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

PROVINCIAL TRAINING CONFERENCE 2013 - Radisson Hotel, 8181 Cambie Road, Richmond, BC V6X 3X9
(Aberdeen skytrain)

TUESDAY, OCTOBER 8, 2013 - 8:00 am - 5:00 pm & Dinner 6 pm

8:00 - 8:30	**Registration**			
8:30 - 9:00	**Opening prayer (Elder Sparrow), welcome (Mark Benton QC and Wayne Robertson QC) and announcements (Baljinder and Lois)**			
9:00 - 10:30	**Residential Tenancy Branch update: Discussion with the Executive Director** ***Cheryl May, Executive Director, Residential Tenancy Branch*** **An opportunity to hear first hand from the Executive Director of the Residential Tenancy Branch what her office is planning for the coming year and to discuss issues that arise for advocates in working with the RTB.** **BALLROOM A/B**	**Legal issues affecting seniors** ***Kevin Smith, staff lawyer, Community Legal Assistance Society and BC Centre for Elder Advocacy and Support*** **A session that will provide information on issues such as benefits available to seniors, advance planning, dealing with abuse, and issues arising from dementia and capacity. There will also be a discussion of ageism and assumptions, the importance of time in senior's casework and dealing with interested third parties.** **BRIDGEPORT ROOM**		**Legal Services Society Intake and Duty Counsel Services** ***Linda Theissen, Coordinator Family Law Services*** ***Sarah Khan, Coordinator Intake Services*** **A session that will update advocates on the role and location of LSS duty counsel. It will also provide full information on the LSS intake application process and coverage in light of new changes in the law.** **BALLROOM C**
10:45 - 12:15	**Update on Administrative Fairness at the Residential Tenancy Branch** ***Jess Hadley, lawyer and Kendra Milne, staff lawyer Community Legal Assistance Society (CLAS)*** **This session will provide an update on the results of last year's consultation on RTB issues and CLAS's Residential Tenancy Administrative Justice Project.** **BALLROOM A/B**	**Working Effectively with Doctors: Helping Clients with Provincial Disability Applications and Appeals** ***Annette Murray,*** ***BC Coalition of People with Disabilities*** ***Stephen Portman, Together Against Poverty Society (TAPS)*** **An opportunity to collect suggestions and tools for working as effectively as possible with doctors on PWD files.** **BRIDGEPORT ROOM**		**Family Law Resources** ***Winnifred Assmann, Legal Services Society*** ***Kathyrn McCard, People's Law School*** ***Jimmy Yan, Access Pro Bono*** ***Kari Boyle, Mediate BC*** **An update on family law information, self-help, referral and other resources.** **BALLROOM C**
LUNCH 12:15 - 1:30				
1:30- 3:00	**Update on the new Family Law Act and relevant case law** ***JP BOYD, Canadian Research Institute for Law and the Family*** **A workshop that will reflect on the past year in family law in BC and update advocates on important developments and case law.** **BALLROOM AB**	**CPP Disability Appeals and the new Social Security Tribunal** ***Peter Beaudin and Ashley Silcock, BC Coalition of People with Disabilities*** **An update about the process for CPP disability appeals within the new Social Security Tribunal.** **BRIDGEPORT ROOM**		**Romancing the Statute** **Devyn Cousineau and Kendra Milne,staff lawyers Community Legal Assistance Society (CLAS)** **Learn how to read and understand statutes, and to use statutory arguments to advance your client's case. This is an interactive workshop designed to help all advocates make friends with legislation.** **BALLROOM C**
3:15 - 5:00	**advocapedia: consultation and update on work-to-date** ***Penny Goldsmith, Nicky Dunlop, PovNet*** ***Alison Ward, staff lawyer, Community Legal Assistance Society (CLAS)*** **PovNet advocapedians will share the progress of this pilot project on welfare law. We are developing a private, password protected site (wiki technology) for advocates to access (and co-create) authoritative information about welfare law, and to share resources.** **You will be able to upload and share legal arguments, copies of submissions and decisions, PLE presentations, and other relevant administrative resources like intake forms, file lists, precedent letters. Advocates can also annotate whatever they share.** **The workshop is a testing ground for the new site – here's a chance to release your inner geek.** **BALLROOM A/B**	**REPEAT** **Legal issues affecting seniors** ***Kevin Smith, staff lawyer, Community Legal Assistance Society and BC Centre for Elder Advocacy and Support*** ***BRIDGEPORT ROOM***	**Overview of child protection: Red flags and resources** ***Amanda Rose, lawyer*** **An overview of child protection in BC that will flag important issues and deadlines for advocates to be aware of, and identify resources for clients and advocates.** **CAMBIE ROOM**	
6:00 PM	**DINNER**			

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WEDNESDAY, OCTOBER 9, 2013 8:30 am - 4:30pm

8:30 - 10:00	**Welfare and lump sums: More Money, More Problems?** ***John Minkley, lawyer*** ***Robin Loxton, BCCPD*** ***Stephen Portman, TAPS*** ***Alison Ward, staff lawyer, CLAS*** **A client receiving welfare who receives a lump sum of money often has a range of options about what to do. This panel discussion delves into those options in some depth and examines how to help a client decide what option is best suited to them. It includes an overview of welfare rules that apply to lump sums; compares and contrasts the mechanics and practicalities of trusts and RDSPs (and snags that can happen with each); and provides an example of how an advocate can set up a disability trust for a client using a Tax Free Savings Account. Trust lawyer in attendance!!** **BALLROOM A/B** **.**	**Employment Overview** ***Clea Parfitt, lawyer*** **A session that will explain the intersection of employment standards legislation, employment law principles and human rights law – and how knowing this information could help you help your client.** **CAMBIE ROOM**	**Laying the Groundwork: How to effectively prepare your client's case** ***Kendra Milne and Kaity Cooper, staff lawyers, CLAS*** **This workshop presents a structured approach for preparing your cases. It will help you assess the merit of your files, manage your client's expectations, and prepare effectively for negotiation, written advocacy or a tribunal hearing in any area of law.** **BRIDGEPORT ROOM**	**Information for Legal Advocates helping clients drafting family law affidavits** ***JP BOYD, lawyer*** **A session that gives advocates the opportunity to review common problems in affidavits and learn the features of effective affidavits.** **BALLROOM C**
10:15 - 11:45				
LUNCH **11:45- 1:15**	**The Civil Resolution Tribunal** ***Cheryl Vickers Acting Chair, Civil Resolution Tribunal*** **A presentation that will set out plans to provide online resources for case management, self help and dispute resolution through the Tribunal. presentation about current work on the Civil Resolution Tribunal. MAIN BALLROOM**			
1:15 - 2:45	**Consultation on adminstrative issues with MSDSI** ***Kendra Milne, staff lawyer, CLAS*** ***Stephanie Smith, MOSAIC*** **This session will provide an opportunity to constructively discuss current administrative barriers faced by advocates and clients when trying to access MSDSI services.** **BALLROOM A/B**		**EI Appeals and the new Social Security Tribunal** ***Kevin Love, staff lawyer, CLAS*** **An update on EI appeal issues as well as procedures in the new Social Security Tribunal.** **BRIDGEPORT ROOM**	**Protection Orders** ***Agnes Huang, lawyer*** **An update on protection orders under the new family law legislation and a discussion about practice issues that have arisen over the past year.** **BALLROOM C**
3:00 - 4:30 pm	**Update on Wills and Estates legislation** ***Hugh MacLellan, lawyer*** **An overview of upcoming changes to legislation governing wills and estates in BC. The session will identify key issues and resources for advocates.** **BALLROOM A/B**		**Co-ops** ***Kevin Love , staff lawyer, CLAS*** ***Grant Haddock , lawyer*** **An overview of issues in co-op law and how to help your client deal with them.** **BRIDGEPORT ROOM**	**Parenting and guardianship issues** ***Agnes Huang, lawyer*** **An update on parenting and guardianship issues that will also consider how violence affects decisions on parenting time and guardianship.** **BALLROOM C**

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THURSDAY, OCTOBER 10, 2013 8:30 am - 3:45 pm

8:30 - 10:00	**Can You Convince Me? How to develop persuasive written arguments** ***Kendra Milne and Devyn Cousineau, staff lawyers, CLAS*** **An interactive workshop designed to help you synthesize your cases in order to create clear, convincing, and focused written submissions. Note: this course does not focus on technical business writing skills.**	**Debt** ***Alison Ward, staff lawyer, CLAS*** ***Manjeet Chana, lawyer*** **A session that gives participants the opportunity to discuss current issues in debt law with lawyers experienced in the area. Issues such as FMEP, attempts to garnishee statutory benefits, and others will be discussed.** **BRIDGEPORT ROOM**	**The Writing on the Wall: Strategies for when a tenancy is likely to end** ***Kaity Cooper and Kevin Love, staff lawyers, CLAS*** **Learn and practice how best to advance your client's interests where they are likely to be evicted. This workshop will teach how to manage client expectations, identify and utilize potential leverage, negotiate persuasively, and advance client interests at hearings that are unlikely to be won on the merits.** **CAMBIE ROOM**	**MCFD and Aboriginal clients: Duties, roles and responsibilities** ***Anja Brown, lawyer*** **Information about issues that arise for Aboriginal clients in child protection matters and how best to help your client.** **BALLROOM C**
10:15 - 11:45	**BALLROOM A/B**			**Discussion of current issues for advocates working with Aboriginal clients** ***Anja Brown, lawyer*** **An overview of current legal issues that affect Aboriginal clients. A useful update for advocates already working in the area and a good introduction to key issues for those less familiar with the area.** **BALLROOM C**
LUNCH 11:45 1:45	**Law Foundation lunch (2 hours)**			
1:45- 3:15	**Hot topics in Family Class Immigration** ***Deanna Okun Nachoff, lawyer*** **Updates on conditional permanent residence for certain sponsored spouses; sponsorship breakdown and how it impacts clients; changes in sponsorship of parents and grandparents, and changes to the definition of dependent child.** **BALLROOM A/B**		**Show me the Money: Enforcement of Small Claims Orders** ***Alison Ward, staff lawyer, CLAS*** ***G* et money owed under a monetary order from the RTB. Learn how to enforce an order, and to enforce a judgment in Small Claims Court. Tips for helping people being enforced against in Small Claims Court also included.** **BRIDGEPORT ROOM**	**Staying on the Bucking Bronco: Maintaining Control in Hearings** ***Devyn Cousineau and Kaity Cooper, staff lawyers, CLAS*** **Learn and practise how to pursue a fair hearing for your client. We will teach you the basic principles of procedural fairness, how to recognize barriers to a fair hearing, and strategies to maintain control in hearings. Then all you have to do is hold on for dear life.** **BALLROOM C**
3:15- 3:45	**closing MAIN BALLROOM**			

Provincial Training Conference
Sponsored by the Law Foundation and Legal Services Society
October 8th to October 10th, 2013

Radisson Hotel Vancouver Airport
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Provincial Training Conference
Sponsored by the Law Foundation and Legal Services Society
October 8th to October 10th, 2013

Radisson Hotel Vancouver Airport
8181 Cambie Road
Richmond, BC V6X 3X9

SPEAKERS (alphabetical by speaker's last name)

Peter Beaudin - Pension Plan Disability Benefits Advocate

BC Coalition of People with Disabilities
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Peter is a Canada Pension Plan, Disabilities Advocate with the BC Coalition of People with Disabilities. He assists individuals with reconsideration requests and provides representation before the Review Tribunal and the Pension Appeals Board. Peter's background includes advocacy in human rights, labour, immigration, and landlord/tenant law. He has also been a political, community, and union organizer.

John-Paul Boyd - Executive Director

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John-Paul Boyd is the executive director of the Canadian Research Institute for Law and the Family, an independent organization affiliated with the University of Calgary, and a fellow of the International Academy of Matrimonial Lawyers. Prior to joining the Institute, John-Paul practiced family law as a litigator, arbitrator, mediator and collaborative practitioner with Aaron Gordon Daykin Nordlinger in Vancouver. John-Paul is a frequent speaker on family law topics for the National Judicial Institute, the Provincial and Superior Courts of British Columbia, the Federation of Law Societies of Canada's National Family Law Program and the Continuing Legal Education Society of British Columbia. He is the founding author of JP Boyd on Family Law, published by Courthouse Libraries BC, and has also been published by the UBC Law Review, Canadian Family Law Quarterly, The Advocate and the Department of Justice.

Anja Brown - Associate

Mandell Pinder LLP
422 - 1080 Mainland Street
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Anja joined Mandell Pinder LLP in January 2009. Since her call to the British Columbia Bar in 1998, Anja has had her own law firm operating out of her home in Bella Bella, and then in 2000, joined a small firm in West Vancouver with a primarily First Nations clientele. Over the years, Anja has gained a broad range of legal experience, including Aboriginal rights, First Nations governance, child protection and criminal law.

The application of Aboriginal restorative justice principles as a means to resolve fisheries and criminal matters is of particular interest to Anja. Anja has also represented many residential school survivors in the Independent Assessment Process, which is an alternative to court for the resolution of abuse claims.

Since 1998, Anja has been a member of the Bella/Bella Coola circuit court team. The continuity of the members of the court team over the years has, in Anja's opinion, enhanced the ability to help deliver justice in a way that is more responsive to community values. During circuit court, Anja has the opportunity to act on both criminal and family law matters.

Anja has appeared at all levels of court; her career highlights so far include being part of the team of lawyers who appeared before the Supreme Court of Canada in support of the Haida and Taku River First Nations in 2004 (Haida Nationv. British Columbia (Minister of Forest), [2004] 3 S.C.R. 511, 2004 SCC73; Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), [2004] 3 S.C.R. 550, 2004 SCC 74) and again in 2007 on behalf of the Tseshaht First Nation in Regina v. Kapp, 2008 SCC41. In October, 2008, Anja appeared in the BC Court of Appeal as one of seven intervenors in McIvor V. Canada (Registrar of Indian and Northern Affairs). 2009 BCCA 153, which considered discriminatory sections of the Indian Act.

Anja is a member of the Heiltsuk Nation and is adopted into the Hunt, Martin and White families. She has been honoured with the Heiltsuk names Habukvas Qvaxacu and Thawiniqs. Anja is the mother of two children and has many treasured nieces and nephews.

Manjeet Chana - Barrister & Solicitor

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Manjeet was called to the BC Bar in 2000. She worked in private practice for three years and then became a staff lawyer with the LawLINE, a telephone legal advice and information line operated by Legal Services Society until 2010. Since 2010, Manjeet has been working with the Legal Services Society on a part-time contract basis. On short-term contracts in 2012 and 2013, Manjeet has also worked with the Community Legal Assistance Society, both with the UBC Law Students' Legal Advice Program as Supervising Lawyer and with Alison Ward on CASL when needed. Over the past year, she has also co-facilitated online family law course sessions through the Justice Education Society. Manjeet is a past presenter at the annual Provincial Training Conference for Advocates and is happy to be a speaker at the Debt session with Alison this year.

Kaity Cooper - Staff Lawyer

Community Legal Assistance Society
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Kaity has worked as a lawyer in the Poverty Law Services Program at Community Legal Assistance Society in Vancouver since April 2012. Kaity helps clients with various legal problems including those in the areas of residential tenancy, cooperative housing, welfare, debt and pension and benefits. In her spare time, Kaity loves playing field hockey and practicing yoga.

Devyn Cousineau - Barrister & Solicitor

Community Legal Assistance Society (CLAS)
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Devyn is a lawyer at CLAS, practicing mainly in the areas of housing, employment and human rights law. She is particularly interested in issues affecting workers' rights and children. She enjoys when her children behave and when there are free treats in the office.

Nicky Dunlop - Training Coordinator

PovNet
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Nicky has had the good fortune of attending numerous Provincial Training Conferences over the years through her advocacy work in both Williams Lake and the DTES of Vancouver, as past Executive Director of TRAC and now as the PovNetU Training Coordinator with PovNet. These conferences are a valuable opportunity to both sharpen your skills and network with colleagues from the poverty law community throughout the province. If you have any questions about any of the resources PovNet offers (email lists, online training or web site) Nicky would be happy to speak with you.

Penny Goldsmith - Executive Coordinator

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Penny has worked in the anti-poverty community for over thirty years, as an advocate, as a writer and editor of public legal education materials in plain language, and for the past sixteen years as the executive co-ordinator of PovNet, an online information resource, communication network and teaching tool for anti-poverty front line workers and poor and otherwise marginalized people. She maintains a strong commitment to continuing to be part of a network that builds accessible and affordable online communities. She is also the owner of a small publishing house, Lazara Press, where she publishes and distributes progressive books and posters.

C. Grant Haddock - Barrister & Solicitor

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Grant Haddock was called to the Bar of British Columbia in 1992. Grant began his career at a construction litigation firm in downtown Vancouver where he developed his co-operative housing, strata property and construction law practice. Grant opened Haddock & Company early in 2001, and moved the

practice to North Vancouver to be closer to home. The firm's preferred areas of practice are co-operative housing law, strata property law, residential and commercial tenancy and construction law.

Grant has acted for numerous housing providers and construction companies and has appeared for those clients at the Provincial, Supreme and Appellate Court levels, as well as before various tribunals.

Grant has been a course leader and frequent speaker at educational conferences sponsored by:

- the Co-operative Housing Federation of British Columbia (CHF BC);
- the Condominium Homeowners Association (CHOA);
- the Continuing Legal Education Society of BC;
- the British Columbia Non-Profit Housing Association (BCNPHA);
- the British Columbia Owners and Apartment Managers Association (BCOAMA) (now part of the Rental Council of British Columbia)

Grant is also a frequent contributor of articles noting interesting and industry specific legal topics for periodicals published by CHFBC, CHOA, BCNPHA and BCOAMA.

Jess Hadley - Barrister & Solicitor

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Jess is currently practicing at Hastings Labour Law Office LLP, on leave from her position as a staff lawyer at Community Legal Assistance Society. Her work at CLAS has included a focus on housing issues and she is looking forward to re-connecting with advocates at the Provincial Training Conference.

Agnes Huang - Barrister & Solicitor

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Agnes is a sole practitioner, focusing primarily in the area of family law. Agnes is a member of the Legal Aid Action Committee of the Trial Lawyers Association of BC's and legal committee of West Coast LEAF. She is also on the executive of the LGBTQTS section (SOGIC) of the Canadian Bar Association, BC Branch and of the Federation of Asian Canadian Lawyers (BC Chapter). Prior to entering the practice of law, Agnes worked in the feminist movement for many years, including at Vancouver Status of Women/Kinesis and Breaking the Silence in the Downtown Eastside, and with Direct Action Against Refugee Exploitation which advocated for the Chinese women who arrived by boat in 1999/2000.

Sarah Khan - Coordinator of Intake and Referral Services

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Sarah has been employed with Legal Services Society for 13 years having experience as an intake worker, paralegal and reciprocals. She has volunteered with various community groups and still volunteer. Sarah loves to bike ride, hike/walk and spend time with her family. She has three kids so life is busy, but good!

Kevin Love - Barrister & Solicitor

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Kevin is currently working in CLAS' Community Law Program. He previously worked in CLAS' Mental Health Law Program.

Robin Loxton - Co-Director, Advocacy Access

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Robin has worked as an advocate with the BCCPD since the inception of the BCCPD program in 1989. The main focus of his work over the past few years has been to assist persons with disabilities with PWD and MSD applications and appeals.

Cheryl May - Executive Director

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Cheryl was appointed Executive Director in the spring of 2012 and is responsible for Residential Tenancy Branch services and provincial government policy related to the regulation of the rental housing sector.

Cheryl's interest in housing is long standing and within the provincial government she has led work on issues related to homelessness and social housing, strata properties, and the regulation of real estate agents and mortgage brokers.

Prior to entering government, Cheryl worked as a social worker and advocate in not-for-profit housing programs for women and youth.

Hugh McLellan - Barrister & Solicitor

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Hugh, a partner in the law firm of McLellan Herbert, practices in the areas of estate litigation, estate planning and elder law. He is a former Chairman of the Canadian Bar Association Wills and Trusts (Vancouver) Subsection. He is the founding Vice Chair (and past Chair) of the CBA National Elder Law Section and the founding Chair of the CBA BC Elder Law Subsection. He is a member of the Estate Planning Council of Vancouver and the U.S. National Academy of Elder Law Attorneys.

Hugh is the author of numerous articles on estate litigation, estate planning and Elder Law, co-editor of Financial and Estate Planning for the Mature Client in British Columbia (LexisNexis, 2000), a contributor to B.C. Representation Agreement Act, Adult Guardianship Act and Related Statutes (Carswell, 2000) and is an associate editor of the Estates and Trusts Reports. He is a frequent lecturer for various professional and community programs. www.mclellanherbert.com.

Kendra Milne - Barrister & Solicitor

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Kendra has been a staff lawyer at the Community Legal Assistance Society since 2008. Her work is exclusively focused on law and policy related to low income housing income security. She directly represents clients and pursues systemic change in these areas. Kendra also spends her time eating kale, baking treats and having dance parties with her dog.

John Minkley - Barrister & Solicitor

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As a lawyer in Victoria John has worked for many years with individuals with disabilities and their families in setting up trusts, estate planning and decision making arrangements. In an earlier career John was a manager with BC Treasury Board Staff in the area of social policy. John's hobby is kayaking.

Annette Murray - Advocate

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Annette has worked as an income assistance advocate at BCCPD for many years. Her interests include politics and current events, music (JJ Cale - RIP) and good TV.

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Deanna is an immigration lawyer in private practice at McCrea & Associates since August 2010. After receiving her call to the Bar of British Columbia in 2003, Deanna became Staff Lawyer and Executive Director of the West Coast Domestic Workers' Association, where she represented live-in caregivers in all aspects of immigration and employment law. Deanna has extensive experience assisting marginalized and low-income workers, undocumented workers, trafficked persons and applicants for permanent residence who require Ministerial permission to remain in Canada due to medical inadmissibility or other non-compliance with Canadian immigration requirements. Deanna is currently serving as Treasurer of the Canadian Bar Association's National Immigration Section, as Supervising Lawyer at the West Coast Domestic Workers' Association, as a Board Member at MOSAIC, and as a volunteer lawyer at Access Pro Bono.

