a) all proceedings taken under this Code with respect to the complaint may continue, and

(b) all proceedings available under this Code with respect to the complaint may be taken.

Offence Act

48 Section 5 of the *Offence Act* does not apply to this Code or the regulations.

Power to make regulations

49 (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make

regulations as follows:

(a) prescribing the standards for the purposes of section 10;

(b) prescribing a period

(i) to (iv) [repealed]

(v) within which a hearing must be begun, and

(vi) within which a decision and reasons must be provided under section 37 (6);

(c) authorizing a person to extend a period referred to in paragraph (b) and prescribing the circumstances in which the period may be extended;

(d) respecting the procedures to be followed before a period prescribed under paragraph (b) may be extended;

(e) providing for the suspension of a period prescribed under paragraph (b) where consideration of a complaint is deferred under section 25 (2);

(f) [repealed]

(g) respecting the practice and procedure in hearings before the tribunal.

(h) [repealed]

(3) A regulation made under subsection (2) (c) may permit a period to be extended despite the fact that the period has already expired.

(4) Without limiting subsection (2) (g), a regulation made under that subsection may include provisions respecting

(a) the disclosure and inspection of documents by parties to a complaint,

(b) the oral examination of parties and witnesses on oath or affirmation,

(c) the holding of prehearing conferences, and

(d) procedures for formal offers to settle a complaint.

Transitional

(1) Unless it has been dismissed or otherwise settled or withdrawn, a complaint that is filed with the commissioner of investigation and mediation under section 21 of the *Human Rights Code* on or before the date on which section 8 of this Act comes into force is continued as if it were a complaint filed with the tribunal within the time limit under that Code.

(2) A decision of the commissioner of investigation and mediation under section 21(5) or (6), 22(3) or 25(2) of the *Human Rights Code* is deemed to be a decision of the tribunal under that Code.

Administrative Tribunals Act

Definitions

1 In this Act:

"applicant" includes an appellant, a claimant or a complainant;

"application" includes an appeal, a review or a complaint but excludes any interim or preliminary matter or an application to the court;

"appointing authority" means the person or the Lieutenant Governor in Council who, under another Act, has the power to appoint the chair, vice chair and members, or any of them, to the tribunal;

"constitutional question" means any question that requires notice to be given under section 8 of the *Constitutional Question Act*;

"court" means the Supreme Court;

"decision" includes a determination, an order or other decision;

"dispute resolution process" means a confidential and without prejudice process established by the tribunal to facilitate the settlement of one or more issues in dispute;

"intervener" means a person who is permitted by the tribunal to participate as an intervener in an application;

"member" means a person appointed to the tribunal to which a provision of this Act applies;

"privative clause" means provisions in the tribunal's enabling Act that give the tribunal exclusive and final jurisdiction to inquire into, hear and decide certain matters and questions and provide that a decision of the tribunal in respect of the matters within its jurisdiction is final and binding and not open to review in any court;

"tribunal" means a tribunal to which some or all of the provisions of this Act are made applicable under the tribunal's enabling Act;

"tribunal's enabling Act" means the Act under which the tribunal is established or continued.

Appointment of acting chair

4 (1) If the chair expects to be absent or is absent, the chair may designate a vice chair as the acting chair for the period that the chair is absent.

(2) If the chair expects to be absent or is absent and there is no vice chair or if there is a vice chair and the vice chair is not willing or able to act as chair, the chair may designate a member as the acting chair for the period that the chair is absent.

(3) Despite subsections (1) and (2), if the chair is absent or incapacitated for an extended period of time, the appointing authority may designate a vice chair as the acting chair for the period that the chair is absent or incapacitated.

(4) Despite subsections (1) and (2), if the chair is absent or incapacitated for an extended period of time and there is no vice chair or if there is a vice chair and the vice chair is not willing or able to act as chair, the appointing authority may designate a member, or appoint an individual who would otherwise be qualified for appointment as a member or as the chair, as the acting chair for the period that the chair is absent or incapacitated.

(5) If the tribunal has no chair, the appointing authority may appoint an individual, who is a member, or appoint an individual who would otherwise be qualified for appointment as a member or as the chair, as the acting chair for a term of up to 6 months.

(6) In exceptional circumstances an individual may be appointed as the acting chair under subsection (5) for an additional term of up to 6 months.

(7) Subsections (3), (4) and (5) apply whether or not an individual is designated, under the Act under which the chair is appointed, to act on behalf of the chair.

(8) An individual designated or appointed under any of subsections (1) to (5) has all the powers and may perform all the duties of the chair.

Member's absence or incapacitation

5 (1) If a member is absent or incapacitated for an extended period of time or expects to be absent for an extended period of time, the appointing authority, after consultation with the chair, may appoint another person, who would otherwise be qualified for appointment as a member, to replace the member until the member returns to full duty or the member's term expires, whichever comes first.

(2) The appointment of a person to replace a member under subsection (1) is not affected by the member returning to less than full duty.

Temporary, non-renewable appointments

6 (1) If the tribunal requires additional members, the chair, after consultation with the minister responsible for the Act under which the tribunal is established, may appoint an individual, who would otherwise be qualified for appointment as a member, to be a member for up to 6 months.

(2) Under subsection (1), an individual may be appointed to the tribunal only twice in any 2 year period.

(3) An appointing authority may establish conditions and qualifications for appointments under subsection (1).

Powers after resignation or expiry of term

7 (1) If a member resigns or their appointment expires, the chair may authorize that individual to continue to exercise powers as a member of the tribunal in any proceeding over which that individual had jurisdiction immediately before the end of their term.

(2) An authorization under subsection (1) continues until a final decision in that proceeding is made.

(3) If an individual performs duties under subsection (1), section 10 applies.

Termination for cause

8 The appointing authority may terminate the appointment of the chair, a vice chair or a member for cause.

Responsibilities of the chair

9 The chair is responsible for the effective management and operation of the tribunal and the organization and allocation of work among its members.

Remuneration and benefits for members

10 (1) In accordance with general directives of the Treasury Board, members must be reimbursed for reasonable travelling and out of pocket expenses necessarily incurred in carrying out their duties.

(2) In accordance with general directives of the Treasury Board, the minister responsible for the tribunal's enabling Act must set the remuneration for those members who are to receive remuneration.

Withdrawal or settlement of application

17 (1) If an applicant withdraws all or part of an application or the parties advise the tribunal that they have reached a settlement of all or part of an application, the tribunal must order that the application or the part of it is dismissed.

(2) If the parties reach a settlement in respect of all or part of the subject matter of an application, on the request of the parties, the tribunal may make an order that includes the terms of settlement if it is satisfied that the order is consistent with its enabling Act.

(3) If the tribunal declines to make an order under subsection (2), it must provide the parties with reasons.

Disclosure protection

29 (1) In a proceeding, other than a criminal proceeding, unless the parties to an application consent, a person must not disclose or be compelled to disclose

(a) a document or other record created by a party specifically for the purposes of achieving a settlement of one or more issues through a dispute resolution process, or

(b) a statement made by a party in a dispute resolution process specifically for the purpose of achieving a settlement of one or more issues in dispute.