Clea Parfitt - Barrister & Solicitor

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Clea obtained her LLB from the University of British Columbia in 1991 and was called to the bar in May 1992. She articled with Victory Square Law Office, a union-side labour firm, and then worked for the BCGEU doing arbitration and labour board cases. Since October 1993, Clea has practiced privately, from 2000 onwards as a sole practitioner.

She works primarily in the areas of human rights and employment law. She has represented complainants before the B.C. Human Rights Tribunal on a wide cross-section of complaints and has appeared on judicial reviews of human rights matters before the BC Supreme Court. Clea has also appeared before a number of other administrative tribunals on a variety of issues, generally employment related. Clea was co-counsel in a historical abuse case against the Crown involving a former child ward at Woodlands School.

Clea was active for more than a decade with the West Coast Domestic Workers' Association, a non-profit organization which provides legal advice and advocacy for domestic workers in British Columbia, was a Board Member of P.A.C.E. (Prostitution Alternatives Counselling and Education Society), and is now a board member of West Coast LEAF and a member of its Legal Committee.

Stephen Portman - Advocate

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Stephen works as a legal advocate at Together Against Poverty Society (TAPS) in Victoria on Vancouver Island. Stephen has been an enthusiastic advocate for the interests of marginalised people through his work at TAPS over the past four years working as the coordinator of the Volunteer Disability Advocacy Project, as an Income Assistance advocate, and more recently as an Employment Standards advocate. Working in the area of legal advocacy Stephen has become very interested in the need to provide legal support to those in need. Seeing first hand that access to social justice is one of the largest barriers to

constructing a community built on social equality, he is currently serving as a Co-chair to the Coalition for Public legal Services. Here in Victoria Stephen completed a B.A. Majoring in Political Science and History from UVIC. While completing his studies Stephen became particularly interested in the study of social reform movements as well as various forms of grass roots activism and currently serves as the secretary of Socialcoast, an organization that provides support to other organizations through direct action campaigns. Stephen's work with TAPS serves as his first foray into the field of professional legal advocacy.

Amanda Rose - Lawyer

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Amanda is a former advocate on child protection with training in mental health. She retrained as a lawyer in BC (after legal training in the UK) and now practice child protection and family law. Amanda likes hiking.

Ashley Silcock - Advocate

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Ashley is an advocate with the BC Coalition of People with Disabilities. She helps people with applications and appeals including those involving Canada Pension Plan Disability benefits. Ashley's background includes women's and LGBT-Q issues.

Kevin Smith - Staff Lawyer

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Kevin is a graduate of Osgoode Hall Law School of York University, Ontario. Kevin is a member of the BC and Ontario Bar, has worked as a legal aid lawyer for thirty years in Ontario, and for the last three years has worked in BC. While in Ontario, Kevin worked in the community legal clinic system there. His last position there was as the Clinic Director of Parkdale Community Legal Services (PCLS), a community clinic associated with Osgoode. PCLS has twenty staff, and each academic term twenty law students come to work in the clinic as full time caseworkers. Kevin was Co-Director of the Parkdale Intensive Program in Poverty Law of Osgoode, and was a member of Osgoode's Faculty. More recently in BC Kevin has specialized in 'elder law.' Kevin has his own elder law practice, Coastal Elder Law Corporation. Kevin had also previously worked with BC CEAS as the Program Manager of the Elder Law Clinic.

Stephanie Smith - Legal Advocate

MOSAIC

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Stephanie started doing front line legal work about 13 years ago. In that time she has also been a case manager and union activist, and worked with grassroots anti-poverty and social justice organizations.

Linda Theissen - Lawyer

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Linda graduated from the University of Saskatchewan. She practised family law in BC for 16 years before joining Legal Services Society. She was previously with Family Case Management, the LawLINE and now responsible for family law services including the Family Duty Counsel Program.

Cheryl Vickers - Chair & CEO

Property Assessment Appeal Board
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Richmond, BC V6X 2W9
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Appointed in January 2003 as Chair of the Property Assessment Appeal Board, Ms. Vickers served the Board as Vice-Chair since 1995 and as a part-time Board member from 1993 to 1995. In July 2007, Ms. Vickers was also appointed Chair of the Mediation and Arbitration Board, now called the Surface Rights Board, a tribunal exercising jurisdiction under the Petroleum and Natural Gas Act to resolve surface lease disputes between landowner's and the holders of subsurface rights. In March 2013, she was appointed Acting Chair of BC's new Civil Resolution Tribunal, Canada's first ever on-line tribunal to help citizens resolve strata and small claims disputes.

Ms. Vickers is a lawyer, obtaining her LLB from the University of Victoria in 1984, and formerly practiced in a variety of fields, including administrative law. Ms. Vickers was active in the development of the British Columbia Council of Administrative Tribunals (BCCAT), and has served as member of that organization's Board of Directors including as Secretary from 1996 to 1998 and as President from 2004-2006. She has assisted in curriculum development for BCCAT courses offering training to appointees of quasi-judicial boards and tribunals and is an instructor of the Foundations of Administrative Justice, Foundations for Professional Regulatory Tribunals, Staff Foundations, Decision Writing, and Hearing Skills courses. She has delivered workshops on as variety of subjects including Case Management and Alternate Dispute Resolution for Tribunals at Annual Conferences of BCCAT and the Council of Canadian Administrative Tribunals, and has presented at Continuing Legal Education programs in both Administrative Law and Property Assessment. She serves on the editorial boards of two CLE Practice Manuals – Real Property Assessment and Administrative Law. In October 2009, Ms. Vickers received BCCAT's Recognition Award for outstanding contribution to administrative justice.

Alison Ward - Barrister & Solicitor

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Alison has run the Community Advocate Support Line (CASL) since its inception in 2006. She works at the Community Legal Assistance Society (CLAS) in Vancouver where, through CASL, she collaborates with and advises advocates throughout BC on poverty law and family law issues. She is also a PovNet board member. Before working at CLAS, Alison spent 16 years as a staff lawyer at the Legal Services Society in Vancouver. She practiced poverty law until 2002, and then child protection and family law in LSS's family law clinic. She subsequently worked as LSS's LawLine, and then started and ran CASL at LSS, until it moved to CLAS in 2010. Alison is grateful to be able work with so many wonderful advocates!

She has worked in poverty law and family law since she became a lawyer in 1994. Alison articled with LSS in Vancouver in poverty law, and then practiced in LSS's Vancouver poverty law clinic from 1995 to 2002, handling issues including income assistance, housing, EI, WCB, disability insurance, foreclosure, bankruptcy, debt, employment and other civil matters. She took a year out from that to work in LSS's appeals department handling immigration and criminal law appeals and judicial reviews. After LSS's poverty law clinics closed in August 2002, Alison practiced family and child protection law in the LSS family law clinic in Vancouver (that clinic later closed in April 2009). In early 2004, Alison moved to the LawLINE (which ended April 2010) and then became the staff lawyer on CASL when it opened in May 2006.

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Provincial Training Conference for Legal Advocates

October 8, 9, 10, 2013

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   - **Discussion of current issues for advocates working with Aboriginal clients (Day 3)**

2. **Debt and Consumer Issues**
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3. **Employment**
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   - **EI Appeals and the new Social Security Tribunal (Day 2)**

4. **Family and child protection**
   - **Update on the new Family Law Act and case law (Day 1)**
   - **Overview of child protection (Day 1)**
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    - **Welfare and Assets (Day 1)**

9. **Other**
    - **Legal Issues Affecting Seniors (Day 1) (repeated 1st and 4th session)**
    - **Update on Wills and Estates Legislation (Day 2)**
    - **Immigration Hot Topics (Day 3)**

TAB 1: Aboriginal Issues

- **MCFD and Aboriginal Clients (Day 3)**

Orange sheet

- **Discussion of current issues for advocates working with Aboriginal clients (Day 3)**

Aboriginal Clients and MCFD: the Intersection of Rights and Responsibilities

Law Foundation of B.C.

Provincial Training Conference for Legal Advocates

October 10, 2013

Anja P. Brown

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Overview

- Aboriginal people have an inherent right to self-government which includes jurisdiction over matters concerning the well-being and protection of children.
- This recognition has been reflected in various ways, including through self-government agreements, the existing provincial child protection legislation *(Child, Family and Community Service Act "CFCSA"),* the development of tri-partite Delegation Agreements, incorporation into treaties, and most uniquely, through an *Indian Act* By-law (Splatsin First Nation).

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- For most BC First Nations, greater control of child protection issues continues to take place under the framework of the *CFCSA*
- On-the-ground exercise of Aboriginal principles and laws of child care and child protection can be formalized through alternate parenting arrangements, for example, under the *CFCSA*, *Family Law Act*, or through adoption (custom or otherwise).

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Child, Family and Community Service Act (CFCSA)

- Provincial law that applies on and off reserve
- Provides to a certain extent for First Nations involvement (notice, standing as a party but practical barriers to full participation)
- Delegated Aboriginal agencies
- Differences in practice approach between the Ministry and delegated Aboriginal agency, formalized through practice standards

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- Guiding principles at s. 2 provide that the *CFCSA* is to be interpreted and administered so that safety and well-being of children are the paramount considerations and include
  - being in one's own family is the preferred environment
  - ties to extended family should be preserved if possible
  - cultural identity of Aboriginal children should be preserved

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- Over-representation of Aboriginal children in Ministry care is well documented and there is recognition that there must be ways to address this.
- First Nations are best-placed to make decisions about their children in need of protection

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- In BC, First Nations are taking greater control of child welfare issues in a number of ways:
  i. Through delegation agreements that operate pursuant to the *CFCSA*
  ii. In a few cases, through modern treaties (Nisga'a, Tsawwassen); treaty nations recognized in *CFCSA*
  iii. In 1 case only, through an *Indian Act* by-law

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Delegation Agreements

- Legally binding delegation agreements with the province, under the *CFCSA*
- "delegated Aboriginal agency", varying levels of authority translate to different services provided to the community
- Powers of delegation:

  C-3: support services

  C-4: guardianship for children under CCO

  C-6: fully delegated child protection services
- Examples include Usma Nuu-chah-nulth (fully delegated), Kaxla (partial delegation), Vancouver Aboriginal Child and Family Services ("VACFSS")

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Aboriginal involvement in the child protection process – in practice and theory

- notice to Aboriginal organization of presentation hearing if practicable (s. 33.1(4)(c) supervision; s. 34(3)(d) removal)
- notice of protection hearing is mandatory
  - s.38(1)(c) – Indian band;
  - 38(1)(c.1) – Nisga'a, (c.2)
  - - treaty, (d) – non-treaty,
  - non-registered Aboriginal child – notice to designated representative of Aboriginal community that has been identified by the child age 12 or over, or the parent.

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- First Nation entitled to be a party if appears at commencement of protection hearing); once a party, entitled to disclosure, call witnesses, attend FCC and mediation, other ADR processes
- Mediation, Family group conferencing; family case conferences
- S.8 agreements (formerly "kith & kin", now extended family program ("EFP");
- permanent transfer of custody under s. 54.01 (before CCO) or 54.1 (after CCO);
- transfer of custody under *Family Law Act*; adoptions including custom adoptions

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Splatsin First Nation By-Law

- (A By-law for the Care of our Indian Children: Spallumcheen Indian Band By-law #3 – 1980)
- under s. 81 of the *Indian Act*, Band councils have powers to make by-laws in relation to a number of listed subject areas
- only child protection by-law under the *Indian Act* in Canada
- the By-law was a response to the "60's scoop" and loss of children from the community
- unique in Canada, and has been in place for over 30 years (since 1980)

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Adoption

- Custom adoption can be recognized under s. 46 of the BC *Adoption Act.*
- Custom adoption exists whether one has an order under the *Adoption Act* or not .
- *Indian Act* recognition of custom adoption; can circumvent restrictive nature of registration rules.
- Under the *Adoption Act s.7,* before placing an Aboriginal child for adoption, the director must make reasonable efforts to discuss the placement with the First Nations. No detail about those "discussions" and no veto power by the First Nation.

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Custom Adoption

- custom adoptions have been taking place in Aboriginal communities since time immemorial, each in accordance with the particular custom of the community
- adoption and the caring of another's biological child as one's own is an important and integral aspect of Aboriginal communities, and has been recognized in Canadian case law as having legal effect
- In BC, custom adoptions can be formally recognized under s. 46 of the *Adoption Act*; there is a process whereby a custom adoption has the same legal effect and can be recognized as an adoption under the *Act*.

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Current Legal Issues Affecting Aboriginal Clients

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The work of advocates

- Advocates help clients navigate a broad range of legal issues. With Aboriginal clients, there is an added legal layer to be mindful of and which can greatly affect or even change the advocacy provided.
- As we all know, obtaining legal aid has become increasingly difficult, meaning more clients are turning to advocates, pro bono clinics, and Native Courtworkers where available, as a starting point to get legal advice or information and from there often proceed with the challenge of representing themselves in court.

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- First Nations clients deal not only with provincial and federal governments, but also with First Nations' governments which can give rise to unique legal issues at all levels of court. This is especially true for persons living on reserve, but applies to off reserve members as well.
- First Nations considerations are also relevant when dealing with legal matters that may not involve the courts (i.e. Residential Schools, EI, housing, CRA and Canadian Human rights).

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Levels of court in BC and Canada

i. Provincial court (circuit court in rural BC communities)
- family (not all)
- youth and adult criminal
- small claims (under $25, 000)
- traffic court (some cities)
- regulatory offences (i.e. under provincial laws such as the *Wildlife Act*, or federal law such as *Fisheries Act)*

ii. BC Supreme Court
- civil claims over $25,000
- family (provincial or supreme sometimes optional depending on the nature of the case)

or – can be first level of appeal court

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iii. Court of Appeal

iv. Supreme Court of Canada

v. Federal Court of Canada

- also Tax Court of Canada
- for certain matters under federal jurisdiction, i.e. challenges under the *Indian Act*
- appeals to Federal Court of Appeal, then Supreme Court of Canada

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Family Court

- ***Family Law Act (FLA)* – in force since March, 2013**
  - private law issues (between individuals)
  - parenting time and responsibilities, guardianship, contact (formerly known as access), child and spousal maintenance (Provincial or Supreme court)
  - divorce (Supreme Court only)
  - division of property now includes common-law (Supreme Court only)
  - adoption not under the *FLA*, but rather *Adoption Act* (Supreme Court)
  - BC Supreme Court has NO jurisdiction to deal with family property on reserve. This is a gap in the law that the federal government has attempted to address through the *Family Homes on Reserve and Matrimonial Interests of Rights Act* (not yet in force)
  - Dealing with property issues on reserve is complicated because any new law must be consistent with family law principles under the *FLA* and the *Indian Act* and flexible enough to take into account and be respectful of existing First Nations laws and policies in relation to their lands.

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Family Court continued

- ***Child, Family and Community Service Act ("CFCSA")***
  - public law (government intervention where child may be at risk)
  - child protection (aka child welfare)
  - provincial law that applies on and off reserve throughout BC except for Spallumcheen (Splatsin) First Nation
  - a law of general application meaning it applies to Aboriginal children on reserve and through s. 88 of the *Indian Act*
  - Guiding principles at s. 2 provide that the CFCSA is to be interpreted and administered so that safety and well-being of children are the paramount considerations and include:
    - being in one's own family is the preferred environment
    - ties to extended family should be preserved if possible
    - cultural identity of Aboriginal children should be preserved

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Criminal Court

- adult and youth (*Youth Criminal Justice Act*)
- *Criminal Code*, *Controlled Drugs and Substances Act*, *Wildlife Act*, *Fisheries Act*, etc.
- some charges prosecuted by provincial crown, some by federal crown

Process

- criminal incident (arrest or not), investigation, report to Crown Counsel, charge approved or not by Crown
- if arrested: bail hearing (planning, involvement of local Restorative Justice office or committee, *Gladue* principles engaged)
- if charge approved, then to Court for 1st appearance

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- for youth, certain charges may be referred by police for "diversion" or "alt measures", to the Restorative Justice office or committee, get dealt in the community with and never end up in court. Known under the *YCJA as* extra-judicial measures or sanctions ("EJS")
- at or soon after first appearance, accused person obtains particulars
- retain legal counsel (legal aid or hire), assistance from NCW if appropriate and available, represent self, or duty counsel for guilty plea; availability of First Nations Court?
- Legal aid determined by financial eligibility + Crown's initial sentencing position ("ISP") OR if there is an Aboriginal rights defence

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– guilty or not guilty
– if not guilty, then trial
– if guilty/accept responsibility, negotiations with Crown prior to plea;
– if guilty, then sentencing (involve Restorative Justice office or committee); consider effect of weapons prohibition; indigenous alternatives to incarceration; community-based accountability

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Indian Residential School Settlement Agreement

- Settled a Canada-wide class action lawsuit
- Covers IRS survivors who did not opt out of settlement and who were living as of May 30, 2005.
- provides for common experience payment ("CEP"), and an out-of-court process to compensate for sexual abuse, serious physical abuse and other wrongful acts (IAP);

CEP

- Application process for general IRS compensation based on years of attendance ($10,000 for first year + $3,000 for each additional year)
- deadline for applications was September, 2011. Late applications in the case of exceptional circumstances (disability or hardship) were accepted up to September, 2012
- reconsideration and appeal process on-going. Not surprising since many school records were lost or destroyed, or are inaccurate.
- More than $40 million remaining in the Fund designated for CEP, so once approved by the Court, funds will be made available on application to CEP recipients or may be transferred to eligible family members as personal credits of up to $3,000 for educational purposes.

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Residential School continued

- **IAP**
  - Deadline passed September 19, 2012
  - applications can be made to the Court for extension of time under exceptional circumstances
  - many survivors submitted applications without the assistance of legal counsel in order to make the deadline
  - unlike CEP which required only an application and eligibility was determined solely by years of attendance, IAP is a legal process and requires a hearing and the giving of evidence under oath to prove the claim. Therefore, in most cases, IAP requires the claimant to be alive.
  - Canada provides 15% of any settlement towards legal fees. Under the Settlement Agreement, the maximum lawyers can charge for representation under the IAP is 30% and adjudicators have the power to review legal fees for reasonableness.
  - Indian Residential Schools Survivors Society is an excellent source of information and provides on-going support to survivors.

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Some common *Indian Act* issues

- S. 6: Indian status; *McIvor* case and Bill C-3 *Gender Equity in Indian Registration Act*
- S. 45: Wills
- S. 74: Band Council elections (custom elections, s. 2(1))

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- S. 87: Taxation – personal property if an Indian or a band situated on a reserve is tax exempt

  Personal property includes items such as vehicles and furniture purchased on reserve or delivered to reserve, real property on reserve, and depending on the circumstances, can include employment earnings and EI based on those earnings and investment interest

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- S. 89: Protection from seizure
  - Protects a status Indian's real and personal property from seizure
  - Exception under s. 89(2) – conditional sales – i.e. Vehicle financing
  - Exception where a Band or another status Indian are seizing (for example, where family maintenance is owing)
- *Bill S-2, Family Homes on Reserves and Matrimonial Interests or Rights Act*
  - not yet in force
  - once in force, First Nations can establish their own matrimonial property laws and those that do not, will be subject to the *Act*.

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Other issues

- **Disputes with First Nations government, for example**
  - band membership
  - housing
  - post-secondary funding
  - employment
- *Canadian Human Rights Act*
  - In 2008, s. 67 of the *Act* was repealed. S. 67 prevented the filing of a human rights complaint in relation to anything arising from the *Indian Act;*
  - the repeal of s. 67 was immediately applicable to the federal government, and First Nations were provided *a* three year transition period that ended on June 18, 2011
  - complaints may be made to the Human Rights Commission where an individual feels he or she has been discriminated against by a Federal government official or a First Nations government on the basis of a prohibited ground, for example race, sex, disability or sexual orientation.

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TAB 2: Debt and Consumer Issues

- **Debt Issues (Day 3)**
  - TOC at start of section.

Orange sheet

- **Show me the Money (Day 3)**
  - Show me the Money notes

Separating sheet

- Appendices A to F;

Separating sheet

- Common procedural questions with scanned attachment; and

Separating sheet

- Resources for Small Claims Court with attached appendix.
-

Provincial Advocacy Training Conference 2013

Debt Law: Manjeet Chana and Alison Ward

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Manjeet K. Chana
Provincial Advocacy Training Conference
October 10, 2013

Credit/Debt Law



Source: http://blog.chargesmart.com/2012/05/update-consumer-revolving-debt/

I. Joint debtors and guarantors

1. What is the difference between a joint debtor/cosigner and a guarantor?

   - A cosigner, also known as a joint debtor, is someone who enters into a credit contract (for a loan or credit card, for example) together with at least one other party. Each of the debtors is jointly and severally (or fully and separately) responsible for repayment of the whole of the debt.
   - A guarantor is someone who promises to be responsible for another person's debt in case that person defaults on payment of a credit contract.

2. If joint debtors default on a credit contract, who can the creditor pursue for payment?

   - Where two or more debtors have signed the credit contract and where there has been default on the contract by the debtors, the creditor can rely on the promises to pay made in the original credit contract and pursue one or both joint debtors, or one of the debtors before the other, for the whole of the debt. This is because both debtors are equally responsible for repayment of the debt – regardless of who incurred the debt, who has a higher income, or an agreement (such as a separation agreement) between the parties as to who will repay the debt.

3. When can a creditor demand payment from a guarantor on a credit contract signed by a principal debtor and a guarantor?

   - If the principal debtor defaults on payment of a credit contract, the creditor can then request payment from the guarantor.

4. Can a creditor who has a judgment against a debtor garnish a joint bank account?

   - A creditor who is enforcing a judgment against a *single* debtor cannot garnish a *joint* bank account because the creditor could be withdrawing monies that belong to the innocent party.

5. Can a creditor who has a judgment against a debtor register a judgment against the title to a home which is in joint tenancy?

   - A creditor can register a judgment against the property interest of a debtor where that property is in joint tenancy. The Land Title Office makes a notation of the judgment against the interest of the joint tenant who is the judgment debtor.

6. When is a secondary or additional cardholder responsible for payment of a debt owing on a credit card?

   - Often, primary cardholders can add family members or friends as secondary or additional authorized users to their credit card accounts. Depending on the cardholder agreement, secondary cardholders are usually **not** legally liable for any debt owed to the credit card company. However, some credit contracts do make secondary cardholders accountable for the total card debt -- despite not signing an application (for example, when the primary cardholder requests a secondary card and the credit card company sends a card out in the second individual's name with the primary cardholder's number, and the second individual signs and uses the card).
   - A secondary cardholder **is** held responsible for repayment of the debt when the primary cardholder requests a secondary card and the secondary cardholder signs an application form agreeing s/he is an additional (or joint) card user who, as a joint borrower, accepts full responsibility for any outstanding balances;
   - Consider also s. 97(4) of the *Business Practices and Consumer Protection Act* ("BPCPA"), which states that an individual who applies for a credit card without signing an application form is deemed, on **using** the credit card for the first time, to have entered into a credit agreement in relation to that card in the terms of the disclosure statement issued by the credit card issuer.

7. If a credit card is lost or stolen, who pays for any accumulated charges?

   - According to s. 99 of the BPCPA, once a card issuer is informed verbally or in writing that a credit card has been lost or stolen, no payment is necessary by a consumer for charges accumulated on the lost or stolen card. If someone uses the

card before it is reported lost or stolen, a consumer's liability is limited for unauthorized charges by the BPCPA to a maximum of the lesser of $50 or the maximum amount set by the credit agreement. This protection does not apply to credit cards used with a confidential PIN to withdraw from a cash machine.

- If there is both a primary and secondary cardholder (eg. a husband and wife) and both have signed the credit contract, each will be jointly and probably severally liable to pay the $50 liability, regardless of whose card was lost or stolen.

8. Is a surviving spouse liable for the debts of a deceased spouse?

- A surviving spouse is not personally liable for the debts of a deceased spouse unless a debt was in joint names.

II. Dealing with Debt: Options

9. What are some options a debtor has to deal with his or her debts, whether personally or jointly owed?

- A debtor has various options, including "doing nothing" (where appropriate and which often really involves a "wait and see" approach), communicating directly with the creditor himself/herself or with the assistance of a legal advocate or representative, obtaining assistance through credit counseling (with options, for example, such as debt pooling and consolidation), and/or pursuing an option under the federal Canada *Bankruptcy and Insolvency Act* ("BIA"), such as making a consumer proposal or an assignment into bankruptcy.

10. Who is eligible to make a consumer proposal under the BIA?

- A consumer proposal is a formal process that is carried out through a trustee in bankruptcy and is available to individuals whose total debts do not exceed $250,000, excluding debts like mortgages secured by their primary residence. With a consumer proposal, the trustee puts together an offer to pay creditors a percentage of what is owed to them over a specific period of time, or offers to extend the time the debtor has to pay off the debt, or the offer may be a combination of both. Payments are made through the trustee, and the trustee uses that money to pay each of the creditors.

11. What are some pros and cons for a debtor of making a consumer proposal under the BIA?

- The primary advantages of a consumer proposal are that the (1) client keeps all of his or her assets, (2) actions against the client by unsecured creditors, such as wage garnishments, will be stayed (stopped), and (3) the client can deal with his or her financial problems without having to declare bankruptcy.

- In terms of disadvantages, the proposal will appear on a debtor's credit record for the term of the proposal plus three years after the date of the last payment made. In addition, if payments are 3 months or more in arrears, the consumer proposal is deemed to be annulled, meaning that creditors will be able to take action to collect on the monies owed to them. Otherwise, the maximum term for a consumer proposal is 5 years.

12. When can a debtor make an assignment in bankruptcy?

- Debtors can make an assignment in bankruptcy if they have liabilities to creditors of $1,000 or more. These liabilities have to be provable claims under the federal BIA and debtors must be:
    - generally unable to pay their credit obligations as the obligations become due; and,
    - not able to file a workable consumer proposal.
- The most important effect of an assignment is that all legal actions by creditors against the bankrupt are stopped; unless creditors get court permission, they cannot sue a bankrupt or take judgement enforcement proceedings.

13. What property is a person making an assignment into bankruptcy allowed to keep?

- A debtor can keep certain assets, which are called "exempt property". Exempt assets include:
    - post-bankruptcy income tax refunds (unless there is an FMEP garnishment order in place);
    - RRSPs, RRIFs, and DSPs (deferred profit sharing plans) under the *Income Tax Act*, except for contributions made in the last 12 months before the debtor went into bankruptcy; and,
    - the same assets that are exempt from seizure by a bailiff under the *Court Order Enforcement Act* (s. 71) and the *Court Order Enforcement Exemption Regulation* (s. 2), including an exemption value of $4,000 for household furnishings and appliances; $5,000 for one motor vehicle (if the debtor is not a maintenance debtor), or $2,000 for one motor vehicle if the debtor is a maintenance debtor; and $10,000 for tools and other personal property of the debtor that are used by the debtor to earn income from the debtor's occupation. All essential clothing and medical and dental aids are also exempt. In addition, there is an exemption allowed for equity in a principal residence of a debtor. If within Greater Vancouver, a debtor has $12,000 equity exemption, while if living outside of Greater Vancouver, it is $9,000.

14. What debts will a bankruptcy *not* discharge?

- Section 178 of the BIA provides that a discharge from bankruptcy will not release the bankrupt from certain debts, including:
    - court imposed fines, penalties, or restitution orders;
    - court awards for damages for intentionally inflicted bodily harm or sexual assault;
    - spousal or child support arrears;

(5)

- debt or liabilities arising from certain types of fraudulent conduct by the debtor; and,
- student loans if the debtor files for bankruptcy before ceasing to be a student or within 7 years of ceasing to be a student. (However, a former student can make a special application to be discharged from his or her student loan after five years on the grounds of hardship).

15. What if a potential bankrupt cannot afford to hire a bankruptcy trustee?

- The Office of the Superintendent of Bankruptcy has a "Bankruptcy Assistance Program" ("BAP"), a very popular program consisting of a small number of volunteer trustees. The BAP assists individuals with hiring a bankruptcy trustee if they cannot afford to do so on their own. Note, it is *not* a free program.
- A client may be eligible for the BAP if s/he:
  - has contacted at least two trustees (or the sole trustee in the area where there is only one trustee) and tried to obtain their services;
  - is not involved in commercial or business activities;
  - is not in jail; and,
  - does not have surplus income.
- While the client is still required to pay a trustee's out of pocket expenses, such as Supreme Court filing fees, a trustee participating in the BAP will work out a fee arrangement with a debtor depending on his or her financial circumstances. A debtor may be required to pay some wages (if working) into his or her bankruptcy estate. If the client owns any non-exempt assets, the trustee can sell them and the monies would go into the debtor's estate, which the Trustee would look to for payment.

16. When is a bankrupt discharged?

- Currently under the BIA, in the case of a first time bankrupt, the period of time for an automatic discharge is 9 months if there has been no surplus income. First time bankrupts who have surplus income are eligible for an automatic discharge after contributing part of their surplus income to their estate for 21 months.
- In the case of a second time bankrupt, the period for an automatic discharge is 24 months if there has been no surplus income, and 36 months if there has been surplus income.

17. What is the effect of bankruptcy?

- After discharge, a bankrupt is legally released from paying non-exempt debts incurred before the assignment in bankruptcy was made. However, bankruptcy **does not** cancel the responsibility of anyone who has guaranteed or cosigned a loan. If one of two joint debtors declares bankruptcy, then the non-declaring party becomes liable for the whole of the joint debts and the creditors can pursue repayment of the debts from that person. If the non-bankrupt joint debtor repays part or all of a joint debt, s/he can become a creditor in the bankruptcy.

- A bankruptcy remains on a debtor's credit record for 6 years after the discharge date.
- Under the *Wage Earner Protection Program Act* ("WEPP"), protection is provided to employees of a company or business that has declared bankruptcy. WEPP provides for compensation for amounts owing to employees such as unpaid salaries, commissions, compensation for services rendered, vacation pay, gratuities, bonuses, severance and termination pay.
- To be eligible, an employee must submit an application for payment under WEPP within 56 days of the later of the date of the bankruptcy or end of employment. The maximum amount of the claim that can be paid out to an employee under the WEPP is the greater of $3,000 or an amount equal to four times the employee's maximum insurable earnings under the federal *Employment Insurance Act*, which is about $3,600 for 2013.

III. Some Defences to Debt Claims

1. *Defence:* Frivolous Claim - Shoplifting Civil Demand Letters

Note: See article "Have you been accused of shoplifting?" and sample civil demand letter in materials.

i. Does someone accused of shoplifting have to comply with a civil demand for payment?

- Generally, the answer is "no". Someone receiving this type of demand letter can raise, as part of a response letter or defence in a court action, that the alleged creditor is making a "frivolous claim" because the demand is made without proof that the monies claimed are actually owed. The general sense of the courts seems to be that the overall costs of investigation and/or loss prevention are already, and properly, being passed on to society at large, so such costs are unlikely to be awarded against an individual in BC Small Claims Court.

ii. Is a parent of a child caught shoplifting liable to comply with a civil demand for payment?

- Under common law, the parent of the child caught shoplifting is not liable (unless the parent encouraged the shoplifting or was otherwise directly involved). However, a parent can be liable under BC's *Parental Liability Act* (which was known as the *Parental Responsibility Act* until March 18, 2013). The key provision of this Act imposes potential financial liability for property damage on a parent of any child who "intentionally takes, damages or destroys property of another person". The maximum award against all parents under this Act is $10,000.

2. *Defence:* Lack of Capacity

a. Infant Contracts

i. Who is an infant?

- An infant (or minor) is defined in the BC *Age of Majority Act* as anyone under the age of 19.

ii. Is a contract made by an infant enforceable by an adult against that infant?

- Pursuant to the British Columbia *Infants Act*, contracts made by an infant are unenforceable against a child under 19. This means is that the adult party to the contract cannot force the infant party to perform the contract because the infant is presumed not to have the necessary mental capacity to make a contract. However, there are exceptions to this. A contract **is** enforceable against an infant:
  - where a statute specifically allows such a contract to be enforceable (for example, infants can enter into residential tenancy agreements as tenants with landlords according to s. 3 of the British Columbia *Residential Tenancy Act*);
  - where an infant affirms the contract on reaching the age of 19;
  - where an infant performs or partially performs or does not repudiate or reject the contract within one year after reaching 19; or,
  - where the contract signed is a student loan agreement.

iii. If a contract is unenforceable against an infant, does either the adult or infant party to the contract have any legal remedy?

- If the contract is unenforceable against an infant, either the adult party or infant party (by litigation guardian) can apply to BC Supreme Court for a remedy. The type of remedy that a Supreme Court can order includes payment of compensation, return of property, or discharge from the contract. In deciding whether to make such an order, the Supreme Court considers all the circumstances surrounding the making of the contract, including whether the infant lied about his or her age.

iv. What if a third party guarantor signed the contract made by an infant?

- A third party guarantor (someone who signed the infant's contract agreeing to be responsible for the debt if the infant does not/is unable to pay) will have to pay the debt owing/perform the contract obligations, regardless of whether the contract is enforceable against the infant.

b. Contracts made by someone with a mental illness

i. What level of capacity is required to enter into a valid contract?

- To enter into a contract in law a person is required to have a level of mental capacity by which he or she understands the nature and effects of the contract being signed.
- Someone who has a serious mental condition (like schizophrenia or Alzheimer's) which makes them incapable of caring for themselves or managing their affairs in general may not to have the mental capacity in law necessary to make a valid contract. A contract entered into by this type of person could be void or voidable (proven to be invalid) and a court may decline to enforce a contract made by such a person, even where a creditor did not know of the person's mental incapacity.

ii. What possible legal defences does someone with a mental illness have to the enforcement of a contract?

- Some examples include lack of capacity, mistake (fundamental misunderstanding of an element of a contract), misrepresentation (false statements), unconscionability, unfairness, undue influence (stronger person pressures weaker person), and duress (coercion). These defences are also available to mentally competent individuals.
- Unconscionability exists where the terms of the contract are so unfair and adverse to one party so as to be inequitable. The BPCPA, s. 8, defines unconscionable acts and practices, including a situation where one party (the supplier) takes advantage of a consumer who is unable to reasonably protect his or her own interests because of his or her mental incapacity. If this defence is successful in court, the court may refuse to enforce the contract, refuse to enforce the offending clause or take other measures it deems necessary to have a fair outcome.
- Undue influence exists where an unfair contract has been created by a stronger or more powerful person inducing or pressuring the weaker person to enter into an agreement or transaction.

iii. What are some practical tips for helping someone who has a serious mental condition, has incurred a debt, and is facing demands for payments from a creditor?

- The debtor can write a letter to the creditor explaining his financial situation, his mental condition, and other relevant circumstances surrounding the making of the contract, such as the creditor's knowledge of the debtor's incapacity at the time of the making of the contract. The debtor can raise an applicable legal defence mentioned above (including lack of capacity to understand the nature and effect of the contract signed) and request that the debt be written off. It would be helpful for a debtor to obtain a letter from his or her doctor confirming his or her mental illness and its nature (eg. because of the debtor's dementia he or she did not understand the nature and consequences of the contract) and to attach it to the letter to the creditor requesting a write off.

(9)

- If the creditor refuses to write off the debt, the creditor may sue the debtor in court and the debtor can then raise various legal defences in court. The creditor needs to consider, however, whether it is worthwhile to start a court action in light of the defences that might be raised in such a case and also in light of the debtor's financial circumstances (the debtor may be judgment proof).

3. *Defence:* Limitation period for debt has passed

i. Is there a limitation period to start an action on a debt?

- **Before** June 1, 2013, the limitation period for debt was 6 years. **Effective June 1, 2013**, BC's *Limitation Act* (section 6) introduced a **basic 2 year limitation period** that applies to most *(but not all)* claims for injury, loss, or damage. This section governs most debt situations. The new Act also reduces the general "ultimate" limitation period from 30 years to 15 years.
- There are some important exceptions to the new basic limitation period:
  (1) under the former *Limitation Act*, unsecured debts to the government (e.g. welfare overpayments, BC student loans, and motor vehicle indebtedness owed to ICBC) were generally governed by a 6 year limitation period and under the new *Limitation Act*, most debts to the Province of BC **continue** to be governed by a 6 year limitation period; and,
  (2) according to s. 16.1(5) of the *Canada Student Financial Assistance Act,* even if an acknowledgement (whether in writing or by partial payment) is made **after** the 6 year limitation period has passed, the acknowledgement restarts the 6 year limitation period and a student loan debt is still owed.
  (3) the *Limitation Act* does not apply to an action where a specific limitation period is set by another statute (e.g. the *Residential Tenancy Act* sets a two year limitation period to file a monetary claim against a landlord).
- There are transitional rules to help determine when the former Act applies and when the current Act applies: see http://www.ag.gov.bc.ca/legislation/limitation-act/pdf/LAFlowchart.pdf.

ii. What if the limitation period has passed?

- Section 6 of the new *Limitation Act* sets out that legal actions for claims (including unsecured debts), cannot be brought more than 2 years after the day on which the claim was discovered. In a debt case, if a creditor starts a court action more than 2 years later, a debtor can raise a "limitations" defence, contending that the creditor's claim is "statute-barred".
- Section 27 of the new *Limitation Act* prevents a creditor from also exercising a "non-judicial remedy" once the governing limitation period has expired. In other words, if a limitation period has expired, a creditor is not entitled to start a court action but also cannot exercise an out-of-court remedy.

(10)

iii. When is a limitation date extended or restarted under the Act?

- If a debtor acknowledges liability before the end of the applicable limitation period, the whole limitation period restarts. The BC *Limitation Act*, section 24, says that an acknowledgement of liability occurs when it is in writing and signed (by hand or electronic signature) by the debtor to the person with the claim, or when a part payment in respect of a debt is made. In many cases, this means that the limitation date will run from the date when a payment was last made, or a written and signed acknowledgement of liability made, rather than the date when the payments under the agreement were first in default, or when the claim was first discovered.
- If there is some question as to whether a debtor might have a limitation defence, the debtor should not to make any payments in the meantime, not give any kind of written statement (e.g., in a letter to the creditor) acknowledging his or her liability for the debt, and should consult a lawyer.

iv. How long is a judgment enforceable?

- According to section 7 of the BC *Limitation Act*, creditors have up to 10 years from the day after the judgment becomes enforceable to try to enforce the judgment. The creditor is allowed to take enforcement steps any time during those 10 years, but not after, unless the judgment is "renewed".

4. *Defence:* First Nations Personal Property on Reserve

i. Can personal property on a First Nations reserve be seized by a creditor or debt collector?

- Because of s. 89(1) of the Canada *Indian Act*, real estate (or real property) and personal property of a First Nations person on a reserve is exempted from seizure by a non-First Nations person.

ii. Are there exceptions to the personal property exemption from seizure?

- According to s. 89(2) of the Canada *Indian Act,* if a First Nations person or Band enters into a conditional sales agreement (where the seller retains ownership or possession rights and keeps the right to seize the goods) and defaults under the agreement, the seller will likely have to start a court action to get a court order for return of the property. If the court order is granted, a sheriff acting under the authority of the order can go on a reserve and seize the property (for example, a vehicle).
- If the creditor is a First Nations person or a First Nations Band, then goods situated on a reserve are not protected from seizure; goods on a reserve can be seized by a First Nations creditor.

IV. List of Resources

- "Consumer Law and Credit/Debt Law" by Allan Parker, Q.C. (see Legal Services Society ("LSS") publications at http://www.lss.bc.ca/publications/pub.php?pub=17), chapters 3-5, 9, 12, 13, 15, and 19.
- "BC Debtor-Creditor Law and Precedents" by Lyman Robinson.
- "Can't Pay Your Mortgage" (LSS publication, see http://www.lss.bc.ca/publications/pub.php?pub=15).
- "Have you been accused of shoplifting?" originally written by Bruno Drucker, updated by Manjeet Chana.
- Office of the Superintendent of Bankruptcy ("OSB") website for information about (1) consumer proposals at http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br02051.html and (2) the Bankruptcy Assistance Program at http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br02138.html.
- Human Resources and Skills Development Canada webpage about the *Wage Earner Protection Program Act:* http://www.labour.gc.ca/eng/standards_equity/wepp/index.shtml.
- New BC *Limitation Act* information on the Ministry of Justice website: http://www.ag.gov.bc.ca/legislation/limitation-act/2012.htm.
- Aboriginal Poverty Law Manual by Legal Services Society (see: http://www.lss.bc.ca/publications/pub.php?pub=5)
- Reference to various British Columbia and federal legislation, including the *Bankruptcy and Insolvency Act*, *Business Practices and Consumer Protection Act*, *Court Order Enforcement Act*, *Wage Earner Protection Program Act*, *Infants Act*, *Age of Majority Act*, *Limitation Act*, *Mental Health Act*, *Patients Property Act*, and *Indian Act.*

(12)

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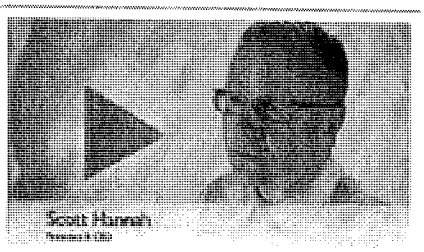
Home > Debt Help

Debt Repayment & Bankruptcy Solutions - Credit Counselling for Canadians

Is the stress of being in debt getting to you? You might only be a few months behind on your bills, or you might be so far behind that you don't even open your bills anymore. Whatever your situation, we have experienced, caring Counsellors [1] ready to give you guidance and solutions that will work for you. Our appointments are free and confidential, because nothing should get in the way of getting help with your debts.



Click to hear more about how we help.

Depending on your situation, there are several options our Counsellors will discuss with you. Some of them include:

Debt Management Program - Consolidate Your Debt Payments & Make a Budget



Click to hear what a debt management program is and how it works.

There are many different types of debt consolidation. A debt repayment program through the Credit Counselling Society means that we help you get on track with your money so that you only need to make one payment each month. The amount of the payment is based on what you can afford and you do not borrow more money to pay off what you already owe.

Your Counsellor will work with you to figure out what you can afford for a payment each month, while still maintaining a reasonable lifestyle. While you are repaying your debts through our program, your creditors will substantially lower or eliminate interest charges. All of your credit card payments will be consolidated into one affordable monthly payment. In the end, this allows you to repay all of your debts, get back on track and save thousands of dollars in interest.

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Debt Repayment Strategies

If you prefer to resolve your situation on your own, we're happy to provide you with guidance and information so that you know what to do. Sometimes this means showing you how to communicate effectively with your creditors [4] to gain their cooperation during a difficult time, providing advice about consolidation loans [5], or explaining what to look for as you consider other options.

Speaking with one of our Counsellors doesn't obligate you to anything. And a little good advice can go a long way!



[2]

Global News interviews Julia Fletcher after she pays off $10,000 in debt interest free due to help from the Credit Counselling Society. Watch [2]

Debt Settlement Programs

A debt settlement means that you pay back part of what you owe. If this option is right for you, one of our Debt Settlement Specialists will negotiate with your creditors to accept a one-time lump sum payment. Our debt settlement programs [6] are highly successful because creditors recognize the Credit Counselling Society as a trusted, reputable non-profit organization. Speak with one of our Counsellors to find out if offering your creditors a settlement is the right option for you.



[3]

CTV News shows how Dan Robinson paid off $30,000 in debt with no interest with the help of the Credit Counselling Society. See [3]story [3]

Bankruptcy Trustee Referral Program

Bankruptcy is a legal process for dealing with your debts. While no one really wants to go bankrupt, sometimes your situation gets to a point where you need to at least consider if bankruptcy is a good option for you or not. There are long term implications to declaring bankruptcy and it's not the right option for everyone.

After looking at your financial situation, if bankruptcy is one of your options, your Counsellor will explain the process, your responsibilities and the consequences of declaring bankruptcy. That way you have the information you need to make an informed decision.