(2) Subsection (1) does not apply to a settlement agreement.

Tribunal duties

30 Tribunal members must faithfully, honestly and impartially perform their duties and must not, except in the proper performance of those duties, disclose to any person any information obtained as a member.

Power to compel witnesses and order disclosure

34 (3) Subject to section 29, at any time before or during a hearing, but before its decision, the tribunal may make an order requiring a person

(a) to attend an oral or electronic hearing to give evidence on oath or affirmation or in any other manner that is admissible and relevant to an issue in an application, or

(b) to produce for the tribunal or a party a document or other thing in the person's possession or control, as specified by the tribunal, that is admissible and relevant to an issue in an application.

(4) The tribunal may apply to the court for an order

(a) directing a person to comply with an order made by the tribunal under subsection (3), or

(b) directing any directors and officers of a person to cause the person to comply with an order made by the tribunal under subsection (3).

Tribunal without jurisdiction over Canadian Charter of Rights and Freedoms issues

45 (1) The tribunal does not have jurisdiction over constitutional questions relating to the *Canadian Charter of Rights and Freedoms*.

(1.1) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

(2) If a constitutional question, other than one relating to the *Canadian Charter of Rights and Freedoms*, is raised by a party in a tribunal proceeding

(a) on the request of a party or on its own initiative, at any stage of an application the tribunal may refer that question to the court in the form of a stated case, or

(b) on the request of the Attorney General, the tribunal must refer that question to the court in the form of a stated case.

(3) The stated case must

(a) be prepared by the tribunal,

(b) be in writing,

(c) be filed with the court registry, and

(d) include a statement of the facts and relevant evidence.

(4) Subject to the direction of the court, the tribunal must

(a) to the extent that it is practicable in light of the stated case, proceed to hear and decide all questions except the questions raised in the stated case,

(b) suspend the application as it relates to the stated case and reserve its decision until the opinion of the court has been given, and

(c) decide the application in accordance with the opinion.

(5) A stated case must be brought on for hearing as soon as practicable.

(6) Subject to subsection (7), the court must hear and determine the stated case and give its decision as soon as practicable.

(7) The court may refer the stated case back to the tribunal for amendment or clarification, and the tribunal must promptly amend and return the stated case for the opinion of the court.

Notice to Attorney General if constitutional question raised in application

46 If a constitutional question over which the tribunal has jurisdiction is raised in a tribunal proceeding, the party who raises the question must give notice in compliance with section 8 of the *Constitutional Question Act*.

Notice to Attorney General if conflict between Code and other enactment (unofficial heading)

46.1(3) If, in an application before the tribunal, a party or an intervener raises the question of whether there is a conflict between the *Human Rights Code* and any other enactment, the party or intervener must serve notice on the Attorney General in accordance with this section.

(4) The notice must contain the following information:

(a) the names and addresses for delivery of the parties and interveners to the application;

(b) the name of the tribunal and address of the tribunal's registry;

(c) any identification numbers assigned by the tribunal to the application;

(d) the section of the enactment and the section of the *Human Rights Code* that may conflict and the basis on which the question of a conflict arises;

(e) the date, time and location of any hearing scheduled by the tribunal to consider the question.

(5) The notice must be served on the Attorney General at least 14 days before the date of any hearing scheduled by the tribunal to consider the question, unless the Attorney General, in writing, waives this requirement.

(6) The tribunal may not hear the question of whether there is a conflict between the *Human Rights Code* and any other enactment until after the Attorney General has been served with notice in accordance with this section.

(7) If the party or intervener required to serve notice on the Attorney General does not provide proof of service satisfactory to the tribunal, the tribunal may

(a) adjourn the hearing of the question until the party or intervener provides proof of service satisfactory to the tribunal, or

(b) decline to consider the question and proceed to hear the remainder of the application.

(8) If the Attorney General has been served with notice in accordance with this section and intends to appear at the hearing scheduled to consider the question, the Attorney General

(a) must give notice to the tribunal and the parties and interveners to the application at least 3 days before the date of the hearing, and

(b) has the same rights as any other party to the hearing.

(9) Subsections (3) to (8) do not apply if the Attorney General is representing a party or intervener in the application before the tribunal.

Maintenance of order at hearings

48 (1) At an oral hearing, the tribunal may make orders or give directions that it considers necessary for the maintenance of order at the hearing, and, if any person disobeys or fails to comply with any order or direction, the tribunal may call on the assistance of any peace officer to enforce the order or direction.

(2) A peace officer called on under subsection (1) may take any action that is necessary to enforce the order or direction and may use such force as is reasonably required for that purpose.

(3) Without limiting subsection (1), the tribunal, by order, may

(a) impose restrictions on a person's continued participation in or attendance at a proceeding, and

(b) exclude a person from further participation in or attendance at a proceeding until the tribunal orders otherwise.

Contempt proceeding for uncooperative witness or other person

49 (1) The failure or refusal of a person summoned as a witness to do any of the following makes the person, on application to the court by the tribunal, liable to be committed for contempt as if in breach of an order or judgment of the court:

(a) attend a hearing;

(b) take an oath or affirmation;

(c) answer questions;

(d) produce the records or things in their custody or possession.

(2) The failure or refusal of a person to comply with an order or direction under section 48 makes the person, on application to the court by the tribunal, liable to be committed for contempt as if in breach of an order or judgment of the court.

(3) Subsections (1) and (2) do not limit the conduct for which a finding of contempt may be made by the court in respect of conduct by a person in a proceeding before the tribunal.

Decisions

50 (1) If the tribunal makes an order for the payment of money as part of its decision, it must set out in the order the principal sum, and if the tribunal has power to award interest and interest is payable, the rate of interest and the date from which it is to be calculated.

(2) The tribunal may attach terms or conditions to a decision.

(3) The tribunal's decision is effective on the date on which it is issued, unless otherwise specified by the tribunal.

(4) The tribunal must make its decisions accessible to the public.

Compulsion protection

55 (1) A tribunal member, a person acting on behalf of or under the direction of a tribunal member or a person who conducts a dispute resolution process on behalf of or under the direction of the tribunal must not be required to testify or produce evidence in any proceeding, other than a criminal proceeding, about records or information obtained in the discharge of duties under the tribunal's enabling Act or this Act.

(2) Despite subsection (1), the court may require the tribunal to produce the record of a proceeding that is the subject of an application for judicial review under the *Judicial Review Procedure Act*.

Immunity protection for tribunal and members

56 (1) In this section, **"decision maker"** includes a tribunal member, adjudicator, registrar or other officer who makes a decision in an application or an interim or preliminary matter, or a person who conducts a dispute resolution process.

(2) Subject to subsection (3), no legal proceeding for damages lies or may be commenced or maintained against a decision maker, the tribunal or the government because of anything done or omitted

(a) in the performance or intended performance of any duty under this Act or the tribunal's enabling Act, or

(b) in the exercise or intended exercise of any power under this Act or the tribunal's enabling Act.

(3) Subsection (2) does not apply to a person referred to in that subsection in relation to anything done or omitted by that person in bad faith.

Time limit for judicial review

57 (1) Unless this Act or the tribunal's enabling Act provides otherwise, an application for judicial review of a final decision of the tribunal must be commenced within 60 days of the date the decision is issued.

(2) Despite subsection (1), either before or after expiration of the time, the court may extend the time for making the application on terms the court considers proper, if it is satisfied that there are serious grounds for relief, there is a reasonable explanation for the delay and no substantial prejudice or hardship will result to a person affected by the delay.

Standard of review if tribunal's enabling Act has no privative clause

59 (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.

(2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.

(3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.

(4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,

(b) is exercised for an improper purpose,

(c) is based entirely or predominantly on irrelevant factors, or

(d) fails to take statutory requirements into account.

(5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

Application of Freedom of Information and Protection of Privacy Act

61 (1) In this section, **"decision maker"** includes a tribunal member, adjudicator, registrar or other officer who makes a decision in an application or an interim or preliminary matter, or a person who conducts a dispute resolution process.

(2) The *Freedom of Information and Protection of Privacy Act*, other than section 44 (2), (2.1) and (3), does not apply to any of the following:

(a) a personal note, communication or draft decision of a decision maker;

(b) notes or records kept by a person appointed by the tribunal to conduct a dispute resolution process in relation to an application;

(c) any information received by the tribunal in a hearing or part of a hearing from which the public, a party or an intervener was excluded;

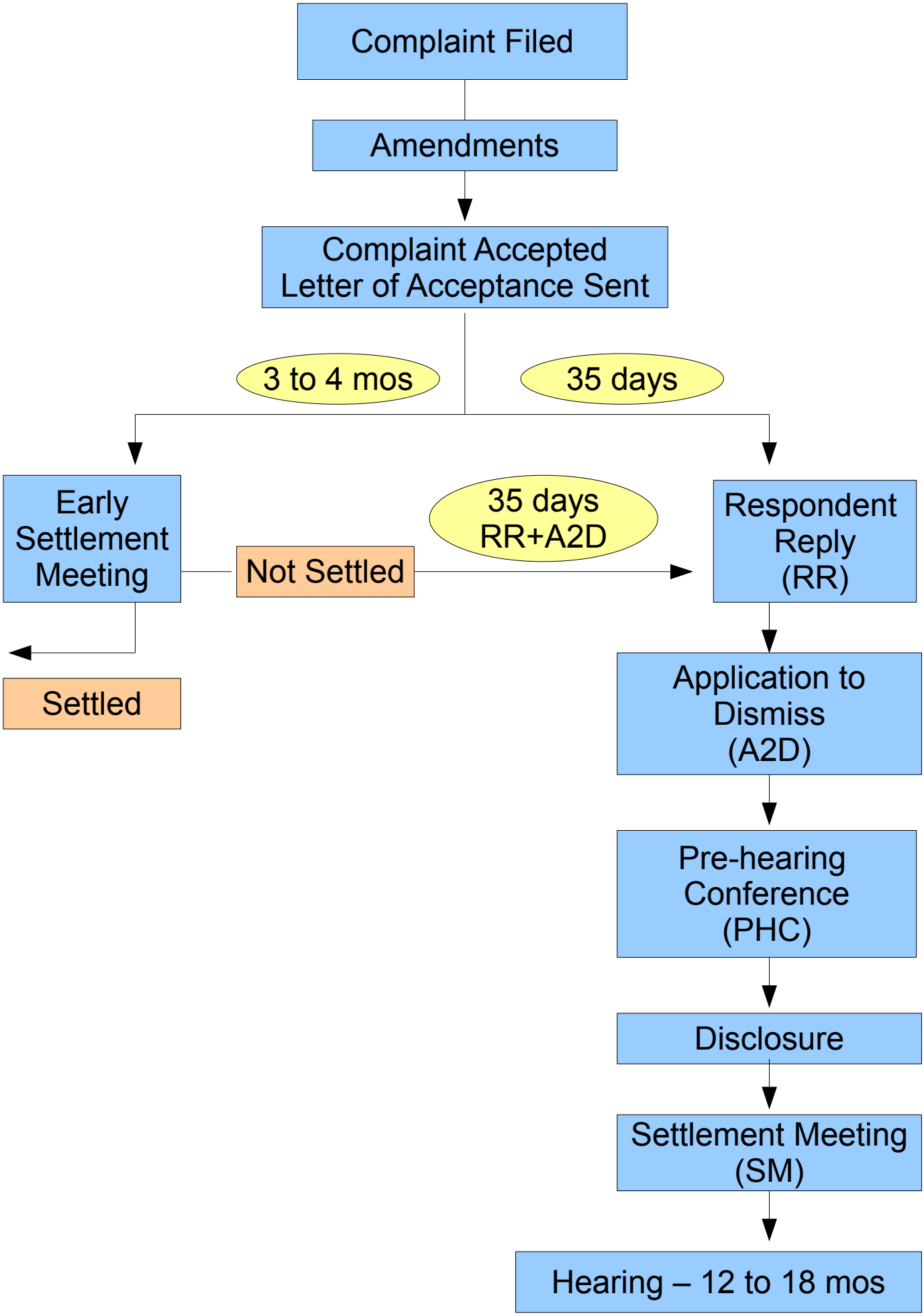
(d) a transcription or tape recording of a tribunal proceeding;

(e) a document submitted in a hearing for which public access is provided by the tribunal;

(f) a decision of the tribunal for which public access is provided by the tribunal.

(3) Subsection (2) does not apply to personal information, as defined in the *Freedom of Information and Protection of Privacy Act*, that has been in existence for 100 or more years or to other information that has been in existence for 50 or more years.

	Protected Areas			
Protected Grounds	***Employment***	***Public Services & Accommodation***	***Purchase of Property***	***Tenancy***
Race	✓	✓	✓	✓
Colour	✓	✓	✓	✓
Ancestry	✓	✓	✓	✓
Place of Origin	✓	✓	✓	✓
Political Belief (as long as it does not cause harm to others)	✓	✗	✗	✗
Religion	✓	✓	✓	✓
Marital Status (includes protection if you are married, single, widowed, divorced, separated, or living common law)	✓	✓	✓	✓
Family Status (includes having children or not having children)	✓	✓	✗	✓
Physical or Mental Disability	✓	✓	✓	✓
Sex (includes protection for males and females, sexual harassment, pregnancy discrimination and transgendered discrimination)	✓	✓	✓	✓
Sexual Orientation (includes protection for heterosexual, bi-sexual, gay men and lesbian women)	✓	✓	✓	✓
Age (19 and over)	✓	✓	✗	✓
Criminal or summary conviction	✓	✗	✗	✗
Source of Income	✗	✗	✗	✓


Complaint Filed
Amendments
Complaint Accepted
Letter of Acceptance Sent
3 to 4 mos
35 days
Early
Settlement
Meeting
Not Settled
35 days
RR+A2D
Respondent
Reply
(RR)
Settled
Application to
Dismiss
(A2D)
Pre-hearing
Conference
(PHC)
Disclosure
Settlement Meeting
(SM)
Hearing – 12 to 18 mos

BC Human Rights Coalition

We find that quite often there is confusion about the services that we, the BC Human Rights **Coalition** provide and the services that the BC Human Rights **Tribunal** provides. This is understandable. Below we have tried to explain some of the differences and who does what.