Learn More

You can quickly learn more about how we help by watching these short videos:

How We Help

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What is a Debt Management Program & How Does it Work?



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Office of the Superintendent of Bankruptcy Canada
An Agency of Industry Canada

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

osb.ic.gc.ca

Dealing with Debt

A Consumer's Guide



Canada

OSB • BSF

Protecting the integrity of the insolvency system

Protéger l'intégrité du système d'insolvabilité

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MANDATE AND MISSION
OF THE OFFICE OF THE SUPERINTENDENT OF BANKRUPTCY

The Superintendent of Bankruptcy is mandated to "supervise the administration of all estates and matters under insolvency legislation."

To fulfill its legislative mandate, the Office of the Superintendent of Bankruptcy (OSB) has undertaken the mission "to contribute to a fair and efficient marketplace by protecting the integrity of the Bankruptcy and Insolvency system for the benefit of investors, lenders, consumers and public interest."

The OSB intends to achieve this mission by concentrating its efforts on the following four strategic objectives:

1. maintain an efficient and effective regulatory framework;
2. promote awareness of the rights and responsibilities of the stakeholders in the insolvency system;
3. ensure trustee and debtor compliance with the legislative and regulatory framework; and
4. be an integral source of information on Canadian insolvency matters.

INTRODUCTION

Many Canadians face a financial crisis at some time. Most debt problems are easy to solve. Others need professional assistance. The best way to deal with your financial problems is to admit to them and take control before they get out of hand.

This booklet can help you decide whether you have a serious debt problem. It also gives some suggestions for solving your difficulties and avoiding them in the future. The information in this booklet is meant for individuals only and does not apply to corporations.

Readers are reminded that this booklet is not meant to be used for legal purposes. Its only aim is to give information to individuals who are having financial difficulties.

RECOGNIZE
THE DANGER SIGNALS

You have a debt problem, or are going to have one, if:

- you continually go over your spending limit or you use your credit cards as a necessity rather than a convenience;
- you are always borrowing money to make it from one payday to the next;
- your wages have been garnisheed to pay for outstanding debts;
- you pay only interest or service charges monthly and do not reduce your total debt over many months;
- creditors pressure you for payment, threaten to sue or repossess your car, furniture or television, or hire a collection agency to recover the money for them; or
- utility companies cut off service because your bills have gone unpaid.

POSSIBLE **SOLUTIONS**

Contact your creditors

Explain why you can't make your payments and suggest making lower payments over a longer period of time. You may be surprised by how many creditors are willing to accept such arrangements.

Credit counselling

Credit counselling services are available, but may be different from province to province. Contact a local family or community counselling office or a credit counselling association to find out how to get in touch with such a service. If you have difficulty making a budget and sticking to it, counselling may help you.

Debt consolidation loan

You can ask a bank or financial institution about combining or "consolidating" your debts into one loan. In such a case, the bank or financial institution will pay off all your debts and, in return, you make single monthly payments to the bank or financial institution. Make sure to shop around because interest rates are different. It is important to stop buying on credit. Continuing to use credit could make your debt load too great for you to handle.

Consolidation order

If you live in Alberta or Saskatchewan, you may apply for a consolidation order. A consolidation order sets out the amount and the times when payments

are due to the court. The court will distribute your payments to your creditors. This part of the *Bankruptcy and Insolvency Act* (Part X: Orderly Payment of Debts) lets you pay off your debts over three years and frees you from creditor harassment and wage garnishment. Unlike bankruptcy, you do not lose your assets.

Voluntary Deposit scheme

For residents of Quebec, the Voluntary Deposit scheme (better known as the "Lacombe Law") is similar to a consolidation order. You must make a monthly payment based on your income and number of dependants, to the court. This service is usually available at the local courthouse.

Consumer proposal

Under the *Bankruptcy and Insolvency Act* you may make a consumer proposal to your creditors to reduce the amount of your debts, extend the time you have to pay off the debt, or provide some combination of both. Consumer proposals are explained in more detail on page 19.

Bankruptcy

If none of the above methods solves your debt problem, you may choose to declare bankruptcy. Bankruptcy should be a last resort if you cannot meet your financial obligations through affordable payments over a specific period of time.

Bankruptcy is a legal process performed under the *Bankruptcy and Insolvency Act*. Because of your inability to pay your debts, you assign all of your assets, except those exempt by law, to a licensed trustee in bankruptcy. This process relieves you of most debts, and legal proceedings against you by creditors should stop. Bankruptcy is explained in more detail on page 23.

WHAT YOU SHOULD KNOW

Administrator of consumer proposals

An administrator of consumer proposals is a trustee in bankruptcy or a person appointed by the Superintendent of Bankruptcy. British Columbia (1-800-663-7867), Saskatchewan (1-306-933-6520) and Nova Scotia (1-902-424-7020) provide administration of consumer proposals. You may wish to contact the appropriate provincial department. With regard to trustees in bankruptcy, their names may usually be found in the Yellow Pages under the headings of "Bankruptcy" or "Trustees in Bankruptcy."

Assets acquired during bankruptcy

You must assign to your trustee all assets acquired during your bankruptcy, including lottery winnings and inheritances, so they can be divided among your creditors.

Assets and property

In a bankruptcy, you must assign all your assets to the trustee, except for exempt property, such as basic furniture and tools-of-trade needed to make your living. Exempt property can vary from province to province. Your trustee can tell you what these are.

Bankrupt

This is the legal status of a person who declares bankruptcy.

Bankruptcy and Insolvency Act (the Act)

This is the federal law that regulates bankruptcy and insolvency in Canada.

Bankruptcy Court

This is a court in which a judge or registrar will decide on a bankrupt's application for discharge and other insolvency matters. Discharges are explained in more detail on page 26.

Co-signers

Your bankruptcy does not cancel the responsibility of anyone who has guaranteed or co-signed a loan on your behalf. For example, if your parent co-signed a loan for you, that parent would be liable to pay the loan in full even if you decide to file for bankruptcy.

Creditor

A creditor is a person, institution or business to whom you owe money. Secured creditors are creditors that have taken certain measures to protect themselves and hold a mortgage, pledge, lien or similar instrument on, or against, your assets. If secured creditors are not repaid, they can enforce their claims by recovering the assets on which they hold security.

Unsecured creditors are creditors that do not have any security for the debt owing to them.

Credit rating and re-establishment of credit

Credit bureaus collect information about consumers' financial affairs and sell the information to their clients, such as credit lenders, employers and insurance companies. These agencies obtain information from various sources, for example:

- from the consumer who provides information when filling out an application for credit or a loan;
- from public records that provide information related to such matters as bankruptcy, court judgments and conditional sales contracts that are registered with provincial authorities;
- from credit lenders and collection agencies that provide credit files on a monthly basis. These files contain information such as the account number, the outstanding balance and a nine-point rating scale, indicating, for example: R1 — that payment was made on time; R2 — that payment was made 30–60 days late; and R9 — a bad debt or one that has been placed for collection (also applies to bankruptcy).

It should be noted that your credit rating is set by your creditors. Credit bureaus only pass that information on to their clients.

Generally, information concerning your bankruptcy could show up on your file for a period of 6 to 7 years after your discharge. If you have been bankrupt before, this period could be extended to as much as 14 years. This period could vary from one province to another.

The decision as to whether or not to grant credit to an applicant is made by the credit lender, not the credit bureau. It is the lender's individual credit scoring system that determines access to credit.

Should you wish to improve your credit rating after obtaining your discharge from bankruptcy, you could, for instance, contact your banker and request a meeting. For this meeting, you could bring your paycheque stubs, your budget and your discharge papers. You could explain that you have obtained your discharge and ask the banker how you can earn your way back to a good credit rating.

Debtor

A debtor is a person who receives a loan or an advance of goods and services in exchange for a promise to pay at a later date.

Income tax returns

You must complete two income tax returns for the calendar year in which you become bankrupt. The pre-bankruptcy return covers the period from the beginning of the year to the date of your bankruptcy. You will be required to provide your trustee with details and documentation to support this return. The post-bankruptcy return covers the period from the date of bankruptcy to the end of the calendar year.

Income tax refunds for both the pre- and post-bankruptcy periods become part of your bankruptcy.

Inspector

Inspectors are appointed by creditors to represent them before the trustee during the administration of proposals and bankruptcies. They are expected to assist the trustee by virtue of their experience and are required to supervise certain aspects of the trustee's administration.

Insolvent person

An insolvent person has a debt of $1000 or more and is unable to meet financial obligations when they become due, or has ceased to do so, or whose total assets, if they were sold, would not be enough to pay for all of that person's financial obligations.

Legal action

Although legal actions or most garnishments against you stop on the date you declare bankruptcy or file a consumer proposal, criminal actions and some civil matters, such as actions in matrimonial matters, are not affected by a bankruptcy or proposal. You must give the trustee or administrator copies of all legal documents that you have received before and after the date you became bankrupt or filed a proposal. In a proposal, no creditor can, without permission of the court, start or continue any legal action until the proposal is either withdrawn, refused or annulled, or until the administrator has been discharged. In the case of a bankruptcy, no creditor can, without permission of the court, start or continue any legal action until the trustee has been discharged.

Mediation

Mediation is a way of resolving conflict between two or more individuals. In the context of a bankruptcy, an impartial and independent person — the "mediator" — will help the individuals involved in a dispute to settle their disagreement instead of going to court. Generally, the mediator is an employee from one of the Superintendent of Bankruptcy's Division offices. Mediation is more flexible, speedier and less costly than formal court proceedings. It allows people affected by the bankruptcy to be directly involved in deciding how their disagreement will be settled.

In bankruptcy, mediation is available to resolve two types of disputes:

i. when the trustee and the bankrupt are not in agreement with the amount that the bankrupt, who has surplus income, is required to pay creditors; and

ii. when opposition to the discharge is based on the fact that the bankrupt has failed to comply with the requirement to make surplus income payments, or if the bankrupt could have made a viable proposal and has chosen bankruptcy rather than a proposal as a solution to debt.

When mediation takes place, the bankrupt and the trustee (or trustee's representative) must be present. If a creditor requests mediation, that creditor must also be present.

For more information on mediation, you may ask your trustee to provide you with a free copy of the brochure entitled "All About Bankruptcy Mediation" prepared by the Office of the Superintendent of Bankruptcy or you may consult the OSB's website at: osb.ic.gc.ca.

Official Receiver

The Official Receiver is a federal government employee in the Office of the Superintendent of Bankruptcy and an officer of the court with specific duties under the *Bankruptcy and Insolvency Act*. The Official Receiver, among other things, accepts the documents that are filed in proposals and bankruptcies, examines bankrupts under oath, and chairs meetings of creditors.

Payments and surplus income

Immediately after becoming bankrupt, you should no longer be required to make payments to your creditors. However, you have a duty to inform your trustee of any material change in your financial situation, such as an income tax refund, a new job or the birth of a new family member.

The trustee determines whether you have any surplus income, taking into consideration the standards issued by the Superintendent of Bankruptcy, your total income, and your personal and family situation. Surplus income is the amount of total income a bankrupt receives that exceeds the amount needed to maintain a reasonable standard of living. If the trustee concludes that you have surplus income, the trustee will set the amount you must pay into the bankruptcy estate. This amount may be adjusted during the administration of your bankruptcy if there is a change in either your total income or personal or family situation.

The Superintendent of Bankruptcy's standards are set out in Directive No. 11, which is available on the OSB's website at: osb.ic.gc.ca.

If you do not agree with the amount set by the trustee, the trustee must request mediation. Similarly, a creditor may request mediation if that creditor does not agree with the amount of the surplus income payment set by the trustee. If mediation does not resolve the dispute, the trustee, under certain circumstances, will have to apply to court to have the matter decided.

Failure to make the required payments may affect your discharge (that is, the date of your release from bankruptcy).

Pressure from creditors

One of the objectives of the Act is to relieve you of pressure from your creditors. If you receive phone calls or letters from creditors, tell them that you are bankrupt, or have made a proposal, and refer them to your trustee or administrator of consumer proposals.

Superintendent of Bankruptcy

The Superintendent of Bankruptcy is a federally appointed official by the Governor in Council who oversees the administration of estates under the *Bankruptcy and Insolvency Act* in Canada.

Trustee in bankruptcy

A trustee in bankruptcy is a person licensed by the Superintendent of Bankruptcy to administer proposals and bankruptcies. The trustee represents your creditors and is an officer of the court. However, the trustee can give you information and advice about both the proposal and bankruptcy processes and make sure that your rights, as well as those of the creditors, are respected.

WHERE TO GO **FOR HELP**

If you want more information on making a consumer proposal to your creditors, contact an administrator of consumer proposals — usually a trustee in bankruptcy. If you wish more information on declaring bankruptcy, you should contact a trustee in bankruptcy. The names of trustees and administrators of consumer proposals in your area are usually listed in the Yellow Pages under "Bankruptcy" or "Trustee in Bankruptcy," or provincial government services. If you cannot secure the services of a trustee, contact the nearest Office of the Superintendent of Bankruptcy at Industry Canada (see Appendix II, on page 35).

ASSESSMENT
AND COUNSELLING

Before you decide whether to make a consumer proposal or declare bankruptcy, the administrator of consumer proposals or the trustee, as the case may be, will perform an assessment. The purposes of this assessment are to evaluate your financial situation, to explain the options available to you, and to discuss with you the merits and the consequences of your choice.

Should you decide to make a consumer proposal or declare bankruptcy, the *Bankruptcy and Insolvency Act* requires that counselling be provided to you. Counselling must be given by a counsellor registered with the Office of the Superintendent of Bankruptcy. Counselling consists of two sessions. During the first counselling session, you will be provided with information concerning money management, spending and shopping habits, warning signs of financial difficulties, and obtaining and using credit. In the second session, the counsellor will help you to discover and understand the causes of your insolvency or bankruptcy, and will assist you in establishing a rehabilitation plan by helping you to develop recommendations and alternatives for a financial action plan. You must attend these two sessions. Counselling may also be provided to someone who is related to you or has a financial relationship with you. If you feel that you need additional help or assistance, you may ask for a third counselling session.

If you made a proposal and refuse or neglect to use this service, the administrator of consumer proposals cannot issue a certificate of full performance of consumer proposal. If you declared bankruptcy and refuse or neglect to use this service, you will not be eligible for an automatic discharge.

CONSUMER
PROPOSAL

What is a consumer proposal?

A consumer proposal is an offer made by a debtor to his or her creditors to modify his or her obligations to them. For example, you may propose to your creditors that you will pay a lower amount each month, but over a longer period of time. Or you may propose that your creditors accept being paid a percentage of what you owe.

How does a consumer proposal benefit you?

Your unsecured creditors will not be able to take legal steps to recover their debts from you (such as seizing assets or garnisheeing wages) unless the proposal is withdrawn, rejected or annulled, or if the administrator is discharged before the proposal was fully performed. However, creditors may continue to pursue recovery of debts that would not be released by an order of discharge in a bankruptcy (except if the proposal explicitly provides for the compromise of such claims and the creditor votes in favour of the proposal).

Who can make a consumer proposal?

Any natural person who is insolvent, including a bankrupt, whose debts do not exceed $250 000, excluding a mortgage for the person's principal residence, can make a consumer proposal. When a bankrupt wishes to make a proposal, the proposal must first be approved by the inspectors and the bankrupt must have obtained the assistance of a trustee who will be the administrator of the consumer proposal. If the person's debts exceed $250 000, the proposal will be made under Division I of Part III of the Act.

It is also possible to make a joint consumer proposal. Two or more consumer proposals may be joined where they could reasonably be dealt with as one proposal because of the financial relationship of the consumer debtors involved. It must be emphasized that joint consumer proposals can be made only if the total debt of all the consumer debtors does not exceed $500 000.

How does someone make a proposal? What is the procedure?

The procedure begins when you seek the help of an administrator who might be a trustee in bankruptcy or a person appointed by the Superintendent of Bankruptcy. This individual will assess your financial situation and give you advice about what kind of a proposal may be best for you and your creditors. The administrator will ask you to sign the required forms, which will then be filed with the Official Receiver.

What happens after a proposal is filed with the Official Receiver?

Within 10 days after filing your proposal with the Official Receiver, the administrator is required to send the Official Receiver a report. The report contains the administrator's opinion about whether the proposal is fair and reasonable, and whether he or she believes you will be able to perform it. It also contains a list of your creditors.

At the same time, the administrator must send to each of your creditors a copy of your proposal, of your statement of affairs (which contains the list of your assets and liabilities; list of your creditors; information related

to your personal affairs; and budget information) and of the administrator's report on your proposal. If there is a meeting of the creditors, the administrator will ask the creditors to accept or reject the proposal.

How does a proposal get accepted?

Your creditors will have up to 45 days to consider whether to accept or reject your proposal. A creditor may send a notice to the administrator accepting or rejecting the proposal. If creditors do not respond, they will be considered to have accepted the proposal. If a sufficient number of creditors accept the proposal, then it will become binding on you and your creditors, and you will have to meet its terms.

What happens if the proposal is rejected?

If the proposal is rejected, you will no longer be protected by the Act. The administrator will, within 5 days, notify you, all your creditors and the Official Receiver of the rejection. Your creditors will now be able to take legal steps to recover their debts from you. If you were bankrupt when you made this proposal, the administration of your bankruptcy will continue.

What if my proposal is accepted, and I fully meet the terms?

When the proposal is fully performed, the administrator must give a certificate of full performance to you and the Official Receiver, and you will be relieved of the debts that were in the proposal.

What if I stop making the payments and default on the performance of the proposal?

If you fail to keep the terms of your proposal, it may be annulled or deemed annulled. If you were insolvent prior to making the proposal, you return to the same situation and your creditors would have a claim against you for the amount owed to them before the proposal, minus any amount you paid them during the proposal. If you were bankrupt when the proposal was made and then your proposal is subsequently annulled or deemed annulled, you will be considered bankrupt on the date of the annulment.

Administrators of consumer proposals are given discretion to "revive" a consumer proposal that would otherwise be *deemed annulled*. In fact, administrators can rectify the default by providing notice to the creditors. It is especially beneficial in situations where the debtor faces a temprary problem meeting payments, for example, due to illness or temporary unemployment, but otherwise is making good faith efforts to comply with the terms of the proposal. Also, courts have the power to make an order reviving a consumer proposal on any terms the court considers appropriate.

Does it cost anything to make a proposal?

Yes. There is a filing fee to be paid to the Superintendent of Bankruptcy. In addition, the administrator is entitled to be paid. These fees are prescribed by the *Bankruptcy and Insolvency Rules*, which may be consulted on the OSB's website at: osb.ic.gc.ca.

BANKRUPTCY

What is bankruptcy and what are the benefits to the debtor?

Bankruptcy is a legal process, regulated by the Act, by which you may be discharged from most of your debts. The purpose of the Act is to permit an honest, but unfortunate, debtor to obtain a discharge from his or her debts, subject to reasonable conditions.

When you declare bankruptcy, your assets are given to a trustee in bankruptcy who then sells them and distributes the money among your creditors. Once you declare bankruptcy, your unsecured creditors will not be able to take legal steps to recover their debts from you (such as seizing assets or garnisheeing wages).

It is also possible to file a "joint assignment." A joint assignment allows two bankrupts, involved in a close financial relationship, to file for bankruptcy together and to see their assets combined and their files dealt with as one file. This is available to debtors if their debts are substantially the same and the trustee believes it is in the best interest of the debtors and creditors.

What are the duties of a bankrupt?

Once you are legally a bankrupt, you are required to perform the duties of bankrupts as outlined in Appendix I, which begins on page 29. The trustee will inform you of these duties.

How does one declare bankruptcy?

First, you meet with a trustee in bankruptcy who will assess your financial situation and explain the options available to you as described earlier. If you decide to declare bankruptcy, the trustee will help you complete several forms that you will have to sign. You are considered a bankrupt only when the trustee files these forms with the Official Receiver.

What kind of forms will I have to sign?

You will have to sign at least two forms. One is an "Assignment" and the other is your "Statement of Affairs." In the assignment you state that you are handing over all of your assets to the trustee for the benefit of your creditors. In the statement of affairs you list your assets, liabilities, income and expenses. As well, you will have to answer several questions about your family, your employment and the disposition of your assets.

Before you sign the forms, make sure you understand these legal documents that become part of your bankruptcy file. Although the trustee prepares them from the information you provide, they are your statements. You are responsible for the accuracy of their contents. Review them carefully before you sign. Once these documents have been filed with and accepted by the Official Receiver, you become legally bankrupt and, at this point, the process cannot be reversed without a court order. Keep copies of notices and all other documents the trustee sends you.

What happens after the forms are filed with and accepted by the Official Receiver and I become bankrupt?

Generally, a meeting of creditors is not necessary but there may be instances where such a meeting will be held. Creditors or the Official Receiver may request one. If a meeting of creditors is called, you must attend this meeting. You may also be required to go to the Official Receiver's office to answer several questions under oath about your financial affairs.

What happens at the first meeting of creditors?

If a meeting is called, the trustee will give a report about your assets and liabilities and the creditors may ask you questions related to your financial file. The creditors will then vote to either confirm the trustee's appointment, or substitute a trustee of their choice. The creditors will then have an opportunity to vote for the appointment of inspectors. They may also give directions to the trustee related to the administration of the estate.

What does the examination with the Official Receiver involve?

The Official Receiver may send you a notice instructing you to appear before him or her for an examination under oath. The Official Receiver will then ask you a number of questions about the causes of your bankruptcy, your conduct, the disposition of your assets and the nature of your debts.

When is a bankrupt discharged?

If you are a first-time bankrupt, you will be automatically discharged nine months after the date of bankruptcy if you have no surplus income. You will be automatically discharged after 21 months after the date of bankruptcy if you are required to make surplus income payments to the estate.

For a second bankruptcy, you will automatically be discharged after 24 months after the date of bankruptcy if you have no surplus income and 36 months after the date of bankruptcy if you are required to make surplus income payments to the estate.

Bankrupts with personal income tax debt in an amount of $200 000 or more representing 75 percent or more of total unsecured claims, are not eligible for an automatic dicharge.

An automatic discharge happens only if notice of opposition to the discharge is not given by the Superintendent of Bankruptcy, the trustee or a creditor.

If notice of opposition to the discharge is given and it is based on the fact that the bankrupt did not pay the required amount of surplus income, or the bankrupt, who could have made a viable proposal, has chosen bankruptcy rather than a proposal as a solution to debt, the trustee must ask the Official Receiver for mediation.

If mediation fails to resolve the issue or if an opposition is filed for other reasons, the trustee will have to obtain a date for a court hearing. The parties opposing the discharge will have to give their reasons to the court, which will make a decision. It should be noted that a first-time individual bankrupt who refuses or neglects to receive the required counselling sessions will not qualify for an automatic discharge.

What kind of discharge orders can a judge or registrar issue?

At a hearing for a discharge, the court decides whether to postpone the hearing to a later date, refuse the discharge or issue any of the following orders:

i. **Order of Absolute Discharge**
This official document relieves you of the debts incurred before you declared bankruptcy, taking into consideration the exceptions provided in the Act.

ii. **Order of Conditional Discharge**
The court may impose certain conditions that must be met before your discharge becomes absolute. For example, the court may require you to pay an amount to your trustee for distribution to your creditors.

iii. **Order of Suspended Discharge**
The court orders a delay so that the discharge will not be effective until a certain date.

Your discharge may be delayed by an opposition by a creditor, the trustee or the Superintendent of Bankruptcy on such grounds as an ongoing criminal investigation or a breach of your duties as specified in the *Bankruptcy and Insolvency Act.*

What is the effect of a bankruptcy discharge?

The bankrupt is released of most debts. Some debts are not released, however, such as an award for damages in respect of an assault; a claim for alimony, spousal or child support; any court fine; a debt arising out of fraud or misleading representation; or debts or obligations for student loans if the bankruptcy occurs while the debtor was still a student or within seven years after the bankrupt ceased to be a student.

How does bankruptcy affect employment?

For the most part, bankruptcy should not affect your employment. However, there are some special cases. For example, you may have difficulty being bonded. Your trustee will be able to give you more information on other possible restrictions or prohibitions.

Does it cost anything to go bankrupt?

Yes. There is a filing fee to be paid to the Superintendent of Bankruptcy. In addition, the trustee is entitled to be paid. These fees are prescribed by the *Bankruptcy and Insolvency Rules*, which may be consulted on the OSB's website at: osb.ic.gc.ca.

APPENDIX I

Excerpts from the *Bankruptcy and Insolvency Act* concerning bankruptcies

DUTIES OF BANKRUPT
Section 158

A bankrupt shall

(a) make discovery of and deliver all his property that is under his possession or control to the trustee or to any person authorized by the trustee to take possession of it or any part thereof;

(a.1) in such circumstances as are specified in directives of the Superintendent, deliver to the trustee, for cancellation, all credit cards issued to and in the possession or control of the bankrupt;

(b) deliver to the trustee all books, records, documents, writings and papers including, without restricting the generality of the foregoing, title papers, insurance policies and tax records and returns and copies thereof in any way relating to his property or affairs;

(c) at such time and place as may be fixed by the official receiver, attend before the official receiver or before any other official receiver delegated by the official receiver for examination under oath with respect to his conduct, the causes of his bankruptcy and the disposition of his property;

(d) within five days following the bankruptcy, unless the time is extended by the official receiver, prepare and submit to the trustee in quadruplicate a statement of the bankrupt's affairs in the prescribed form verified by affidavit and showing the particulars of the bankrupt's assets and liabilities, the names and addresses of the bankrupt's creditors, the securities held by them respectively, the dates when the securities were respectively given and such further or other information as may be required, but where the affairs of the bankrupt are so involved or complicated that the bankrupt alone cannot reasonably prepare a proper statement of affairs, the official receiver may, as an expense of the administration of the estate, authorize the employment of a qualified person to assist in the preparation of the statement;

(e) make or give all the assistance within his power to the trustee in making an inventory of his assets;

(f) make disclosure to the trustee of all property disposed of within the period beginning on the day that is one year before the date of the initial bankruptcy event or beginning on such other antecedent date as the court may direct, and ending on the date of the bankruptcy, both dates included, and how and to whom and for what consideration any part thereof was disposed of except such part as had been disposed of in the ordinary manner of trade or used for reasonable personal expenses;

(g) make disclosure to the trustee of all property disposed of by gift or settlement without adequate valuable consideration within the period beginning on the day that is five years before the date of the initial bankruptcy event and ending on the date of bankruptcy, both dates included;

(h) attend the first meeting of his creditors unless prevented by sickness or other sufficient cause and submit thereat to examination;

(i) when required, attend other meetings of his creditors or of the inspectors, or attend on the trustee;

(j) submit to such other examinations under oath with respect to his property or affairs as required;

(k) aid to the utmost of his power in the realization of his property and the distribution of the proceeds among his creditors;

(l) execute such powers of attorney, conveyances, deeds and instruments as may be required;

(m) examine the correctness of all proofs of claims filed, if required by the trustee;

(n) in case any person has to his knowledge filed a false claim, disclose the fact immediately to the trustee;

(n.1) inform the trustee of any material change in the bankrupt's financial situation;

(o) generally do all such acts and things in relation to his property and the distribution of the proceeds among his creditors as may be reasonably required by the trustee, or may be prescribed by the General Rules, or may be directed by the court by any special order made with reference to any particular case or made on the occasion of any special application by the trustee, or any creditor or person interested; and

(p) until his application for discharge has been disposed of and the administration of the estate completed, keep the trustee advised at all times of his place of residence or address.

BANKRUPTCY OFFENCES
Section 198

1. Any bankrupt who

(a) makes any fraudulent disposition of the bankrupt's property before or after the date of the initial bankruptcy event,

(b) refuses or neglects to answer fully and truthfully all proper questions put to the bankrupt at any examination held pursuant to this Act,

(c) makes a false entry or knowingly makes a material omission in a statement or accounting,

(d) after or within one year immediately preceding the date of the initial bankruptcy event, conceals, destroys, mutilates, falsifies, makes an omission in or disposes of, or is privy to the concealment, destruction, mutilation, falsification, omission from or disposition of, a book or document affecting or relating to the bankrupt's property or affairs, unless the bankrupt had no intent to conceal the state of the bankrupt's affairs,

(e) after or within one year immediately preceding the date of initial bankruptcy event, obtains any credit or any property by false representations made by the bankrupt or made by any other person to the bankrupt's knowledge,

(f) after or within one year immediately preceding the date of the initial bankruptcy event, fraudulently conceals or removes any property of a value of fifty dollars or more or any debt due to or from the bankrupt, or

(g) after or within one year immediately preceding the date of the initial bankruptcy event, hypothecates, pawns, pledges or disposes of any property that the bankrupt has obtained on credit and has not paid for, unless in the case of a trader the hypothecation, pawning, pledging or disposing is in the ordinary way of trade and unless the bankrupt had no intent to defraud,

is guilty of an offence and is liable, on summary conviction, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year or to both, or on conviction on indictment, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding three years, or to both.

2. A bankrupt who, without reasonable cause, fails to comply with an order of the court made under section 68 or to do any of the things required of the bankrupt under section 158 is guilty of an offence and is liable

(a) on summary conviction, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both; or

(b) on conviction on indictment, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding three years, or to both.

FAILURE TO DISCLOSE FACT OF BEING UNDISCHARGED
Section 199

An undischarged bankrupt who

(a) engages in any trade or business without disclosing to all persons with whom the undischarged bankrupt enters into any business transaction that the undischarged bankrupt is an undischarged bankrupt, or

(b) obtains credit to a total of $1,000 or more from any person or persons without informing them that the undischarged bankrupt is an undischarged bankrupt,

is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both.

APPENDIX II

Division Offices of the Superintendent of Bankruptcy

NOVA SCOTIA
Maritime Centre
1505 Barrington Street, 16th Floor
Halifax, Nova Scotia B3J 3K5
Tel.: 1-877-376-9902 | Fax: 902-426-7275

QUEBEC
1141, Route de l'Église, 4th Floor
Québec, Quebec G1V 3W5
Tel.: 1-877-376-9902 | Fax: 418-648-4120

5 Place Ville-Marie, Suite 800
Montréal, Quebec H3B 2G2
Tel.: 1-877-376-9902 | Fax: 514-283-9795

ONTARIO
Place Bell Building
160 Elgin Street, 11th Floor, Suite B-100
Ottawa, Ontario K2P 2P7
Tel.: 1-877-376-9902 | Fax: 613-996-0949

25 St. Clair Avenue E, 6th Floor
Toronto, Ontario M4T 1M2
Tel.: 1-877-376-9902 | Fax: 416-973-7440

Federal Building
55 Bay Street N, 9th Floor
Hamilton, Ontario L8R 3P7
Tel.: 1-877-376-9902 | Fax: 905-572-4066

Federal Building
451 Talbot Street, Suite 303
London, Ontario N6A 5C9
Tel.: 1-877-376-9902 | Fax: 519-645-5139

MANITOBA
400 St. Mary Avenue, 4th Floor
Winnipeg, Manitoba R3C 4K5
Tel.: 1-877-376-9902 | Fax: 204-983-8904

SASKATCHEWAN
1945 Hamilton Street, Suite 600
Regina, Saskatchewan S4P 2C7
Tel.: 1-877-376-9902 | Fax: 306-780-6947

123 Second Avenue S, 7th Floor
Saskatoon, Saskatchewan S7K 7E6
Tel.: 1-877-376-9902 | Fax: 306-975-5317

ALBERTA
Standard Life Tower
639 Fifth Avenue SW, Suite 510
Calgary, Alberta T2P 0M9
Tel.: 1-877-376-9902 | Fax: 403-292-5188

Canada Place Building
9700 Jasper Avenue, Suite 725
Edmonton, Alberta T5J 4C3
Tel.: 1-877-376-9902 | Fax: 780-495-2466

BRITISH COLUMBIA
300 West Georgia Street, Suite 2000
Vancouver, British Columbia V6B 6E1
Tel.: 1-877-376-9902 | Fax: 604-666-4610

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Government of Canada / Gouvernement du Canada

Canada

Industry Canada

Office of the Superintendent of Bankruptcy Canada

You Owe Money —
Understanding Consumer Proposals

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Insolvency at a glance

Glossary

Order a publication

If you are an individual and your total debts do not exceed $250,000 (not including debts such as a mortgage secured by your principal residence), a consumer proposal might be the right choice for you.

What is a consumer proposal?

A consumer proposal is a formal, legally binding process that is administered by a bankruptcy trustee. In this process, the trustee will work with you to develop a "proposal"—an offer to pay creditors a percentage of what is owed to them, or extend the time you have to pay off the debts, or both. The term of a consumer proposal cannot exceed five years.

Payments are made through the trustee, and the trustee uses that money to pay each of your creditors.

When is a consumer proposal appropriate?

Tip: To find a trustee in your area, consult the Yellow Pages and search for "bankruptcy trustees," or search the Trustee Registry.

To find out if a consumer proposal (or a different option) is the right choice for you, set up a meeting with a trustee to discuss your personal circumstances.

The trustee will evaluate your financial situation and explain the pros and cons of the various options that could help you solve your financial problems.

If you decide to submit a consumer proposal, the trustee will work with you to develop a proposal that works for both you and your creditors.

Below is an explanation of what happens when you file a consumer proposal.

Your responsibilities

If you file a consumer proposal, you must

- give the trustee a complete list of all of your assets (property) and liabilities (debts);
- attend the first meeting of creditors, if a meeting is requested (see below);
- attend two counselling sessions;

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- advise the trustee in writing of any address change; and
- generally assist the trustee in administering the proposal.

How a consumer proposal works

1. The trustee will file the proposal with the Office of the Superintendent of Bankruptcy (OSB). Once your proposal is filed, you stop making payments directly to your unsecured creditors. In addition, if your creditors are collecting your salary (garnishing your wages) or have filed lawsuits against you, these actions are stopped.
2. The trustee will submit the proposal to your creditors. The proposal will include a report on your personal situation and the causes of your financial difficulties.
3. Creditors then have 45 days to either accept or reject the proposal. They can also do this either prior to or at the meeting of creditors, if one is held.

When is a meeting of creditors held?

A meeting of creditors is held if one is requested by one or more creditors provided they are owed at least 25% of the total value of the proven claims.

A request for a meeting must be made by the creditors within 45 days of the filing of the proposal. The OSB can also direct the trustee to call a meeting of creditors at any time within that same period.

The meeting of creditors must be held within 21 days after being called. At the meeting, the creditors vote to either accept or refuse the proposal.

If no meeting of creditors is requested within 45 days of the filing of the proposal, the proposal will be deemed to have been accepted by the creditors—regardless of any objections received.

Understanding the vote to accept or refuse the proposal

At the meeting of creditors, a creditor's acceptance or refusal of a proposal counts as a vote, provided it is received at or before the meeting. (If there is no meeting, an objection does not count as a vote on the proposal.)

The number of votes corresponds to the total dollar value of the proven claims. The vote is decided by a simple majority of this dollar value (i.e., 50% plus 1). For example, if the proven claims total $150,000, and if the creditors who vote to accept the proposal are together claiming at least $75,001, then the proposal will be deemed accepted and all other unsecured creditors must accept it as well. (In the event there is no quorum of creditors at the meeting, the proposal will be deemed accepted.)

If your proposal is accepted, the OSB (or any other interested party) has 15 days to ask the trustee to apply to the court to have the proposal reviewed. If no such request is made, the proposal will be deemed to have been approved by the court.

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If your consumer proposal is accepted

If your consumer proposal is accepted, you will

- be responsible for paying either a lump sum or periodic payments to the trustee;
- be required to adhere to any other conditions in the proposal;

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- retain your assets (provided you make your payments to your secured creditors); and
- be required to attend two financial counselling sessions.

If your consumer proposal is not accepted

If your consumer proposal is not accepted, you can

- make changes to the proposal and resubmit it;
- consider other options for solving your financial problems; or
- declare bankruptcy.

How will a consumer proposal affect my credit rating?

Generally, a person who declares bankruptcy or submits a consumer proposal is assigned the lowest possible credit score.

Information that affects your credit score is usually removed from your records after a certain period of time, depending on the type of information and where you live. Similarly, depending on which province you live in, the proposal will be on your credit report for the duration of the proposal's term, plus a few years after.

Your ability to obtain and use credit after a consumer proposal depends on convincing lenders of your personal financial maturity and ability to repay the debt; there are no guarantees—no one is required to give you credit.

Once you have fulfilled the terms of your consumer proposal, you will receive a "certificate of full performance." To ensure your credit record is updated, send a copy of this document to the major credit-reporting agencies. Be sure to keep all of your proposal-related documents for reference by future lenders.

Learn more about credit reports, scores and ratings

If you meet the conditions of your proposal

If you meet the conditions in full, you will be legally released from the debts included in the proposal.

However, if you are making monthly payments and miss three payments, or if your payment schedule is less frequent but your last payment is more than three months past due, the proposal will be deemed annulled. This means your creditors will be able take action to collect the money you owe them, unless the court has ordered otherwise, or unless an amendment to the consumer proposal has been filed. A consumer proposal that has been deemed annulled may be revived under certain conditions.

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Any questions?

Feel free to contact us if you have

- questions about the consumer proposal process;
- a complaint; or
- a problem with your trustee.

The OSB keeps records of all complaints and can investigate any complaint. If you have a complaint against your trustee, we can review and investigate your complaint and attempt to reach an acceptable resolution with your trustee.

Office of the Superintendent of Bankruptcy Canada
An Agency of Industry Canada

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

Directive / Instruction

N° 20

BANKRUPTCY ASSISTANCE PROGRAM

Issued: August 14, 2009

(Supersedes Directive No. 11 issued on July 23, 1993, on the same topic)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"BAP" means the Bankruptcy Assistance Program;

"OSB" means the Division Office of the Office of the Superintendent of Bankruptcy in the locality of the debtor;

"Out-of-pocket expenses" refers to the expenses delineated in subsection 128(2) of the Rules;

"Rules" means the *Bankruptcy and Insolvency General Rules*.

PROGRAMME D'ACCÈS À LA FAILLITE

Date d'émission : le 14 août 2009

(La présente instruction remplace et annule l'instruction n° 11 sur le même sujet émise le 23 juillet 1993.)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » désigne le bureau de division du Bureau du surintendant des faillites dans la localité du débiteur;

« débours » renvoie aux débours tels que définis au paragraphe 128(2) des Règles;

« Loi » désigne la *Loi sur la faillite et l'insolvabilité*;

« PAF » s'entend du Programme d'accès à la faillite;

« Règles » renvoie aux *Règles générales sur la faillite et l'insolvabilité*.

Canada

OSB • BSF Protecting the Integrity of the Insolvency System
Protéger l'intégrité du système d'insolvabilité

Authority and Purpose

2. This Directive is issued pursuant to paragraph 5(4)(*c*) of the Act.

3. The purpose of this Directive is to set out the framework of a program that will permit a debtor who has insufficient funds to cover the cost of an administration of a bankruptcy to have access to the bankruptcy system. This Directive sets out the procedure and criteria for eligibility.

Procedure

4. Debtors initially contacting the OSB for advice relative to their financial affairs will be provided with a list of trustees participating in the BAP.

5. If unable to obtain the services of a trustee after consulting at least two (2) trustees, or the sole trustee in the area where there is only one trustee, the debtor may again contact the OSB if the debtor considers that bankruptcy remains a potential solution. At such time, a registration form detailing the debtor's name, address and telephone number and the name(s) of trustee(s) previously contacted will be prepared.

6. On a rotational basis, the designated Bankruptcy Analyst will deliver the registration form to a participating trustee, who becomes the designated trustee to administer the assignment.

7. The debtor will contact the trustee designated by the designated Bankruptcy

Autorité et objet

2. La présente instruction est émise en vertu de l'alinéa 5(4)*c*) de la Loi.

3. La présente instruction a pour objet de présenter le cadre du programme qui permet aux débiteurs n'ayant pas les fonds suffisants pour couvrir les frais d'administration d'une faillite d'avoir accès au système de faillite. Elle énonce les modalités et les critères d'admissibilité à ce programme.

Modalités

4. Un débiteur demandant initialement conseil au BSF parce qu'il ne peut faire face à ses obligations se verra remettre une liste de syndics qui se sont engagés à rencontrer les exigences du PAF.

5. Si le débiteur est dans l'impossibilité d'obtenir les services requis après avoir consulté deux (2) syndics, ou le syndic lorsqu'il y en a un seul dans le secteur, le débiteur pourra recommuniquer avec le BSF s'il estime que la faillite demeure une solution envisageable. Un formulaire renfermant le nom, l'adresse, le numéro de téléphone du débiteur et le nom des syndics contactés sera alors préparé.

6. Sur une base rotative, l'analyste des faillites désigné transmettra le formulaire d'enregistrement à un syndic participant qui deviendra de fait le syndic désigné pour administrer la cession.

7. Le débiteur communiquera avec le syndic désigné par l'analyste des faillites désigné afin

Analyst in order to fully discuss the alternatives to bankruptcy and the consequences of declaring bankruptcy or making a proposal.

de discuter pleinement des solutions de rechange à la faillite et des conséquences de la faillite ou du dépôt d'une proposition.

8. Provided that the debtor is eligible for the BAP pursuant to sections 14 and 15 below, and decides to declare bankruptcy, the designated trustee will prepare the necessary documentation for the filing of the assignment.

8. Si le débiteur est admissible au PAF aux termes des paragraphes 14 et 15 ci-après et s'il décide de faire faillite, le syndic désigné devra préparer la documentation nécessaire en vue de déposer la cession.

9. If the assignment is not filed within thirty (30) days of the debtor's assessment, the trustee is obliged to report this fact to the designated Bankruptcy Analyst. In remote geographical areas, a slightly longer period of time may be acceptable, subject to the approval of the designated Bankruptcy Analyst.

9. Si la cession n'est pas déposée dans les trente (30) jours suivant l'évaluation du débiteur, le syndic devra en faire rapport à l'analyste des faillites désigné. Dans les régions éloignées, une période de temps plus longue pourrait être acceptable, sous réserve de l'approbation de l'analyste des faillites désigné.

10. Trustees must be available for service throughout the entire year and agree to ensure that files accepted under the BAP will receive the same level of service as similar files accepted outside of the program.

10. Les syndics doivent pouvoir offrir le service tout au long de l'année et doivent s'assurer que tous les dossiers acceptés en vertu du PAF seront traités de la même manière que les autres dossiers similaires acceptés par les syndics hors du programme.

11. The application for a bankrupt's discharge is not to be delayed due to the lack of full payment of a trustee's fee. Trustees, however, are entitled to payment in full of their out-of-pocket expenses.

11. La demande de libération du failli ne doit pas être retardée parce que les honoraires du syndic n'ont pas été entièrement versés. Toutefois, les syndics ont droit au paiement intégral de leurs débours personnels.

12. In cases where third-party deposits or guarantees are taken by the trustee, such arrangements must be made in accordance with Directive No. 16, *Third-Party Deposits and Guarantees.*

12. Dans les cas où des dépôts ou garanties de tierces personnes sont acceptés par le syndic, il faut que l'instruction n° 16, *Dépôts et garanties de tierces personnes,* soit respectée.

13. If the debtor does not meet with the trustee at the trustee's office or does not proceed with an assignment after the assessment, the designated trustee will return the registration form indicating the reasons for the non-assignment to the OSB.

Eligible Debtors

14. Following attempts to secure the services of a trustee, insolvent individuals wishing to make an assignment in bankruptcy and who contact the OSB may be accepted into the BAP, except individuals:

(a) who are incarcerated;

(b) who were previously or are currently involved in commercial activities where the administration of the bankruptcy could give rise to an appreciable amount of administrative or investigative work for the trustee; or

(c) who are required to make surplus income payments in accordance with the Directive No. 11R2, *Surplus Income.*

15. Where a debtor's income increases after being accepted into the BAP, the debtor will be required to make payments on the surplus income where required pursuant to the Directive No. 11R2, *Surplus Income.*

13. Si le débiteur ne se présente pas au bureau du syndic ou s'il décide de ne pas faire cession de ses biens suite à l'évaluation, le syndic désigné retournera le formulaire d'enregistrement en donnant les raisons du désistement au BSF.