The BC Human Rights Tribunal	The BC Human Rights Coalition including the BC Human Rights Clinic
They are the "Court" which makes decisions on human rights complaints.	We provide Legal Assistance (think of us as legal aid for Human Rights cases). We also provide Education services about Human Rights.
Their Inquiry Officers can send you forms and tell you about the Tribunal process.	Our Information Coordinators can explain (in general terms) how the law works, assist in helping determine if you might have a complaint, suggest who might be the best organization to help resolve your complaint.
They provide the Forms that need to be completed to file a complaint, respond to a complaint, withdraw a complaint etc…	We provide a Short Service Clinic on Mondays at their location where we help draft complaints, answer questions and help with paperwork.
You file your complaint with them.	Once your complaint is accepted (46 weeks after filing) you can send your complaint to our "Intake Committee" to see if we can help you.
Their Case Managers screen complaints to make sure it is something the Tribunal has legal authority to deal with, and if so it is accepted for filing.	Our Intake Committee looks at complaints accepted by the Tribunal to see if we will/can represent the Complainant(s). If help is denied the Complainant has 14 days to appeal to the Appeals Committee.
Case Managers manage the complaint for the Tribunal, setting dates, sending letters - generally administering the paperwork of the file.	Our Administrative Assistants to the Advocates are generally the first people Complainants speak with once they have been accepted for representation. Assistants set up the files, set dates, send letters, and attend pre-hearing conference calls for Complainants.
The Tribunal does not provide lawyers for either side but Respondent(s) (defendants) can hire Respondent Counsel (Lawyer). The Tribunal cannot give legal advice.	Advocates are the ones responsible for providing legal assistance to Complainants. Most of the Advocates are Lawyers, but they are acting as advocates only.
A Tribunal Member – is like a "Judge" at the Tribunal who makes decisions on cases. A Member will also act as a Mediator at a Tribunal settlement meeting.	Advocates attend with Complainants at settlement meetings and argue (via submissions) the case of the Complainant in preliminary applications. Advocates do not represent clients at Final Hearings, but do prepare the case for the Clinic's litigation partners at CLAS to argue (if they are available).
BC Human Rights Tribunal 1170 - 605 Robson Street Vancouver, B.C. V6B 5J3 Ph.: (604) 7752000 Fax: (604) 7752020 (604) 7752021 (TTY) Toll Free (in BC): 1 888 440 8844 Web: www.bchrt.bc.ca	**BC Human Rights Coalition** #1202 – 510 West Hastings Street, Vancouver, B.C. V6B 1L8. Ph: 6046898474 Fax: 6046897511 Toll Free: 1 877 604 689 8474 Email: Info@bchrcoalition.org Web: www.bchrcoalition.org

Boundaries for Lawyers

Lawyers Assistance Program

Facilitated by

Robert Bircher and Derek LaCroix

Confidentiality

- All LAP classes are highly confidential, this includes mentioning names of people in attendance
- In psycho educational classes like this one you will be talking about your life-you can set your own boundaries about how much or little you disclose to others
- The main purpose here is to increase awareness of boundaries leading to changes in behavior-the academic content is of secondary importance
- Introduction exercise-Where in my life do I have good boundaries?-What boundaries do I want to learn more about in this class?

Importance of Boundaries

- In helping lawyers with practice and personal problems we notice that many are created by a lack of healthy boundaries
- Almost all of the complaints made by clients or the Law Society can be traced to poor boundaries-the Law Society is aware of this-hence the CPD credits!!
- Burnout, for example, has its roots in poor boundary setting
- Some Lawyers know a lot about boundaries bur are poor at putting them into place in their lives

Boundaries and Relationships

- Although we will focus on practice boundaries in this course, healthy boundaries are the basis for good relationships in life and we will talk about these as well
- Many relationship problems have their roots in poor or no boundary setting
- Boundary setting depends on who you are setting the boundary with- setting boundaries around, a telemarketer, your mother, or your boss all have different dynamics

Healthy Boundaries

- Good boundaries are usually learned in childhood, unfortunately so are bad boundaries
- Most people have good boundaries in many areas of their life but often have gaps-depending on parenting
- Most lawyers are good students which sometimes also means they are good at pleasing others-this balance between self and others is where boundary problems arise

Characteristics of Healthy Boundaries

- I must have awareness that a boundary needs to be set and that the problem I face is a boundary problem-this is not as obvious as it may seem
- Appropriateness-I need to decide whether a boundary should be set or if I should just let it go-In some cases a boundary could be set but it may not be worth the time or effort
- Clarity-Boundaries must be clear and unequivocal-fuzzy boundaries are as bad as no boundaries
- Firmness-People will often test your boundaries-do you really mean it?
- Maintenance-Boundaries may need to change or be redefined over time

Characteristics of Boundaries

- Flexibility-some boundaries need to flexible-in some cases even dropped
- Healthy boundaries are not:
- Set by others-this works when you are little; but as you individuate you need to set your own boundaries-usually with some resistance from your family!
- Primarily Hurtful or Harmful-Boundaries often create some pain but this is not the purpose-a good test is if I don't set a boundary here what will the long term consequences be?
- Controlling or manipulating-This is different than boundary setting

Characteristics of Boundaries

- Manipulating is trying to influence or get something indirectly- Controlling is invasive or domineering
- In boundary setting I decide what will happen if the boundary is not honored-if I am controlling I want someone else to change their behavior
- A Wall- is not a boundary, it is inflexible and cuts me off from people, places or experiences

What are Boundaries?

- Various definitions:" how far we can go with comfort go in a relationship. It delineates where I and my physical and psychological space end and where you and yours begin.”
- Boundaries provoke real experiences within us-thus in my relationships with people places and things, the boundary is real
- Another definition: “A boundary is a limit that promotes integrity”

What are Boundaries?

- One example is your skin, another is the walls of a cell in your body
- A good metaphor is that of the wall of a cell, that is a semi –permeable membrane
- "To know when to allow in and when to keep out, means you have a choice in your life, and means you will be an active rather than a passive participant in it"

Boundaries

- Healthy boundaries will enhance your relationship with your self, your body, your health, friendships, marriage, work, your integrity
- Poor boundaries can limit your life and cause misery
- It is useful to know where you have erected defenses instead of healthy boundaries
- This course is about handling life in a way that protects your time and energy for the things that really matter to you.

Boundaries

- It is hard to define or understand yourself without a clear understanding of your boundaries
- It requires a good understanding of our inner life-our beliefs, thoughts, feelings, decisions ,choices and experiences. It also includes wants, needs, sensations, intuitions and unconscious factors.
- Many people go to extremes with boundaries, either being boundary less or being overly ridged, or flip-flopping between these

Boundaries and Codependence

- Much of the popular literature about boundaries has been written about under the rubric of codependence(unhealthy caretaking of others or doing things for others they should be doing for themselves)
- Healing codependence requires learning new boundaries
- There is a 12 step group called codependence anonymous which has setting healthy boundaries as a principle task
- Many people have some level of codependence

Types of Boundaries

- Boundaries cover a huge part of our lives and can be internal(intra-psychic)within your own mind or external (inter-psychic) dealing with other people
- Boundaries can be physical or mental/emotional or spiritual
- See table 1.1 for list of these types of boundaries
- In general, physical boundaries deal with what happens with your physical body, your privacy and your possessions
- In general mental boundaries deal with your beliefs, choices, decisions and how you spend your energy

Testing Your Physical Boundaries

- Stand close exercise
- Crazy driver exercise
- What did it take for you to set your boundary?
- What gets in your way of setting your boundaries?
- Did you set a boundary it at all?

Not Setting Boundaries

- Due to the difficulty in setting boundaries many people chose not to set them at all
- This will result in frustration, passive aggressiveness, inner conflict and a general limiting of your life
- In general you will run up against your inner “people pleaser” in this class
- If you want to live life large you need to understand and set healthy boundaries

Resistance to Boundary Setting

- Even though it is simple enough to understand boundaries many people have trouble setting boundaries for fear that it will hurt the relationship
- In many cases great damage can occur to a relationship if boundaries are not set or discussed
- Often it is a case of short term pain to facilitate long term gain
- Boundary Dilemma-get into groups of 4 and discuss the boundary dilemma in the workbook-is this happening in your life?

Derek's Part-2-3pm

- 3pm coffee

Formation of Boundaries

- Families can range from being fairly dysfunctional where boundaries were ignored, confused, or commonly violated to families that were fairly functional
- It is quite rare for any family to have excellent boundaries in all areas of life
- You learn your original boundaries in your family but obviously people change and you may have healthy boundaries in areas where they were unhealthy in your family and vice versa

Protective Boundaries and Expansive Boundaries

- In general there are two types of boundaries-those involving the protection of physical and psychological space and those involving the extent of interaction with your world
- Physical boundaries are simple to understand-they involve the protection of your body and possessions-car exercise
- Psychological boundaries are much more difficult to understand or even detect

Protective and Expansive Boundaries

- Almost no person will tolerate being hit by another person but surprisingly many will allow the most severe psychological boundary violations
- Expansive boundaries can be described as how large you live-some people live large and impact almost everyone around them-some live small and barely cause a ripple-some do both at different times and with different people
- You will be treated in the world the way you teach others to treat you

Boundaries and your Family of Origin

- Many of your boundary issues began at home (because parenting is an imperfect art) so these boundary problems can come in several varieties
- Too Ridged-also called walls-these are absolute rules that can be too confining: you can't ever play in the living room
- Too Flexible-where the boundaries change easily or are not enforced-one day you are allowed to do something the next day you are not

Family Boundaries

- Too Distant: When the parent is very distant, rarely touches, abandons the child or spends little time with the child
- Too permeable: when a parents identity becomes immersed in the child's-this sometimes happens to mothers and daughters
- Too closed: some parents have very ridged beliefs such that new ideas can't get in-it's their way or the highway-these parents are often cut off from their feelings and can't handle disagreements

Family Boundaries

- Enmeshment: this is where a person doesn't distinguish themselves from the other at all-they take on the others attitudes ,beliefs, interests, friends, goals as if they were their own-they even speak for the other
- Exercise: Groups of 4-Think /Pair/Share- what were the boundaries like in your family? Which ones were healthy/unhealthy?

Assessment of Boundaries

- Lets complete the survey titled "Examining Your Personal Boundaries'
- Read the scoring Page in areas where you have high scores (usually) or very low scores (never)
- You may or may not agree with the scoring-if you haven't experienced boundary problems in a particular area it's probably not a problem
- Complete Personal Boundaries test discussion
- Think/pair/share

Workplace Boundaries Problems Saying No

- **“Burnout” is actually not a primary problem -it is a symptom of poor or non existent boundary setting**
- Poor boundary setting has many underlying causes: people pleasing, unwillingness to say no, poor boundaries in family of origin, fear of standing up for yourself, lack of understanding of your own core values, poor emotional self care etc.

Workplace Boundaries- Power of No

- When you were 2 years old you had no problem saying no, but in this culture it is drilled out of you by teachers parents and friends-so by the time people are adults many have trouble saying no to anyone
- **Axiom: The damage done by saying yes indiscriminately will exceed any damage done to your relationships by saying no**

The Power of No

- "Yes people" quickly become weighted down, feel torn or trapped, are overcommitted and overworked and feel taken advantage of
- "Yes people" can become **passive aggressive** this means the anger or resentment goes underground and shows up as not returning calls, being distant, being late or bailing out of the commitment with weak excuses
- Having a "giver" type of personality works against you here-the world is full of "takers"

The Power of No

- **It is not the job of the "takers" to set your boundaries- <u>it is your job and your issue</u>**
- **If you don't set your own boundaries other people always will**-nature abhors a vacuum!!
- My definition of Passive aggressiveness is "torturing myself and others for my unwillingness to set healthy boundaries"

The Power of No

- Blaming others is often a tip off that boundaries need to be set by you
- Why is saying no so hard for many people?
- "**Terminal Niceness**" these people believe it will ruin the relationship if they say no-in fact the inevitable passive aggressiveness is the real danger to the relationship
- Lets look at the No credo
- Think /pair/share-Where in your life do you have problems saying no?

The Power of No

- **Poor sense of priorities**: some people are unwilling or unable to live their lives consistent with their values because they are unclear about their values
- People who are clear about their values find it much easier to make tough decisions-if you value time with your children you will not give this time away to clients, other lawyers partners etc.
- Boss/Employee role -plays

People Pleasing

- Another reason people have trouble saying no is that they are obsessed about what other people are thinking about them
- In my self esteem workshops we call this other-esteem which is a poor substitute for genuine self esteem
- Other-esteem is giving your power away on the false belief other people are thinking about you-in other words you have a story you are telling yourself about the story you believe other people have of you (thus you worry about your image)

People Pleasing

- If you believe this delusion you will spend the rest of your life on a fruitless search to increase your esteem from the outside
- I always say to lawyers: in your 20's you are very concerned about what other people think of you, in your 30's and 40's you start to say I don't care what other people are thinking about me, in your 50's and 60's you realize they weren't thinking about you!!
- It is folly to govern your life to try and please others

Field Inter-dependence

- This does not mean you go the opposite extreme and become a psychopath
- Field dependence, field independence , field interdependence, field awareness explained
- Good relationships are dependent on good boundaries
- People with good boundaries are admired and trusted - you can be assured their yes means yes and their no means no-they don't need hidden agenda

Boundary Behaviors- Problems saying no

- There is a boundary problem wherever there is a problem setting limits or where there is a failure to respect other people's limits
- **Compliant behavior** -this where people have fuzzy or indistinct boundaries-they melt into the demands and needs of other people. They are like chameleons. They are unwilling or unable to say no, like a ship with broken radar.