Débiteurs admissibles

14. Après avoir essayé d'obtenir les services d'un syndic, toute personne insolvable qui désire faire une cession et qui communique avec le BSF pourra être admissible au PAF, sauf les personnes :

a) qui sont incarcérées;

b) qui participaient ou participent à des activités commerciales dans le cadre desquelles l'administration de la faillite pourrait entraîner un travail de gestion ou d'enquête important pour le syndic; ou

c) qui sont tenues de faire des paiements au titre du revenu excédentaire conformément à l'instruction nº 11R2, *Revenu excédentaire.*

15. Lorsqu'un débiteur voit ses revenus augmenter après son admission au PAF, le débiteur doit effectuer des paiements au titre du revenu excédentaire lorsqu'il est tenu de le faire en vertu de l'instruction nº 11R2, *Revenu excédentaire.*

Eligible Trustees

16. A participating trustee, once designated, must agree to accept and process assigned eligible debtors except in those situations where the trustee will be in a conflict of interest. For the purpose of this Directive, conflicts of interest shall be governed by the applicable provisions of the Act and the Rules.

17. All trustees requesting to participate in the BAP will be eligible to do so subject to the following provisions:

(a) they fully agree to adhere to all the requirements of the BAP;

(b) new trustees requesting to participate in the BAP will be added to the list of participating trustees every January 1 and July 1;

(c) any trustee withdrawing from the BAP, either voluntarily or involuntarily, will not be permitted to return to the program for a period of two (2) years from the withdrawal date. Subsequent readmittance into the program would be at the discretion of the designated Assistant Superintendent; and

Syndics admissibles

16. Un syndic participant au programme, lorsque désigné, doit accepter tous les débiteurs admissibles demandant de l'aide en matière de faillite, sauf lorsque l'acceptation placerait le syndic dans une situation de conflit d'intérêt. Aux fin de la présente instruction, les situations de conflit d'intérêt seront régies selon les dispositions applicables de la Loi et des Règles.

17. Tous les syndics demandant de participer au PAF seront admissibles, sous réserve des dispositions suivantes :

a) ils conviennent de se conformer à toutes les exigences du PAF;

b) les nouveaux syndics demandant de participer au PAF verront leur nom ajouté à la liste des participants le 1er janvier et le 1er juillet de chaque année;

c) tout syndic se retirant du PAF, de façon volontaire ou non, ne pourra être réadmis au programme avant l'expiration d'un délai de deux (2) ans. Sa réadmission à l'intérieur du programme sera laissée à la discrétion du surintendant adjoint désigné; et

(d) should any trustee withdraw from the program due to exceptional circumstances (e.g. sickness), the designated Assistant Superintendent would decide as to when the trustee would be admitted back into the BAP.

18. To prevent undue advantage to any participating trustee, periodic rearrangement of the trustee list will be made by the OSB.

19. Trustees participating in the program, subject to section 21 of this Directive, shall be resident trustees having a principal office unless bankruptcy service is otherwise unavailable in a particular area.

20. Only one name for each trustee office will be permitted in the listing. A non-resident trustee may be listed as a participating trustee in areas not served by a resident trustee.

21. Trustees not complying with the spirit or conditions of the BAP may see their name deleted from the list of participating trustees by the Superintendent of Bankruptcy.

Coming into Force

22. This Directive comes into force on September 18, 2009.

d) advenant que le syndic se retire du programme en raison de circonstances exceptionnelles (p. ex., maladie), il reviendra au surintendant adjoint désigné de déterminer quand celui-ci pourra être admis de nouveau au PAF.

18. Afin d'éviter un avantage indu en raison de l'ordre des syndics sur la liste, ladite liste sera réaménagée périodiquement par le BSF.

19. Les syndics participant au programme devront, sous réserve de l'article 21 de la présente instruction, être des syndics locaux possédant un bureau principal, à moins que les services d'un syndic ne puissent être retenus dans une région particulière.

20. Un seul nom de syndic par bureau sera inscrit sur la liste. Le nom d'un syndic possédant un bureau secondaire peut être inscrit sur la liste des syndics participants lorsque la région où est situé ce bureau n'est desservie par aucun autre syndic.

21. Les syndics ne se conformant pas au exigences et à l'esprit du PAF pourront voir leur nom retiré de la liste par le surintendant des faillites.

Entrée en vigueur

22. La présente instruction entre en vigueur le 18 septembre 2009.

Enquiries

23. For any questions pertaining to this Directive, please contact your local OSB office.

Demandes de renseignements

23. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

(63)

Office of the Superintendent of Bankruptcy Canada
An Agency of Industry Canada

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

Dear Sir/Madam:

Re: Bankruptcy Procedure

Further to your recent request, we have enclosed a booklet entitled Dealing with Debt and a list of trustees. Please read the booklet to further understand the bankruptcy process. You may also find additional information in the "Resources for: Debtors" portion of our website at www.osb-bsf.ic.gc.ca.

Contact a trustee and schedule an appointment for an initial interview. If, after having interviews with two trustees, you are unable to obtain their services, and you still feel bankruptcy is your only option, you may qualify for the Bankruptcy Assistance Program.

The Bankruptcy Assistance Program is designed to facilitate access to bankruptcy trustees. You may be eligible for help if you:

- have contacted at least two trustees and tried, unsuccessfully to obtain their services;
- are not involved in running a business;
- are not in jail; and
- you do not have "surplus income", the definition for which the trustee will explain to you.

You will need to have the two trustees you spoke with sign the attached form stating the reason they have refused service.

The Bankruptcy Assistance Program is not a free service. Trustees incur out of pocket expenses (e.g. filing fees, counselling fees, taxes, etc.) during the bankruptcy. In a Bankruptcy Assistance Program file the trustee is entitled to expect to be reimbursed for these out of pocket expenses (or more, based upon your ability to pay). The trustee will explain these details to you. For more information about the Bankruptcy Assistance Program, refer to Directive No. 20 on our website.

If you require any further information or have any questions, please feel free to contact our office.

Yours truly,

Audrey Berlovan
Office of the Superintendent of Bankruptcy Canada
audrey.berlovan@ic.gc.ca
Ph. 306-975-6014 or 1-877-376-9902
Fax: 306-975-5317 or 604-666-4610

7th Flr. 123 - 2nd Ave. S. Saskatoon, SK. S7K 7E6 (306)975-4298

Canada

(64)

Office of the Superintendent of Bankruptcy Canada
An Agency of Industry Canada

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

BANKRUPTCY ASSISTANCE PROGRAM
Trustee Refusal of Service

DEBTOR'S NAME: _____

ADDRESS: _____

_____

TELEPHONE: _____

Date: _____

_____

Trustee's Name and Firm, if applicable **Signature**

REASONS FOR NON-SERVICE BY THE TRUSTEE:

_____ Debtor refused to pay fees

_____ Debtor has no ability to pay fees

_____ Debtor does not qualify for the Bankruptcy Assistance Program

Details:

_____

Other Comments:

_____

_____

PLEASE RETURN TO:

Office of the Superintendent of Bankruptcy
Attention: Audrey Berlovan
7th floor 123 2nd Avenue S.
Saskatoon SK S7K 7E6
or/audrey.berlovan@ic.gc.ca
Ph: 1-877-376-9902 or 306-975-6014
Fax 306-975-5317

Canada

Bankruptcy Assistance Program – Trustee list

Vancouver and Burnaby Trustee

Campbell Saunders Ltd.
6080 – 8171 Ackroyd Road
Richmond BC V6X 3K1
604-821-9882

MacKay & Company Ltd
1100 – 1177 West Hastings Street
Vancouver BC V6E 4T5
604-689-3928

Evancic Perrault Robertson Ltd.
216 – 3030 Lincoln Ave.
Coquitlam BC V4B 6B4
604-941-7739

D. Kwasnicky & Associates Inc.
#211 – 3030 Lincoln Avenue
Coquitlam BC V3B 6B4
604-464-7272

Vancouver Island

Smythe Ratcliffe Insolvency Inc.
1497 Admirals Rd, Suite 209
Victoria BC V9A 2P8
250-382-2668

Chase Sekulich
101-400 Tenth Ave
Campbell River BC V9W 4E3
250-287-8331

Smythe Ratcliffe Insolvency Inc.
8C 2220 Bowen Road
Nanaimo BC V9S 1H9
250-751-2668

Okanagan

BDO Canada Ltd.
300 – 1632 Dickson Avenue
Kelowna BC V1Y 7T2
250-763-6700

BDO Canada Ltd. (Non-Resident office)
201-6 St NE
Salmon Arm
(250) 832-2429

BDO Canada Ltd.
202 – 2706 30th Avenue
Vernon BC V1T 2B6
250-309-8407

Kootnays

Deloitte Restructuring
Inc/Restructuration Deloitte Inc.
500 – 299 Victoria Street
Prince George BC V2L 5B8
250-561-1111 fax 250-562-4950

G Moroso & Associates Inc.
241 Columbia Ave
Castlegar BC V1N 1G3
604-786-6331

BDO Canada Ltd.
Suite 510 – 550 Victoria St
Prince George BC V2L 2K1
250-563-5157/1-888-660-6401

Community Legal Assistance Society

providing specialized legal assistance to promote social justice since 1971

"Have you been accused of shoplifting?"
An update and summary of cases

This article first appeared in the March 2001 issue of the Legal Services Society's Community Law Matters. It was updated in August 2009 by the original author, Bruno Drucker (lawyer with the former LawLINE of the Legal Services Society). It has been updated in September 2013 by private bar lawyer Manjeet Chana.

Background:

Many advocates will be familiar with the "demand letters" sent by stores to individuals who have been stopped for shoplifting. In these demand letters, the stores ask the individual to pay them compensation related to the store's shoplifting costs, such as paying for store security, etc. The frequency of these letters seems to rise and fall and then rise again. Stores using these demand letters over the past number of years have collected millions of dollars. The letters come from stores like Zellers, Safeway, Shoppers Drug Mart, Hudson's Bay and sometimes collection agents or company lawyers. The letter's content is always similar and ends with a demand for payment from $225.00 to $700.00 or more, and an implied threat of "serious consequences" if payment is not made.

The public is generally advised to ignore such letters. In the unlikely event you are served with a Notice of Claim (i.e., filed at the Small Claims Court) immediately seek legal advice.

There have been instances of demand letters reaching the courts in provinces across Canada. In general terms, the court cases seem to say:

- **About parental liability for children (people under 19) who are caught shoplifting:** The demand letters are usually sent to the child's parents. Under common law, the parent of the child caught shoplifting is not liable (unless the parent encouraged the shoplifting or was otherwise directly involved). Note: Some provinces, including BC as of 2001, have laws that specifically make parents liable if their children commit a tort (i.e. shoplift). For more information see: "**Parental Responsibility for the Acts of Children**," Canadian Bar Review 79:3, December 2000, p. 369. **See also the BC Parental Liability Act, S.B.C., 2001, Chapter 45, which was called the BC Parental Responsibility Act until March 18, 2013.**

- **About liability of the child caught shoplifting:** While it is technically possible to sue a child for compensation related to shoplifting/trespass, it is most unlikely. Proving a child's liability is difficult. And then, even if the court issues an order for money, it is still difficult to collect payment from a child who has no personal assets. As of 2001, the BC Parental Liability Act (as it is now known) allows parents to be sued for torts committed by their children in certain situations. Reported cases are rare - see BC cases of *M.O. v. E.N.* as well as *S.T. and V.T.* v. *S.H. and G.H.* (case descriptions below).

- **About the overall costs of investigation and/or loss prevention:** The general sense of the courts seems to be that these costs are already, and properly, being passed on to society at large (i.e. security costs are probably being passed on to consumers by being included in the price of goods). Such costs are not likely to be awarded against an individual in Small Claims Court *unless* there are special circumstances. An example of special circumstances might be investigation or security costs directly related to ongoing theft by a particular store employee.

What court cases have actually said:

It may be helpful to summarize what actual court cases have said so far. Some collection agents, and even lawyers, have been known to misquote these cases. Here follows a short summary of the cases most often referred to in shoplifting situations:

- ***Deborah C. Bond v. Harold J. Arkin and Zellers Inc. (also cited as: D.C.B. v. Zellers Inc.)* (1996) 138 D.L.R. (4th) 309**

  This was a decision of Judge Jewers, hearing an appeal from Small Claims Court. Judge Jewers' decision was then confirmed by Judge Twaddle in the Manitoba Court of Appeal. The case involved a shoplifting by Ms. Bond's child. Ms. Bond received a demand letter in connection with her child's shoplifting. Ms. Bond sent $225 to Zellers, and then discovered she should have ignored the demand letter. Ms. Bond sued Zellers for return of the $225. The Small Claims Court dismissed Ms. Bond's claim for return of the money. Then the Court of Queen's Bench ordered Zellers to pay back the money, saying there was no general rule that parents are responsible for their children's action (unless the parent was in some way negligent). This was confirmed by the Court of Appeal.

- ***Great Pacific Industries Inc, operating as Overwaitea Food Group v. Aida Sarroca* (1996), Surrey Registry No. C34195, BC Prov. Ct.**

  This case is usually cited by stores as proof that a shoplifter can be sued for investigation costs. In this case, judgment of $2,490.69 was awarded to Overwaitea to compensate for $125 stolen cash, plus $2,356.69 of surveillance costs incurred. Stores will not tell you, however, that the facts of this case involved special circumstances: the theft over time of cash from a till by a store employee (i.e. a situation quite distinct from the usual shoplifting scenario).

- ***Hudson's Bay Co. v. White* (1997) 22 O.T.C. 366**

  Mr. White shoplifted gloves worth about $200. The gloves were retrieved and no criminal charges were laid. The Bay claimed over $2,000 in security-related costs, plus punitive damages. The court awarded only a nominal $100 in damages for "trespass" (i.e. for Mr. White having entered the store for the unauthorized purpose of shoplifting). The court specified that the costs of fighting crime were already borne by everyone in society, and could not be recovered from shoplifters on an individual basis by way of Small Claims Court. The decision was then appealed to the Ontario Court of Justice (General Division) Divisional Court. The Appeal Court replaced the nominal award of

$100 with a punitive award of $300. The appeal decision was three sentences long and gave no further explanation for the increased award.

- ***Chopra v. T. Eaton Co.* [1999] 9 W.W.R. 711**

This case did not involve shoplifting, but did involve a claim related to "trespass" and "private arrest." Mr. Chopra was at the customer service desk of an Eaton's store seeking a cash refund from the credit balance of his account. An argument ensued and two security staff tried to escort Mr. Chopra out of the store. Mr. Chopra pushed the security staff away in an effort to exit the store unassisted. Security staff responded with a headlock and informed Mr. Chopra he was under arrest. Mr. Chopra was handcuffed to a chair in the security office and his wallet removed from his pocket without permission. Mr. Chopra's requests for water and to call his wife were ignored. Police were only called after two hours. Mr. Chopra sued Eaton's for battery (i.e. assault) and for false imprisonment. Eaton's counter-claimed against Mr. Chopra for "trespass." The judge found the behaviour of the security staff outrageous. The judge awarded Mr. Chopra general and aggravated damages of $23,000, plus $10,000 in punitive damages.

- ***Southland Canada Inc. v. Zylike* (1999) 256 A.R. 55**

A 7-Eleven store sued two people found guilty of shoplifting. The claims were for $250 each, relating to the cost of store security. The claims went to a judge for assessment after both shoplifters were noted in default (i.e. the shoplifters failed to reply to the court proceeding). The judge noted that the shoplifters had already been subjected to the criminal process, and that the people who "should be defraying the cost of the security program are those who are not punished by the criminal process." The judge dismissed the claims by 7-Eleven. The judge did leave the door open for future claims based on "trespass to land," and did stress that any such claim "must be properly pled and the entirety of the circumstances giving rise to the relief sought must be favorable to the [store] before serious consideration will be given to them by this Court" (i.e. the store will need to show special circumstances).

- ***Myles Parless, by his guardian ad litem v. Port of Call Holdings et al*, 2000 BCSC S48**

This case involved a money claim for "false arrest" against a Thrifty's security guard. The security guard had apprehended a youth for apparently drinking chocolate milk (not paid for). The Court referred *to Karogiannis v. Poulus and T. Eaton Co* [1976] 6 W.W.R. 197 (B.C.S.C.), and to *Morguard Properties Ltd. Et al v. City of Winnipeg* (1983), D.L.R. (4th) 1 (S.C.C.) The court said a private arrest by a security guard for the purpose of "investigation" is unlawful. A private arrest (i.e. detaining someone) is only permitted where the security guard has reasonable grounds to believe the person being detained has already committed an indictable offence.

- ***M.O. v. E.N.* [2004] B.C.J. 2350**

  This appears to be the first reported decision under the BC *Parental Responsibility Act* (the law as it was known when it was passed in 2001). This was a first time theft by a 14 year old boy whose mother was a single parent. The boy stole a laptop computer from a schoolmate and was eventually prosecuted in Youth Court. The judge called it an "isolated incident" and found the single mom made "reasonable efforts to discourage her son from engaging in the activity that caused the property loss". The judge also found that the son was overall reasonably supervised by his mom. Nevertheless, the judge ordered the single mom to pay compensation equal to 50% of the value of the stolen laptop.

- ***S.T. and V.T.* v. *S.H. and G.H.*, 2008 BCPC 226** (CanLII)

  This case involved a claim by parents (the Claimants) whose residence was broken into. A 15 year old boy, diagnosed with ADHD and having drug addiction issues, stole jewelry from and vandalized the home of the Claimants. Pursuant to the BC *Parental Responsibility Act* (as it was then called), the Claimants sued the parents of the boy for the portion of damages, approximately $5,000, not covered by insurance. The Court noted that every effort was made by the Defendants to accommodate the boy's disability by providing social, psychological, medical intervention coupled with private counseling sessions and opportunities to attend to substance abuse programs. Ultimately, the Court found that the Defendant parents exercised reasonable supervision at the material time, and made reasonable efforts to prevent and discourage the child from engaging in the kind of activity that caused the loss. The court noted that the intent of the *Act* is to hold parents accountable where there is a derogation of duty, and that was not the case in the circumstances.

Where the nature of a shoplifting demand letter is misleading, bear in mind section 123(a) of the BC *Business Practices and Consumer Protection Act*, which states that a person attempting to collect a debt "must not supply any false or misleading information." Consider (1) drawing this law to the attention of the writer of the demand letter and (2) contacting and reporting the matter to Consumer Protection BC (http://www.consumerprotectionbc.ca/).

(70)

P[redacted] M[redacted], B.A.,LL.B.,B.C.L.
BARRISTER AND SOLICITOR

[redacted] ROAD, SUITE [redacted]
TORONTO, ONTARIO, [redacted]
TEL (416) [redacted] FAX (416) [redacted]

WITHOUT PREJUDICE

PRIVATE AND CONFIDENTIAL

October 12, [redacted]

Mr. [redacted]
[redacted] BC [redacted]

Dear Mr. [redacted]

Re: Zellers Inc. and [redacted]
Recovery of Civil Damages/Our Case Number Z[redacted]

I am external legal counsel for Zellers Inc. (the "Retailer") with respect to civil recovery matters. It is alleged that on June 14, [redacted], a young person under your care and custody, (namely [redacted] took unlawful possession of merchandise from the Retailer's premises located at [redacted] Mall, [redacted], BC. The retailer takes the position that it has the right to claim damages from the said young person and/or you as a result of such action based on theft, damages and conversion. The Retailer's right of civil recovery and payments made to the Retailer are separate and distinct from any criminal proceedings which may be instituted by the police.

The Retailer also takes the position that it has the right to claim damages from you as parent or guardian of the young person for failing to provide reasonable supervision of the young person. You have a right to be represented by a lawyer with respect to this claim.

The Retailer is prepared to settle its claim for damages in return for a payment of $475.00 (the "Settlement Amount"), received on or before November 11, [redacted]. If this amount is not paid, I may receive specific instructions, whether or not to arrange for a law firm in your jurisdiction to commence legal proceedings before a civil court for all damages, plus interest, legal expenses, and other administrative costs incurred by the Retailer in connection with this matter. These latter amounts may increase if payment is not made by the noted date. This settlement amount is based on the costs associated with the detection, apprehension, recovery of goods and damages associated with shoplifting, hereafter referred to as Recovery Costs. Retailers have calculated the average Recovery Costs to be approximately $900.00. The settlement amount is significantly lower than the Recovery Costs, however, should the retailer be compelled to prove costs in Court, they would rely on the higher or actual amount of Recovery Costs in any civil claim filed.

Should you choose to settle the Retailer's claim by payment of the Settlement Amount, payment should be made by cheque or money order, made payable to "**CIVIL RECOVERY**" on behalf of the Retailer, with your name and the above case number noted thereon. The payment should be sent in the enclosed postage paid envelope or to the following address: P.O. Box [redacted], Ontario [redacted]

I have been advised that Canadian retailers estimate shoplifting amounts to an annual expense exceeding $4.0 billion. Experience indicates that pursuing shoplifters for such losses reduces the number of shoplifting incidents, resulting in savings which can then be passed on to consumers. *The Hudson's Bay v. White* supports the position that shoplifters, in certain cases, are liable for punitive damages.

Any questions in regard to this matter are to be made in writing, and addressed to the undersigned.

Yours truly,

P[redacted] M[redacted]

[redacted]

Limitation Periods for unsecured debt issues

(This document was copied in large part from Chapter 33 of the Legal Service Society's Consumer Law and Credit/Debt law, and was updated by Alison Ward, lawyer, CLAS, October 2, 2013)

A limitation period, or limitation date, refers to the legal deadline within, or by, which someone must start a lawsuit against someone else. If someone does not start a lawsuit within the applicable limitation period, then the other party may have a "limitation defence" against their claim. In other words, if someone starts a lawsuit against someone else after a limitation period or date has passed, the other person can ask the court to dismiss (throw out) the lawsuit for this reason.