Boundary Behaviors- Problems saying no

- When people are compliant they don't say no due to fears like: hurting the others feelings fear of abandonment and separateness, fear of another's anger, fear of punishment, fear of being shamed, being seen as bad or selfish, fear of being unspiritual etc.
- **Avoidant behavior** -inability to ask for help or recognize our own needs or let others in. Avoidants withdraw when they are in need. Boundaries are not walls but rather like fences with a gate allowing in the good while keeping out the bad

Boundary Behaviors

- **Controlling behavior-** Controllers don't respect other peoples limits- they are likely to see other peoples boundaries as a challenge to try and change their minds or simply ignore their boundaries. They resist taking responsibility for their own lives so they need to control the lives of others. In extreme cases they become manipulative and aggressive bullies
- Controllers can be quite dangerous to themselves and others

Boundary Behaviors

- Controllers cannot delay gratification so they are unwilling or unable to hear another persons no-also they are usually isolated and alone since the people around them are there due to fear, guilt or dependency
- If this occurs in a relationship it requires a compliant partner who has an unconscious agreement to allow themselves to be controlled

Boundary Behaviors

- **Nonresponsive Behavior-** these people are either insensitive or oblivious to the needs of others. They can take the form of supercritical people or narcissistic people obsessed with their own self importance
- Most people fall into these categories from time to time or in certain situations or with certain people-some do it more often at work than at home or vice versa. For some people these behaviors are a dominant force in their lives and have catastrophic consequences

Workplace Boundaries in A Law Practice

- Lawyers face numerous boundary issues at work-there are client boundaries, money boundaries, lawyers on the other side of files, lawyers you work with, time boundaries, ethical boundaries etc.
- Some boundaries are clearly defined by the Law Society (you can't take your clients money) some are fuzzy (having a relationship with a co-worker or staff member)

Workplace Boundaries in Practice

- Many boundary issues, predictably, have very unhappy endings-sexual harassment still occurs, office affairs or romances are still common, the impromptu strip tease or telling off the senior partner, or wearing a lampshade on your head all still occur at the office Christmas party
- Parties, retreats and (Fri pm) after hours office events with alcohol, or cocaine or marijuana are gold mines for boundary problems

Boundary Setting Tips

- If you are resentful or angry with someone or silently fuming or even irritated it is usually the universe inviting you to set a boundary
- The Boundary must be appropriate under the circumstances-there will be a consequence whether you set a boundary or not or if you delay it
- The boundary may require a consequence involving **your behavior** i.e.. If you do that again I will leave the room-I won't drive with you again unless you drive the speed limit

Boundary Setting Tips

- Complaining about them is not boundary setting- “you are such a jerk, why do you drive so fast?”
- Your boundary will be tested sometimes within minutes-expect it-prepare for it
- Your boundary is not a debate or a discussion-no reasons are necessary-the boundary discussion should be in as few words as is possible “you are on my foot –get off” is all you need
- Do not justify or rationalize- “No” is a complete sentence

Boundary Setting Tips

- The more reasons you give the more ammunition you give the other person-you don't want to invite a discussion
- The other person usually will not like it and may not take it well-if they choose to hurt themselves with your boundary it is their issue not yours-don't buy into it
- Be prepared to face whatever consequences that result and be aware that they are almost always less than if you don't set a boundary
- Boundaries are not about control or manipulation

Boundary Setting Tips

- Good boundary setting comes with practice, start small and work up to more difficult boundaries
- Some people believe that they can't set boundaries at work or they will be fired, that is quite rare- much more often people quit or get fired or burn out by **not setting enough boundaries**
- **Do you really want to work anywhere that doesn't respect your boundaries?**

Boundary Setting is a Career Advantage

- If you don't set boundaries you will burn out, stretch yourself too thin, or do a mediocre job
- If you become the office go-to person because you never say no you invite your own boundary crashing party!!
- You need to teach some people how to treat you by setting good boundaries-i.e… teach them how you need to be treated
- Ask "what is the advantage of saying yes here?

Office Boundary Setting

- There is a fine line between high performance and overload
- Some people will go into overload for fear they will be considered lazy- In my experience law offices contain the most hard working people I have ever met-if you have lasted more than 6 months in this business it is safe to assume laziness is not an issue
- Some people that work more "normal jobs" consider everybody who works in a law office a workaholic-the average work week in law is 50 hours -for the rest of the world it is 35-that means the average lawyer works 60 hours more a month than average already!!

Business and Social

- You get invited to a co-workers wedding on a weekend you would prefer to do other things
- Where do you stand on these types of invitations? One test is the level of closeness to the person –would you go even if s/he was not a Colleague?
- Some people draw walls between work and social contact with coworkers-others are more flexible

Office Power Plays

- One difference between setting personal and work boundaries is the power differential-you can't be fired from your family but you can at work
- Many people won't set boundaries due to this fear
- Often this fear is overblown-few people are actually fired for refusing to set boundaries at work

Office Power Plays

- Some managers in law offices will laud their position and any power it gives them over you.
- The most dangerous are those whose life is their job, their business and personal life are one and the same, the classic workaholic-very common in law offices
- They will push your boundaries all the time and will not stop until you say no
- **They will ask anything of anybody and will not stop until you boundary them**
- **Office Role Plays**

Lawyer-Client Boundaries

- Saying no to clients is almost heresy in some law offices-yet many law society complaints would be avoided if no had been said more often
- In many cases no is the best response "I want these companies done by tomorrow" or doing a case that you have little expertise or doing a case without a retainer are all classic client boundary issues lawyers are prone to

Lawyer – Client Boundaries

- This area causes many lawyers a lot of grief since there are many duties owed to clients which can trap the unwary boundary setter
- A huge percentage of Law society complaints are due to poor or no boundary setting by the Lawyer involved
- Some issues involve crashing the clients boundary i.e. conflicts of interest cases

Lawyer-Client Boundaries-Money

- Money boundaries are largely set by the law society
- Retainers and non payment of fees-This is a money boundary that causes no end of grief for some lawyers
- Not getting a retainer or running out of retainer-has many unintended consequences-slowness or lack of interest in the file by the lawyer, also causes stress for the lawyer since at the back of their mind is always the possibility that they won't get paid, also with no retainer the client has "no skin in the game" and can be unreasonable

Lawyer-Client Boundaries-Money

- Transferring money before the work is done or before a bill is rendered is a common cause of suspension or disbarment-this is an example of ignoring a client boundary
- Over billing or exaggerating billing (charging for 2 hours when something only took 1 hour) is another example
- Undercharging or not charging at all violates your own money boundary-be clear about your agenda for not billing-nothing wrong with pro-bono if that is the clear intention

Lawyer-Client Boundaries-Time

- If clear time boundaries are not set out here problems are inevitable-remember burnout is self induced by poor boundary setting
- Classic examples are taking on too much work, setting unrealistic completion dates, agreeing to appointments in non business hours, unlimited access by phone, fax or email are certain to increase stress
- What about client service? Clients appreciate realistic boundaries-if you lose a client by setting boundaries you are doing both of you a favor!!-Clients that set unrealistic demands are stress creators and either let them go or set tough boundaries around them

Lawyer-Client Boundaries-Time

- Another time issue is holidays and time away from work-In law, **not taking frequent restorative breaks creates huge stress and burnout**
- The busier you are the more time off is necessary-sometimes when I ask a stressed out Lawyer when they had their last substantial break they say 3 years ago or never!!
- Also frequent breaks during the day are necessary-i.e. working out or going for a walk or yoga at lunch is very stress relieving-wolfing down a sandwich at your desk-not so much! Also just a 5 minute walk or social break is very stress relieving
- Be aware you may have to fight for this!!