This area of the law is complex. The applicability of limitations defences can turn on fine distinctions of law. In BC, this area of the law became more complex on June 1, 2013, when a new provincial *Limitation Act* S.B.C. 2012, c. 13, came into effect. The new *Limitation Act* repeals and replaces the former *Limitation Act*, R.S.B.C. 1996, c. 266. However, the former *Limitation Act* will continue to apply to some cases after June 1, 2013.

There are complicated transition rules about using the new *Limitation Act* and the former *Limitation Act*. The summary provided below is only a very brief outline of basic principles. A lawyer should be consulted for an opinion in specific cases. **Also note that the *Limitation Act* does not apply to an action where a specific limitation period is set by another statute** (e.g. the *Residential Tenancy Act* sets a two year limitation period to file a monetary claim against a landlord).

Unsecured debts under the former BC Limitation Act

The **former** British Columbia *Limitation Act* provided there was a general limitation period of 6 years for an unsecured creditor to sue someone in relation to most debts. In other words, a court action could not be brought by a creditor more than 6 years after the debt became due and owing, unless the debtor had acknowledged responsibility for the debt in writing in the meantime, OR made a payment toward the debt in the intervening period. Either of those things renewed the running of the limitation period (i.e. the 6 years started again from that date).

Unsecured debts under the new Limitation Act:

The new *Limitation Act*, section 6, introduces a basic two-year limitation period that applies to **most** *(but not all)* claims for injury, loss, or damage as of June 1, 2013. This section will govern most debt situations. However, note there are some important exceptions: including debts to the provincial government and Canada student loans (see below for more information).

Section 6 of the new *Limitation Act* provides that legal actions for claims, including unsecured debts, cannot be brought later than two years after the date on which the claim was "discovered." Sections 8 to 20 of the new Act set out the rules for discoverability of a claim.

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Transitional Rules: when does the former Act apply? When does the new Act apply?

Although the new *Limitation Act* came into force on June 1, 2013, the former *Limitation Act* will continue to apply to some cases after that date. Figuring out whether the new or former *Limitation Act* applies to a particular case will be very important, as there are big differences in the limitation periods created by each act.

For a summary of the transition rules from the former *Limitation Act* to the new *Limitation Act*, see http://www.ag.gov.bc.ca/legislation/limitationact/pdf/LAFlowchart.pdf *(copy attached).*

As that chart illustrates, the first step in deciding which Act applies is to determine the date on which a claim was discovered, or the right to bring the action arose. This is not always easy. In general, a creditor does not have the right to sue a debtor so long as the debtor is keeping up on the payments under the agreement. A creditor's right to bring a legal action arises when the debtor has defaulted on his or her contractual obligation to pay. Most consumer-related credit arrangements, ranging from mortgages to credit cards, require some form of periodic payment. If the periodic payment is missed, the obligation is usually in default and the creditor can sue.

If the creditor's right to sue a debtor first arose on or after June 1, 2013, then the new *Limitation Act* (two-year limitation period) will generally apply.

- For example, if someone owes periodic payments on a credit card and their periodic payment is first missed on July 12, 2013, the new *Limitation Act* would apply. The creditor now has the right to sue them.

However, if the creditor's right to sue a debtor first arose before June 1, 2013, then the former *Limitation Act* (and general six-year limitation period) may still apply. This is because the new *Limitation Act* only applies to claims that were "discovered" on or after June 1, 2013.

- For example, if someone stopped paying their credit card bill on July 30, 2008, and the creditor was aware of that right away, the six-year limitation period under the former *Limitation Act* continues to apply. The former *Limitation Act* applies because the creditor discovered the claim before June 1, 2013.

When is a limitation date extended or restarted under the Act?

There are important provisions in both the new *Limitation Act* and the former *Limitation Act* that can extend a limitation date. Sections 24 of the new Limitation Act, and section 5 of the former Limitation Act, provide that the applicable limitation period (two years or six years) starts all over again if there has been an "acknowledgement" of the debt. Both *Limitation Acts* define "acknowledgement" to include:

(a) making a partial payment; and
(b) the person – or their agent - acknowledging liability for the debt in a signed, written statement made to the creditor.

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This means that in many cases, the limitation date will run from the date when a payment was last made, or a written and signed acknowledgement of liability made, rather than the date when the payments under the agreement were first in default, or when the claim was first discovered.

If there is some question as to whether a client might have a limitation defence, advocates should tell the client not to make any payments in the meantime, and not to give any kind of written statement (e.g., in a letter to the creditor) acknowledging the client's liability for the debt.

Some important exceptions where the new *Limitation Act* does not apply

A. Debts to the Provincial Government

Under the former *Limitation Act*, unsecured debts to the government (e.g. welfare overpayments) were generally governed by a 6 year limitation period.

Under the new *Limitation Act*, most debts to Province of BC will **continue** to be governed by a six year limitation period. This is because, when the new *Limitation Act* was introduced, another provincial statute called the *Financial Administration Act* was amended. A copy of section 86.1 of the *Financial Administration Act* is attached. In essence, it says that when the BC government or "tax payer supported government reporting entity" has a claim in debt, a 6 year limitation period applies. This same 6 year limitation period applies to claims by ICBC for "motor vehicle indebtedness."

B. Canada Student Loans

The B.C. *Limitation Act* does not apply to Canada Student Loans as the *Canada Student Financial Assistance Act* sets specific limitation periods that apply to federal student loans. Generally that limitation period is 6 years. However, section 16.1(5) of the *Canada Student Financial Assistance Act,* says that even if an acknowledgement of a student loan (whether in writing or by partial payment) is made **after** the 6 year limitation period has passed, that acknowledgement restarts the 6 year limitation period from the very beginning, and the debt is still owed.

Effect of the expiry of a limitation period under the new *Limitation Act*

The former *Limitation Act* (section 9) provides that once a limitation date has passed, a person's "cause of action" (legal right) against the other party is "extinguished." In the case of unsecured debts, after a limitation date has passed under the former *Limitation Act*, it follows that the existence of an indebtedness is also extinguished, along with the creditor's legal rights. In short, after a limitation date for suing in respect of an unsecured debt has passed under the former *Limitation Act*, a person can say that they are simply no longer indebted to a creditor. Because the indebtedness no longer exists, the creditor is legally barred both from subsequently suing the person in court, and from exercising any legal remedy outside the court system to collect that debt.

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The new *Limitation Act* treats this issue somewhat differently. Section 27 of the new *Limitation Act* says:

Non-judicial remedies

> ***27*** *(1) In this section,* ***"non-judicial remedy"*** *means a remedy that a person is entitled,* ***by law or by contract****, to exercise in respect of a claim without court proceedings.*
>
> *(2) If a claimant is prevented from commencing a court proceeding in relation to a claim as a result of the expiry of a limitation period under this Act,* ***the claimant is not entitled to exercise against the person against whom the claim is or may be made, or against any other person, any non-judicial remedy*** *that the claimant would, but for this section, be entitled to exercise in relation to the claim.*

So, once a limitation period under the new *Limitation Act* has expired, a legal right is not legally *extinguished* in the same way as it was under the former *Limitation Act.* Theoretically then, the debt still exists and a debtor remains indebted to a creditor.

However, under the new *Limitation Act*, it is clear that if a creditor fails to sue a debtor in court by a limitation date (i.e. fails to exercise a *judicial* remedy by the limitation date), the same creditor is legally barred not only from subsequently starting a court action, but ALSO from exercising any legal remedy outside the court system (i.e. non-judicially) to collect that debt.

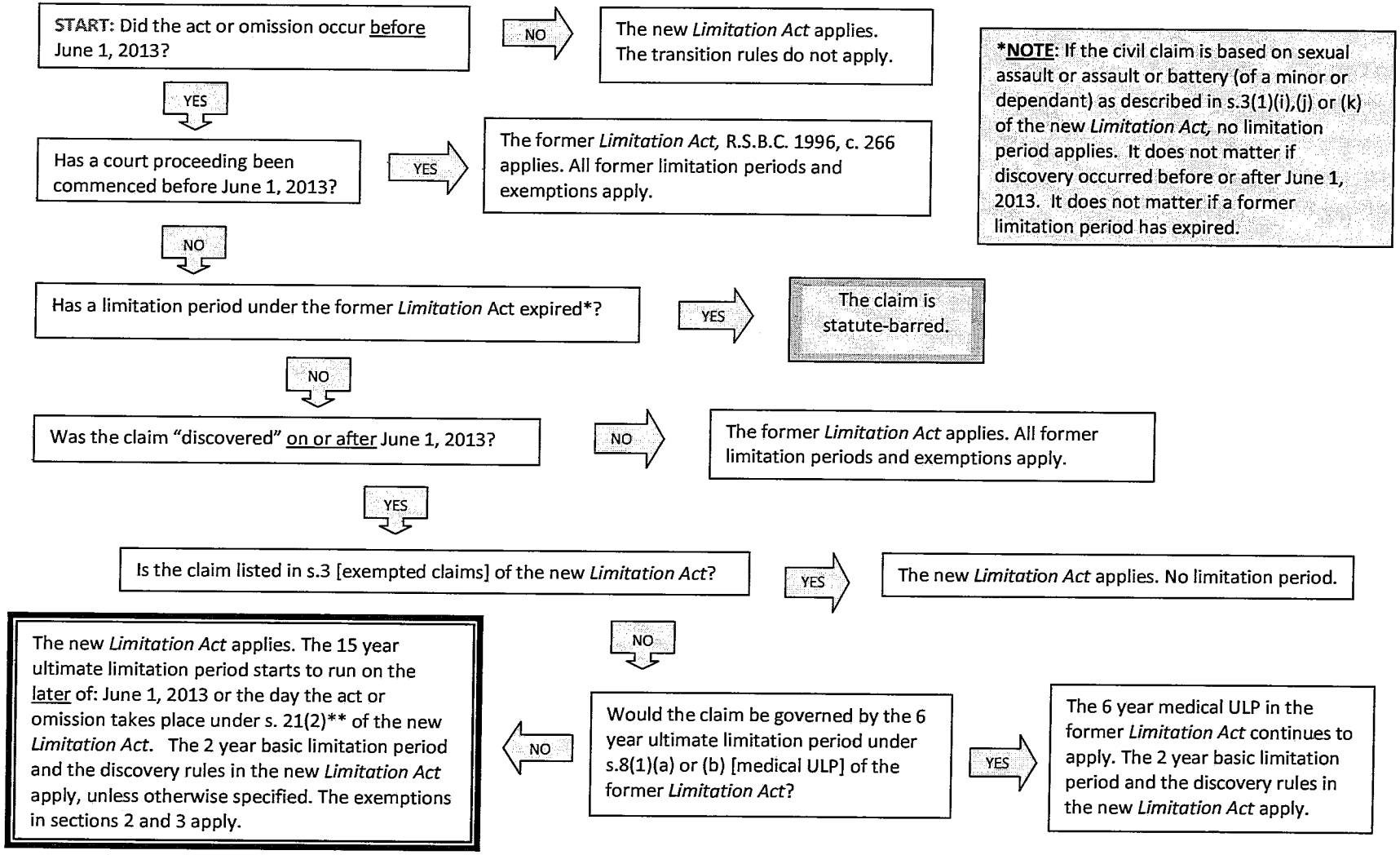
Let's take the example of someone who owes a debt to ICBC in respect of a car accident in which the person was found to be at fault but does not pay ICBC voluntarily. The accident happened after June 1, 2013 so the new *Limitation Act* applies to the situation. A six year limitation period applies to "vehicle indebtedness" under the new *Limitation Act*, by virtue of section 86.1 of the *Financial Administration Act.* If ICBC fails to sue the person before the passage of the six year limitation date, it could be argued that section 27 of the new *Limitation Act* then also legally prohibits ICBC from withholding that person's driver's license or from refusing them insurance on account of "vehicle indebtedness," which are powers that ICBC would otherwise have under section 26 of the *Motor Vehicle Act.* In other words, section 27 of the new *Limitation Act* appears to provide that those non-judicial (outside of court) remedies for collecting the debt in question, would no longer be available to ICBC if the limitation date for suing in respect of the same debt has passed.

In this sense, the *effect* of the former and new *Limitation Acts* is the same, however – as you have just seen - the arguments that lead to this same outcome are framed somewhat differently under the new and former Acts. Under the former *Limitation Act*, upon the expiry of a limitation period, a debt was extinguished and therefore, legally, there was no longer any debt for ICBC to try and collect. Under the new *Limitation Act*, upon the expiry of a limitation period, the indebtedness may still *theoretically* exist, but section 27 prevents ICBC from taking any action to collect it.

Ministry of Justice

Transition Rules Flowchart for the new *Limitation Act*

This document was developed by the Civil Policy and Legislation Office, Ministry of Justice. It is posted as educational material to support the transition to the new *Limitation Act*. It is not intended to constitute legal advice and should not be relied upon for those purposes.



Note: The new *Limitation Act* is a default statute. If another provincial statute contains a limitation period, the new *Limitation Act* does not apply, except to the extent provided for in the other provincial statute. The new *Limitation Act* is not yet in effect. Until June 1, 2013 the former *Limitation Act* continues to apply.

**Special ULP start dates for claims involving conversion, fraud, fraudulent breach of trust, future interest in trust property, demand obligations, security realization or redemption, contribution or indemnity, a minor, or a person under a disability.

FINANCIAL ADMINISTRATION ACT
[RSBC 1996] CHAPTER 138
(accessed from www.bclaws.ca on October 2, 2013)

Limitation period for government claims

86.1 (1) In this section:

"claim" has the same meaning as in the *Limitation Act*;

"government claim" means a claim in debt, or any other claim for payment or recovery of money in a specified or ascertainable amount, by

(a) the government,

(b) a corporation or other organization within the taxpayer-supported government reporting entity, or

(c) a corporation or other organization that is not within the taxpayer-supported government reporting entity but that was within the taxpayer-supported government reporting entity on or after the date on which the act or omission on which the claim is based took place and before the expiry of the limitation period created by this section applicable to the claim,

and includes a claim by the Insurance Corporation of British Columbia for vehicle indebtedness;

"limitation period" has the same meaning as in the *Limitation Act*;

"taxpayer-supported government reporting entity" has the same meaning as in the *Budget Transparency and Accountability Act*;

"vehicle indebtedness" has the same meaning as in section 93.1 of the *Insurance (Vehicle) Act*.

(2) Subject to subsection (3), the *Limitation Act* applies to government claims, and, for that purpose,

(a) a reference to a claim in that Act is deemed to be a reference to a government claim, and

(b) the references in section 6 of that Act to 2 years and a 2 year limitation period are, when applied to the government claim, deemed to be references to 6 years and a 6 year limitation period respectively.

(3) Subsection (2) does not apply to a government claim for which a limitation period has been established under an enactment other than the *Limitation Act*.

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BRITISH COLUMBIA

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Ministry of Justice

Limitation Act

The new Limitation Act came into force June 1, 2013. The act replaces and repeals the former Limitation Act, makes the law easier to understand, and brings B.C.'s law more in line with other provinces.

The Limitation Act outlines the set period of time that people have to start a proceeding to sue someone in the civil justice system. While many other laws set limitation periods, the Limitation Act sets the default regime, which means that unless another law sets the applicable limitation period, the Limitation Act applies.

The Limitation Act was reformed for a number of reasons, including:

- It had not been comprehensively updated since its introduction in 1975.
- Independent law reform bodies in B.C. recommended reform in 1990 and again in 2002.
- Individuals and organizations had been calling for change.
- The act was out of step with limitations statutes in other provinces (Alberta, Saskatchewan, Ontario and New Brunswick) that have modernized their limitations laws.
- The Uniform Law Conference of Canada put forward a model limitations statute as a suggested framework to develop a harmonized (consistent) approach to limitations law across the country.

Key Changes

Key changes include:

- moving from a variety of basic limitation periods, based on the type of legal action, to a single two-year basic limitation period for all civil claims. Exceptions to this are civil claims that enforce a monetary judgment, exempted claims and actions that have limitation periods set by other statutes;
- moving from a general 30-year ultimate limitation period to a single 15-year ultimate limitation period;
- changing the commencement model of the ultimate limitation period from an "accrual" model to a model in which the clock starts running based on when an "act or omission" occurred; and
- transition rules.

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Watch this video for an overview of the new Limitation Act.

Transition Information

The resources below have been developed to help the legal community and the public transition to the new Limitation Act. They are not intended as legal advice and should not be relied upon for those purposes.

The New Limitation Act Explained

This document details the new Limitation Act. Where the section replaces, changes or carries over a section of the current Limitation Act that information is included. Each heading links to the corresponding heading in the new Limitation Act. This document can be downloaded by Part or as an entire document.

Part 1 – Interpretation	Part 2 – Basic Limitation Period
Part 3 – Ultimate Limitation Period	Part 4 – Factors Affecting Limitation Periods
Part 5 – Suspension of Limitation Periods	Part 6 – General

Limitation Act Transition Videos

For more information on transitioning to the new Limitation Act, watch part 1 and part 2 of our transition rules video.

Other Resources

- Exposure to Liability – Effect of Transition Rules Beginning June 1, 2013
- Transition Rules Flowchart for the new Limitation Act
- Questions and Answers
- Table of Concordance
- Limitation Act
- Limitation Act (repealed)

For more information:

Information Bulletin (May 31, 2013)
News release (Oct. 2, 2012)

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*Sample letter to ICBC asserting expiry of a limitation period under the former *Limitation Act*

Client name
Client address

July 13, 2012

Insurance Corporation of British Columbia
151 West Esplanade
North Vancouver, BC V7M 3H9

Dear Sir/Madam:

Re: Your Account Number: XXX XXX XXX
Renewal of Driver's License and Issuance of Insurance

I am writing to you regarding the above matter relating to a 1993 motor vehicle accident I was involved in.

As I understand, ICBC is claiming a "MV Indebtedness", effective May 14, 1998, for approximately $134,000.00 (the alleged "Debt") relating to the 1993 accident. As you likely know, one option that ICBC had to pursue collection of the alleged Debt was to start a court action. According to the BC *Limitation Act*, if an action is not brought within the 6 year limitation period for an alleged debt, the right to start a cause of action is extinguished. In my case, ICBC failed to start a recovery action in court within the 6 year limitation period. As a result, the expiry of the limitation period for the recovery of the alleged Debt extinguished the alleged Debt itself and therefore, I do not owe ICBC any monies. Furthermore, by not starting a court action within the limitation period, ICBC failed to prove the alleged Debt, failed to establish that the settlement giving rise to the alleged Debt was reasonable and entered into in good faith, and failed to give me an opportunity to have a court decide the issue of the claimant's contributory negligence, if any. And finally, ICBC has in essence confirmed the extinction of the alleged Debt by its inaction.

As a result of the above, I ask that no further notices be sent to me requesting payment as I do not owe any debt to ICBC. Should ICBC have a response to the above, I request that such response, with reasons, be provided to me in writing **within 14 days of receipt of this letter** by your office.

Finally, I request that I be granted a driver's license and insurance coverage effective immediately upon my application at a local motor vehicle branch.

Yours truly,

Client name

Benefits protected by statute from attachment and set-off

*Prepared by Alison Ward, lawyer, Community Legal Assistance Society, updated September 10, 2013

*NOTE: The discussion in this paper **does not apply to situations where FMEP or the government (Federal or Provincial) is the creditor**. Statutory benefits are not usually protected from collection when the creditor collecting a debt is the government, and special rules apply when the creditor is FMEP.

You've probably all heard clients ask the question: "I owe money to the bank. Can they take away my welfare benefits? Or my EI? Or my child tax benefit?

Do you know the answer to this question? Do you think it's a simple answer? If you think it's simple, think again……

Some benefits issued by government are paid under legislation that provides those benefits with statutory protection from some collection actions by creditors. Some other monies, such as RRSPs, and some private pension monies are also given protection from enforcement by statute. The focus of the discussion on this paper is what protection, exactly, is given to benefits paid by government under legislation that provides them with protection from some collection action.

Let's look at two examples.

1. Section 29 of the BC *Employment and Assistance Act* says:

29 (1) Income assistance, hardship assistance and supplements are exempt from garnishment, attachment, execution or seizure under any Act.

(2) Subsection (1) does not prevent income assistance, hardship assistance or a supplement being retained by way of a deduction or set off under this Act, the Financial Administration Act or a prescribed enactment.

2. Section 42 of the *Employment Insurance Act* says:

Benefits not assignable

***42.** (1) Subject to subsections (2) and (3), benefits are not capable of being assigned, charged, attached, anticipated or given as security and any transaction appearing to do so is void.*

(2) Any amounts payable under this Act by any person and required to be credited to the Employment Insurance Operating Account may be recovered out of any benefits payable to that person, without affecting any other mode of recovery.

(3) If the Government of Canada, a provincial or municipal government or any other prescribed authority pays a person an advance or assistance or a welfare

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payment for a week that would not be paid if unemployment benefits were paid for that week, and unemployment benefits subsequently become payable to that person for that week, the Commission may, subject to the regulations, deduct from those or any subsequent benefits and pay to the government or the prescribed authority an amount equal to the amount of the advance, assistance or welfare payment paid, if the person had, on or before receiving the advance, assistance or welfare payment, consented to the deduction and payment by the Commission.

What this type of statutory protection means, exactly, is a rather complicated area of law.

What benefits have statutory protection?