Lawyer-Client Boundaries

- Taking on clients that are annoying or high maintenance violates your own boundaries, or taking on cases you aren't good at or can't deal with promptly violates your clients boundaries
- Setting good boundaries around clients is not easy and you may be in a legal culture that doesn't support healthy boundaries
- Be aware that whatever painful consequences you get from good boundary setting will be much less painful than poor or no boundary setting
- Many consequences are just fearful fortune telling-The client will leave or be unhappy etc.

Lawyer-Client Boundaries

- Good boundary setting increases self respect and respect from others
- It does take courage!!
- Remember- a **No to another is Yes to you!!-**This is the essence of self definition and self respect!
- Some lawyers overemphasize their duty to their client and crash boundaries with other lawyers, being pushy or disrespectful-this has increased in recent years

Lawyer-Lawyer Boundaries

- It never helps your case if you are rude to other lawyers or judges-crashing other peoples boundaries only demonstrates foolishness and insensitivity
- Some very controlling and aggressive lawyers will ignore your boundaries and push their own agenda-you must be very vigilant with these people and guard your own boundaries-remember they are either oblivious to your boundaries or will deliberately crash them
- Saying no firmly, with voice tone and body language to match will be necessary here
- Your boundary will be tested almost immediately by these people-get used to saying no again

Boundary Setting Improves With Practice

- As you set more boundaries (and begin to see where you are not setting good boundaries) your skills will improve
- **Generally the closer the relationship the harder it is to set good boundaries**
- Allow yourself to try and fail until you get better at it
- Practice and patience will allow progress
- Closing exercise

BOUNDARY WORKBOOK

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Lawyers Assistance Program

Facilitated by

Robert Bircher and Derek LaCroix

Table 1.1. Some Factors in Boundaries in Relationships

Type of Boundary		
Physical	**Mental/Emotional**	**Spiritual**
Physical closeness	Beliefs	Personal experiences
Touching	Thoughts and ideas	Relationship with
Sexual behavior	Feelings	True Self, Higher
Eye contact	Decisions	Self and Higher
Privacy — mail,	Choices	Power
diary, doors, nudity,	Unfinished business	Spirituality
bathroom, telephone,	Projections	Religion
private spaces, etc.	Energy	Spiritual path
Clothes	Sexuality	Spiritual preferences
Shelter	Needs	Spiritual practices
Property	Time alone	
Money	Intuitions	
Physical	Individual differences	
differences	Love	
Gifts	Interests	
Food	Relationships	
Pollution —	Responsibilities	
e.g., noise	Confidences	
and smoke	Secrets	
Time and energy	Participation	
	Roles	
	Rules	
	Messenger function	

Boundary Dilemma

We cannot simultaneously set a boundary and take care of another persons feelings. These acts are mutually exclusive.
While it is a tremendous asset to have compassion for others, this quality can make it difficult to set boundaries.
It's good to care about other people and their feelings; it's essential to take care of ourselves as well. Sometimes, to take good care of ourselves we need to make a choice.
Some of us live with a deeply ingrained message from our family, or from church, about never hurting other people's feelings. We can replace that message with a new one, one that **says it's not okay to hurt ourselves.**
Sometimes, when we take care of ourselves, others will react with hurt feelings.
That's okay. We will learn, grow, and benefit by the experience; they will too. The most powerful and positive impact we can have on other people is accomplished by taking responsibility for ourselves, and allowing others to be responsible for themselves.
Caring works. Caretaking doesn't. We can learn to walk the line between the two

Today, I will set the limits I need to set. I will let go of my need to take care of other peoples feelings and instead take care of my own. I will give myself permission to take care of myself, knowing it's the best thing I can do for myself and others.

Adapted from The Language of Letting Go-by Melody Beattie

Examining Your Personal Boundaries (SPB)

This questionnaire is designed to gather information to determine where your Personal Boundary Issues are. Please answer all questions; your honesty in answering these questions will assist you in learning new, more effective boundaries where necessary.

		Never	Seldom	Occasionally	Often	Usually
		(1)	(2)	(3)	(4)	(5)
1.	I can't make up my mind.					
2.	I have difficulty saying "no" to people.					
3.	I feel as if my happiness depends on other people.					
4.	It's hard for me to look a person in the eyes.					
5.	I find myself getting involved with people who end up hurting me.					
6.	I trust others.					
7.	I would rather attend to others than attend to myself.					
8.	Other's opinions are more important than mine.					
9.	People take or use my things without asking me.					
10.	I have difficulty asking for what I want or what I need.					
11.	I lend people money and don't seem to get it back on time.					
12.	Some people I lend money to don't ever pay me back.					
13.	I feel ashamed.					
14.	I would rather go along with another person or other people than express what I'd really like to do.					
15.	I feel bad for being so "different" from other people.					
16.	I feel anxious, scared or afraid.					
17.	I spend my time and energy helping others so much that I neglect my own wants and needs.					
18.	It's hard for me to know what I believe and what I think.					
19.	I feel as if my happiness depends on circumstances outside of me.					

20.	I feel good.					
21.	I have a hard time knowing what I really feel.					
22.	I find myself getting involved with people who end up being bad for me.					
23.	It's hard for me to make decisions.					
24.	I get angry.					
25.	I don't get to spend much time alone.					
26.	I tend to take on the moods of people close to me.					
27.	I have a hard time keeping a confidence or secret.					
28.	I am overly sensitive to criticism.					
29.	I feel hurt.					
30.	I tend to stay in relationships that are hurting me.					
31.	I feel emptiness, as if something is missing in my life.					
32.	I tend to get caught up "in the middle" of other people's problems.					
33.	When someone I'm with acts up in public, I tend to feel embarrassed.					
34.	I feel sad.					
35.	It's not easy for me to really know in my heart about my relationship with a Higher Power or God.					
36.	I prefer to rely on what others say about what I should believe and do about religious or spiritual matters.					
37.	I tend to take on or feel what others are feeling.					
38.	I put more into relationships that I get out of them.					
39.	I feel responsible for other people's feelings.					
40.	My friends or acquaintances have a hard time keeping secrets or confidences which I tell them.					

Scoring the Personal Boundaries Test

In general, answering (Often-Usually) can mean more boundary problems in these areas. Answering (Seldom) can mean A) you don't have boundary problems in this area, or B) you are unaware of or oblivious to boundaries in these areas. Scoring (Never) a lot may indicate more ridged walls than boundaries. *Trust your intuition-if you don't have problems in this area of your life, your boundaries are probably fine.*

Discussion:

1. Some indecisiveness can be caused by poor boundaries between what you want and what others want; if the influence of others is excessively powerful, unhealthy confusion will result.
2. This is the classic "people pleaser" syndrome; and is usually accompanied by problems with assertiveness. It is saying yes when we really want to say no. It may result in short term gain in relieving the anxiety about saying no to someone we like. Family patterns have a powerful influence here.
3. If you believe your happiness depends on others you will live life giving away your power to others and their moods; as you beg for approval. If you believe you are worthwhile, capable and lovable on your own, you can enjoy others but are not dependant on them for fulfillment.
4. The eyes are the windows of the soul. If I don't accept myself I will have trouble with people "seeing my true self" through direct eye contact with me. This can indicate shame in association with some boundary issue I may have.
5. Some people may have great trouble distinguishing between appropriate and inappropriate behavior in other people and thus will score highly here. If I lack awareness of my authentic self I may have weak or unhealthy boundaries or no boundaries at all.
6. If I can trust myself, I am able to detect trustworthiness in others and act accordingly. If I can't trust myself or had poor modeling of trust in my family of origin, I may not be able to fully trust others at all.
7. An "Often or Usually" response may mean boundaries that are too loose, whereas a "Never" response could mean boundaries are too constrained. If I neglect my needs in favor of helping others (to an extreme), I lose personal power and give up too much of my life for others.
8. An "Often or Usually" response usually indicates boundary problems. If I trust my inner self, I can have my own authentic opinions. In some families where a child's opinions are neither recognized nor supported; as adults, they may have difficulty forming an opinion unless it is told to them by another.
9. If someone takes our possessions or invades our personal space in any way without our permission; it is an invasion of our personal boundaries. If your boundaries are too loose here you often lose both the object and your relationship with the other person.
10. An "Often or Usually" can indicate a boundary problem. You are responsible for seeing that your needs are met. If you are unaware of your authentic self, you may have troubles identifying what your needs actually are.

11. An "Often or Usually" indicates a boundary problem. It could also mean we have been unclear about the terms of an agreement or pick unreliable people to lend to.
12. This more extreme example of item 11, high scores here usually means severe boundary problems.
13. Some shame is normal and healthy, but if it is excessive it could mean you are allowing others to invade your inner self. Instead of feeling worthwhile, capable and lovable no matter what anyone else thinks, some people may try to invade our boundaries by unjustified generic criticism.
14. If this happens a lot, it may indicate that I am not in touch with my authentic inner self, or I lack the confidence to put forth, or to value, my own point of view.
15. High scores here can mean a lack of self acceptance, or a belief that I "should" be like everyone else
16. High scores here can mean we are allowing our boundaries to be invaded.
17. High scores here usually mean a boundary problem. If I am spending too much time minding someone else's business, I have no time to mind my own.
18. If we are confused a lot of the time, it could be due to someone invading our boundaries or having an excessive, unhealthy influence on us.
19. A response of "Often or Usually" indicates a boundary problem. Authentic happiness is an internal experience not an external one. Ultimately, my happiness or fulfillment depends on knowing and living from who I really am-my authentic self.
20. Feeling good is an experience which occurs when we live a life congruent with our authentic self. If you rarely or never feel good this often indicates boundary problems, among other things
21. If you are in touch with your authentic self you will have no problems knowing how you feel. High scores here can indicate boundary problems.
22. Since boundaries and limits protect the well being and integrity of my authentic self, when I repeatedly get involved with people who hurt me, I am not likely fully aware of my personal boundaries and limits.
23. If my authentic self is in hiding, it is hard to make decisions. If I mix up what I want with what other people want me to do, I will be plagued with indecisiveness.
24. Anger is often a tip off that a boundary needs to be set-it can also provide the motivation and energy to set the boundary. A great deal of anger may mean you are getting angry rather than getting results ,by setting healthy boundaries.
25. High scores mean boundaries need to be set in this area of your life. Spending time alone allows us to reflect, contemplate, meditate, rest, renew and just be. People need varying amounts of alone time, but everyone needs some of it to be healthy.
26. High scores indicate a boundary problem. Taking on others moods may have been a childhood coping skill in some families. We can feel compassion or empathy for others, but we are not responsible for their feelings or to fix them.
27. Higher scores may indicate boundary problems. It is helpful to differentiate a confidence or a healthy secret, where neither you nor any other person is harmed by keeping it, and a toxic secret where you and/or another may be harmed by keeping the confidence.

28. High scores may indicate a boundary problem. What "other people think of you is none of your business" applies here. If your authentic self is healthy you can check inside to see whether you agree with the criticism or not and make changes if necessary; without beating yourself up.
29. If you often feel hurt, it is likely that you are either letting others invade your personal boundaries, you are yourself, creating hurt, or both. This is often a result of dysfunction in a family and, if left unhealed, you can allow this mistreatment to continue.
30. Staying in unhealthy relationships of any kind is often the result of poor or no boundary setting. In some cases, people unconsciously choose these toxic relationships is to work through unfinished business from past relationships.
31. If this is a constant in your life, you are right; something is missing- and it is you! Some people live someone else's life due to pressure from parents, partners or the culture at large. Self individualization requires good boundary setting.
32. This is the result of allowing others to invade your boundaries or you are invading other's boundaries inappropriately. This could be due to codependence (over responsibility for others or caretaking) or can be due to trying to create a sense of worth or value by getting caught up in other people's problems.
33. This can be related to codependence or enmeshment.
34. Healthy grieving indicates healthy boundaries. In some cases; if we are usually sad without recent losses or trauma, this can indicate unresolved grieving from the past. It can also indicate "mind manufactured grieving"-sadness caused by thinking about potential tragedies that haven't occurred and are unlikely to ever occur.
35. For non religious people, this question is a non issue. Some organized religions have induced shame, guilt and fear and have closed people off to a connection with a higher power.
36. While families and cultures, including religions themselves, may give advice as to what we "should" believe; the only authentic spiritual experience is from our own heart and soul.
37. See 26 above
38. If mutuality is missing, that is a sense of equality in sharing of interest, energy and time; it may be due to poor boundaries. Relationships you have to "prop up" are rarely healthy for either party.
39. This can be due to an issue of over-responsibility for others (codependence) or enmeshment.
40. See 27 above

What are the top 5 personal boundary areas you could improve?

1. _____
2. _____
3. _____
4. _____
5. _____

Personal Boundaries Test- Discussion

1. Based on your answers to the Personal Boundary test -what boundaries do you need to set and with whom?

2. What resistance or obstacles do you foresee in setting these boundaries?

3. How would it change your life if you learned and practiced healthy boundary setting in the areas you identified in the boundary test?

4. Which of these can you identify as being from your family of origin?

The *No* Credo

As you become proficient at saying no, these rights will become standard operating procedure. This credo significantly reduces any trouble you might have. It is your bill of rights to the freedom and life you deserve.

You have the right to:

* Make your feelings and desires known
* Establish and guard your personal boundaries
* Keep your needs in the forefront so saying no is possible
* Exercise your power and choice to say no
* Repeat *no* until you are heard
* Use *no* to get your life in control and to be in control of it
* Weigh the fallout of saying no
* Request the details before committing
* Postpone an answer; stalling for time is your prerogative
* Refuse anyone who insists on an immediate answer
* Turn down those who flatter or attempt to con you into a yes
* Withhold explanations in an attempt to soften your *no*
* Avoid tasks beyond your ability or expertise
* Alter a request to make it—or part of it—manageable
* Suggest someone else or offer an alternative solution
* Say no initially and change your mind later if you wish