The Acts that govern the following types of benefits give them some statutory protection:

1. Income Assistance, PPMB benefits and supplements: refer to section 29 of the B.C. *Employment and Assistance Act* at http://www.hsd.gov.bc.ca/PUBLICAT/VOL1/Part3/3-2.htm#29

2. PWD benefits and supplements: refer to section 20 of the B.C. *Employment and Assistance for Persons with Disabilities Act* at http://www.hsd.gov.bc.ca/PUBLICAT/VOL1/Part3/3-4.HTM#20

3. CPP benefits: refer to section 65 of the *Canada Pension Plan* at http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-8/latest/rsc-1985-c-c-8.html

4. OAS, GIS and survivor's benefits: refer to section 36 of the *Old Age Security Act* at http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-o-9/latest/rsc-1985-c-o-9.html

5. Federal Child Tax benefits: refer to section 122.61(4) of the *Income Tax Act* at http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-1-5th-supp/latest/rsc-1985-c-1-5th-supp.html

6. Employment Insurance benefits: refer to section 42 of the *Employment Insurance Act* at http://www.canlii.org/en/ca/laws/stat/sc-1996-c-23/latest/sc-1996-c-23.html

7. Workers Compensation benefits: refer to section 15 of the B.C. *Workers Compensation Act* at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/96492_00

8. Crime Victim Assistance Act benefits: refer to section 21 of the B.C. *Crime Victim Assistance Act* at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_01038_01#section21

9. Child care subsidy funds: refer to section 8 of the B.C. *Child Care Subsidy Act* at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96026_01#section8

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10. Some private employment pension benefits: refer to section 63 of the B.C. *Pension Benefits Standards Act* at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96352_01#section63

11. Funds in RRSPs, Registered Retirement Income funds (RRIFs) and Deferred Profit Sharing Plan (DPSPs) (all as defined in the federal *Income Tax Act*) have some protection: refer to section 71.3 of the *Court Order Enforcement Act* at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96078_01#section71.3

Each of these statutes offers some statutory protection to the benefits issued under them. Each statute creates that protection using slightly different wording, which can be confusing.

One thing they have in common though, is that the above benefits are generally protected from being taken **at source** by creditors serving a garnishing order on the body that issue these benefits. For example, if a bank gets a garnishing order against Mr. Smith, and serves the garnishing order on CPP, CPP will not act on it. Such benefits cannot be garnished at source.

A trickier question arises once statutorily protected benefits are deposited in bank accounts.

Issue: Once statutorily protected funds are in a bank account, are they still exempt from garnishment or set-off?

Terminology:

What is a garnishing order?

A **GARNISHING ORDER** is an order made by a court that says that someone who owes money to the debtor must pay it to the creditor. In practice the money is paid to the court. The court holds onto the money and if there are no problems will then release it to the creditor.

What is set-off?

A **SET-OFF** happens without the need for a court order. It can happen when you owe money to a person or Bank for one purpose, and they owe you money for another. For example, if you have a CIBC account with $3000 in it, and you owe $1000 in old debt on a CIBC visa card. In that situation a CIBC might take money from your bank account to apply to your visa debt. This can only happen if you agreed to allow the bank to do this in the credit card agreement, or other loan contract.

The Problem

Once statutorily protected benefits are placed in a bank account:

a) a creditor may be able to obtain a garnishing order from the Court against funds in the bank account. Note that in general, joint accounts cannot be garnished if the creditor has a claim against only one of the joint account holders (this is true whether or not the funds in the account have statutory protection); and

b) an institutional creditor such as the Bank may set off the money in the bank account against other debts the person owes to the Bank (without a court order).

Possible Solutions

If either of these things (a or b, above) happens, the person whose benefits were taken may have a legal remedy. They can argue that the funds should be returned to them because they are still statutorily protected benefits, even though they had been put in the bank.

How and where you would make this argument depends on whether the funds were taken through a garnishing order, or set off.

a) **Funds taken by a Garnishing Order from Court**:

The person can apply to the Court Registry that made the garnishing order, to have the garnishing order set aside, and the money returned to the person, on the grounds that the monies seized are statutorily protected benefits that are exempt from garnishment.

See the case of *Metropolitan Toronto (Municipality)* v. *O'Brien*, [1995] O.J. No 4896 (copy **attached**) for a precedent from the Ontario Court of Justice holding that OAS and CPP benefits are still exempt from garnishment once deposited into a bank account.

b) **Funds taken by Set –Off**

The first step in this situation is to contact the bank manager or customer service department. Explain to them that the funds taken represent statutorily protected benefits, and must be returned to the person. You may want to send the Bank representative a copy of the legislation that states that the funds are protected. You may also want to send the Bank a copy of a precedent case, *McIntosh* v. *Laronde*, [1998] O.J. 5988 (copy **attached**). In *McIntosh* v. *Laronde,* the Ontario Court of Justice found that Ontario welfare benefits that were deposited into a bank account, did not lose their statutory protection. The creditor who had had the funds from her bank account seized, was ordered to pay the money back to the income assistance recipient.

While you may start by dealing with the bank over the phone, it is best to follow up by sending them a letter outlining your position that the client's money must be returned, and the legal reasons for your opinion. Your argument will be easier to make if the only deposits to the bank account in question were from protected government programs. If protected benefits and other non-protected monies (such as child support or wages) were deposited to the account, it will be more difficult to argue that 100% of the funds that were set-off are protected.

If the creditor won't return the funds, and the funds are income assistance or other benefits with statutory protection from attachment or set-off, the person can apply to the Provincial (Small Claims) Court for an order that the funds be returned to them on the basis that they are protected from set-off and seizure. If there is no pre-existing court file between the creditor and the debtor, the client would have to start by completing a Notice of Claim, naming both the creditor and the bank as defendants. The client could then bring on an Application to a Judge to try and get the Court to deal quickly with their issue. Courts in BC have made decisions to return statutorily protected benefits that were set off from bank accounts; unfortunately as far as I am aware, none of these decisions have been reported. You will therefore want to rely on the Ontario cases cited above to support your client's claim for return of their protected funds.

Where the funds that are set off against are income assistance or PWD benefits, you may also consider having your client apply to MSDSI for a crisis supplement to tide them over until their benefits are (hopefully) returned to them.

Because a client whose welfare benefits have been set off against will often be eligible for a crisis supplement (i.e. their resulting needs are unexpected as the set off itself was unexpected), MSDSI has a financial interest in assuring that wrongful set offs against welfare benefits do not occur. At least in Vancouver, Community Relations and Service Quality Manager ("CRSQ") at MSDSI has been willing to intervene with banks where set offs have occurred against welfare benefits, to assert that those funds are protected by their governing legislation, as set out above. Therefore, it may be very useful in dealing with such situations, to make the CRSQ for your region aware of any wrongful set off against welfare benefits. You can do this by copying MSDSI's CRSQ for your region on any letter you write to the bank or credit union involved, and asking the CRSQ to intervene directly with the bank or credit union if you find the bank or credit union is not responsive to your efforts to resolve the problem on your client's behalf.

(85)

Re

Municipality of Metropolitan Toronto and O'Brien; Canadian Imperial Bank of Commerce, Garnishee [Indexed as: Metropolitan Toronto (Municipality) v. O'Brien]

23 O.R. (3d) 543

[1995] O.J. No. 4896

Ontario Court (General Division),

O'Brien J.

April 21, 1995

Debtor and creditor -- Garnishment -- Old age security and Canada Pension Plan payments electronically transferred into judgment debtor's bank account -- Moneys exempt from garnishment -- Old Age Security Act, R.S.C. 1985, c. O-9, s. 36(1) -- Canada Pension Plan, R.S.C. 1985, c. C-8, s. 65(1).

The Municipality of Metropolitan Toronto ("Metro") provided O, who was totally blind and confined to a wheelchair, with food, lodging, and other services at a home for the aged. O did not pay for the services, and Metro obtained a default judgment in the amount of $12,218.90 against him. To enforce its judgment, Metro served a notice of garnishment on a branch of the CIBC where O had a bank account. The bank manager advised Metro that it would not be remitting any funds since the money in O's account was exempt from seizure as Old Age Security and the Canada Pension Plan payments, which had been electronically transferred into O's account. Metro applied for an order under rule 60.08 of the Rules of Civil Procedure requiring CIBC to pay all amounts it paid from O's account since the notice of garnishment was served.

Held, the motion should be dismissed with costs.

Both the Old Age Security Act and the Canada Pension Plan provide that benefits payable shall not be assigned, charged, attached, anticipated or given as security and any transaction purporting to do so is void. This exemption from seizure was not lost merely because of the modern convenience of electronic depositing. The only money in O's bank account came from pension funds, and the account was thus exempt from garnishment.

Cases referred to

Bonus Finance Ltd. v. Smith, [1971] 3 O.R. 732, 21 D.L.R. (3d) 544, 16 C.B.R. (N.S.) 87 (H.C.J.); Foley v. Hill (1848), [1843-60] All E.R. Rep. 16, 2 H.L. Cas. 28; Wayfarer Holidays Ltd. v. Hoteles Barcelo (1993), 12 O.R. (3d) 208, 18 C.P.C. (3d) 36 (Gen. Div.)

Statutes referred to

Canada Pension Plan, R.S.C. 1985, c. C-8, s. 65(1)
Old Age Security Act, R.S.C. 1985, c. O-9, s. 36(1)
Pension Benefits Act, 1965, S.O. 1965, c. 96, ss. 21(1)(b), 22b [enacted 1967, c. 72, s. 1]
Rules and regulations referred to
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 60.08(16)

MOTION under rule 60.08 of the Rules of Civil Procedure requiring payment pursuant to a notice of garnishment.

Jacqueline P. Wigle, for creditor.

Rita A. Chrolavicius, for debtor.

Anne C. Thomas, for garnishee.

O'BRIEN J.: -- Metropolitan Toronto ("Metro") seeks an order under rule 60.08 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 requiring C.I.B.C. to pay all amounts it paid from the debtor's account in one of its branches since notice of garnishee was served on it October 30, 1992.

The issue involved is the exemption from garnishee, of funds payable to the debtor under the Old Age Security Act, R.S.C. 1985, c. O-9, and the Canada Pension Plan, R.S.C. 1985, c. C-8.

Metro obtained default judgment against the debtor in the amount of $12,218.90 for food, lodging and other services rendered to the debtor while he was a resident of Cummer Lodge, a home for the aged operated by Metro. The debtor was in that institution from May 1990 until May 1992. He now resides in a similar facility operated by Extendicare Nursing Homes, a privately operated facility.

The debtor is confined to a wheelchair and is totally blind. His only source of income is from Old Age Security benefits, Canada Pension Plan and Guaranteed Income Supplement. He has no assets. He deposes he has $112 remaining each month for personal and telephone expenses after paying his nursing home costs.

When he was in the Metro facility his only income was from two disability pensions and totalled $1,126 per month.

He apparently entered into an agreement with Metro to pay for some or all of the cost of his care while in the Metro facility. Metro obtained a default judgment against him on September 28, 1992 on the basis payment was not made. Metro then served a notice of garnishment on the garnishee in connection with an account the debtor had with that bank. Service on the garnishee was October 21, 1992; at that time the balance in the debtor's account was minus 43 cents.

The garnishee responded to the notice of garnishee by writing to Metro on November 30, 1992. The bank's manager advised it would not be remitting funds pursuant to the notice as all funds credited to the debtor's account were pension funds from Old Age Security and Canada Pension Funds and were exempt

from seizure. He agreed to remit any funds other than from those sources, which were deposited. He has since deposed there were no such funds.

Since that time the maximum balance in the debtor's account has never exceeded the sum of $1,124. The funds are received from the plans and deposited electronically in the debtor's account, according to his instructions; monthly payments are made to the Extendicare facility where he now resides. There is never any significant surplus of funds in his account.

Exemptions under the Applicable Acts

Both Acts provide benefits payable shall not be assigned, charged, attached, anticipated or given as security and any transaction purporting to do so is void.

These provisions are contained in the Acts as follows: Old Age Security Act, s. 36(1); Canada Pension Plan, s. 65(1).

Metro's counsel concedes the exemptions apply so long as the money is in the possession of the debtor, and also concedes the funds are not subject to garnishee at the source from the Federal Government. She argues, however, the exemption is lost when the funds are electronically deposited with the garnishee.

Counsel relies on a number of authorities which hold that when a customer pays money into a bank account the money ceases to be that of the customer and in its place the relationship of creditor/debtor is created which merely entitles the customer to the return of an equivalent amount when demanded: see Foley v. Hill (1848), [1843-60] All E.R. Rep. 16 at p. 19, 2 H.L. Cas. 28.

Counsel argues that when the deposit was made in this case the money ceased to be the debtor's and any exemption from garnishee was lost.

I do not accept that argument. The funds payable to the debtor in this case are pension funds intended to be paid to him over an extended period and are designed to provide for his infirmity and disability. I reject the submission that the exemption, otherwise available, is lost merely because of the modern convenience of electronic depositing. Such a result in my view would be unreasonable on the facts of this case. Here, the bank records clearly indicate the only money ever deposited into the debtor's account with the garnishee bank came from pension funds, exempt from garnishee.

A somewhat analogous situation was dealt with in Bonus Finance Ltd. v. Smith, [1971] 3 O.R. 732, 21 D.L.R. (3d) 544 (H.C.J.), per Houlden J. In that matter, a judgment creditor attempted to garnishee pension funds payable from a fund registered under the Pension Benefits Act, 1965, S.O. 1965, c. 96. Crown Trust was the administrator of the trust funds. Section 21(1)(b) of the Act provided pension benefits did not confer on the employee (the judgment debtor) any right or interest in the pension benefits capable of being assigned or alienated and s. 22b provided moneys payable under the plan were exempt from seizure or attachment.

Houlden J. refused the garnishee order relying on the exemption provisions contained in the Act.

I conclude the exemption continued in this case notwithstanding the deposit.

I dismiss this application on this basis.

If I am wrong on this point, I would also dismiss the application on the basis of discretion available under rule 60.08(16) and on the basis the relief sought is an equitable remedy. On the facts of this case I conclude it would be inequitable to grant the garnishee order: see Wayfarer Holidays Ltd. v. Hoteles Barcelo (1993), 12 O.R. (3d) 208 at p. 212, 18 C.P.C. (3d) 36 (Gen. Div.).

In my view, the garnishee acted commendably in refusing to honour the garnishee and taking the risk that by paying the monthly pension funds out to a nursing home it would face this type of application.

The garnishee could have taken the position that it was bound to keep the money until the garnishee proceedings were dealt with. At the very least this would have caused great inconvenience to the debtor, and might well have led to his removal from the home. The garnishee notice was served in October 1992. This matter was finally heard in April 1995.

The arrangements under provincial legislation were not explored in detail on this motion, it may be the legislation prevents expulsion of a resident for non-payment; that is not clear.

The garnishee notice was served by Metro on October 30, 1992. The matter was finally heard April 12, 1995.

The motion is dismissed. Costs payable to debtor and garnishee fixed at $1,500 each.

Motion dismissed.

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McIntosh v. Laronde

Between
James R. McIntosh, respondent, and
Mabel Laronde, appellant
[1998] O.J. No. 5988

165 D.L.R. (4th) 178
31 C.P.C. (4th) 256
File No. DV253/96 Sudbury

Ontario Court of Justice (General Division)
Divisional Court - Sudbury, Ontario

Campbell, Farley and Desotti JJ.

Heard: April 1, 1988.
Judgment: May 22, 1998

(9 pp.)

Creditors and debtors — Seizure or attachment of debtors' property — Exemptions — Disability allowance.

This was an appeal by the debtor from the dismissal of her motion to set aside the seizure of her monthly family benefits disability allowance. This was the debtor's sole source of income and the money was deposited directly into her account. The creditor seized $198.04 from this account. The motions judge dismissed the debtor's motion on the ground that section 143.1(1) of the Courts of Justice Act protected against garnishment of social assistance but not against seizure.

HELD: Appeal allowed. The creditor was ordered to repay the money that had been seized. The debtor's social benefits did not lose their character as social benefits and did not become subject to seizure merely because they were deposited in a bank account. Protection from creditors continued after the benefit was paid into a bank account provided that the bank account's purpose was to receive the benefit. The exemption was not lost merely because of the modern convenience of electronic depositing. Any other interpretation would undermine the underlying social purpose of welfare legislation.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. F.2, s. 143.1(1).

Family Benefits Act, R.S.O. 1990, c. F.2, s. 5(1)(b).
Counsel:

James McIntosh, in person.
Trevor Leech, for the appellant.

The judgment of the Court was delivered by

1 CAMPBELL J.:— This cases raises the general issue; to what extent is a welfare recipient protected against seizure, by creditors, of funds received under a provincial welfare disability allowance?

2 The specific question is this: when a family benefits disability allowance is deposited electronically into a bank account, and the allowance is the sole source of the funds in the account,

are the funds in the bank account immune from seizure under s. 5(1)(b) of the Family Benefits Act, R.S.O. 1990, c. F2?

3 The Act provides as follows:

- 1.

  In this Act,
  "allowance" means an allowance provided on the basis of need under this Act and the Regulations.

- recipient" means a person to whom an allowance is provided.

- 5(1)

  An allowance,

  - (a)

    is not subject to alienation or transfer by the recipient; and

  - (b)

    is not subject to attachment or seizure in satisfaction of any claim against the recipient.

4 Mabel Laronde's sole income is a monthly family benefits disability allowance of $690.46 deposited directly by electronic means in her bank account by the Ontario Ministry of Community and Social Services. All the money in the account comes from her disability allowance. No other funds are paid into the account. An examination of the account shows the deposit of $690.46 on the last day of every month, followed by the withdrawal of modest sums during the month for the expenses of daily living. The evidentiary record discloses very little about Ms. Laronde's personal circumstances. We are told that she is in her early sixties, that she has some sort of disability, and lives with her sister in a small apartment in rent-geared-to-income housing in North Bay. During some months Ms. Laronde's expenses are lower than others and she accumulates a small surplus in the account for "rainy day" purposes. Sometimes she withdraws cash from the account and if she does not spend it all at once she re-deposits what she does not then spend. During some months her expenses are higher and the balance in the account reduces. At the time her account was seized, on December 22, 1995, she had a balance of $198.04 in her account.

5 Ms. Laronde and her sister became indebted to James R. McIntosh, a North Bay lawyer, as a result of some estate litigation and they ended up owing him a balance of $9,789.20 for his unpaid legal account. Again, the evidentiary record is sparse but it appears that she and her sister and some other beneficiaries of an estate ended up each having a fractional right to a family cottage on an island in Lake Temagami which is for some reason exempt from seizure. There is no evidence as to the exact nature of Ms. Laronde's interest in the family cottage and no evidence that she has any assets other than her welfare bank account and whatever rights she has in relation to the cottage. What is clear from the record though is that she has established her entitlement to the family benefits disability allowance through need.

6 Mr. McIntosh,, after a number of unsuccessful demands for payment, filed a notice of execution with the Sheriff who notified Ms. Laronde's bank. On December 22, 1995, the bank froze the $198.04 in Ms. Laronde's bank.

7 Ms. Laronde, through the local legal aid clinic, moved unsuccessfully in motions court to have the notice of seizure set aside, on the grounds that the seizure violated s. 143.1(1) of the Courts of Justice Act, R.S.O. 1990, c. F.2, as amended, which provides that no family benefits allowance may be garnisheed, even if it has been paid into a bank account. The learned motions judge, [1996] O.J. No. 2231, dismissed the motion on the grounds that s. 143.1(1) protects against garnishment but not against seizure.

8 Although it is arguable that the function of a garnishment is to effect a seizure and that a purposive interpretation of s. 143.1(1) protects against seizure as well as garnishment, it is not necessary to decide that point because a close examination of the record shows that the appellant, in addition to s. 143.1(1), relied also on s. 5(1)(b) of the Family Benefits Act, although this supplementary argument might not have been made clear to the learned motions judge. In our view this case is governed by s. 5(1)(b) of the Family Benefits Act and by the principle enunciated by O'Brien J. in Metropolitan Toronto (Municipality) v. O'Brien (1995), 23 O.R. (3d) 543. Although that case involved the exemption from garnishment of an old age security benefit, nothing turns on the difference. The principle is that protection from creditors continues after the benefit is paid into a bank account provided that the bank account's purpose is to receive the benefit. O'Brien J. held that the exemption is not lost merely because of the modem convenience of electronic depositing:

- Metro's counsel concedes the exemptions apply so long as the money is in the possession of the debtor, and also concedes the funds are not subject to garnishee at the source from the Federal Government. She argues, however, the exemption is lost when the funds are electronically deposited with the garnishee.
- Counsel relies on a number of authorities which hold that when a customer pays money into a bank account the money ceases to be that of the customer and in its place the relationship of creditor/debtor is created which merely entitles the customer to the return of an equivalent amount when demanded: see Foley v. Hill (1848), [1843-60] All E.R. Rep. 16 at p. 19, 2 H.L. Cas. 28.
- Counsel argues that when the deposit was made in this case the money ceased to be the debtor's and any exemption from garnishee was lost.
- I do not accept that argument. The funds payable to the debtor in this case are pension funds intended to be paid to him over an extended period and are designed to provide for his infirmity and disability. I reject the submission that the exemption, otherwise available, is lost merely because of the modem convenience of electronic depositing. Such a result in my view would be unreasonable on the facts of this case. Here, the bank records clearly indicate the only money ever deposited into the debtor's account with the garnishee bank came from pension funds, exempt from garnishee.
- A somewhat analogous situation was dealt with in Bonus Finance Ltd v. Smith, [1971] 3 O.R. 732, 21 D.L.R. (3d) 544 (H.C.J.), per Houlden J. In that matter, a judgment creditor attempted to garnishee pension funds payable from a fund registered under the Pension Benefits Act, 1965, S.O. 1965, c. 96. Crown Trust was the administrator of the trust funds. Section 21(1)(b) of the Act provided pension benefits did not confer on the employee (the judgment debtor) any right or interest in the pension benefits capable of being assigned or alienated and s. 22b provided moneys payable under the plan were exempt from seizure or attachment.
- Houlden J. refused the garnishee order relying on the exemption provisions contained in the Act.
- I conclude the exemption continued in this case notwithstanding the deposit.

9 We agree that social benefits do not lose their character as social benefits and do not become subject to seizure merely because they are deposited in a bank account. We would only add that any other interpretation would defeat the object and purpose of the statutory exemption, which is to ensure that the modest sums made available to disability pensioners to let them subsist from day to day should not be seized by creditors.

10 The use of bank account and electronic deposits is an administratively convenient and secure way to make welfare payments. Any other interpretation would also undermine the underlying social purpose of welfare legislation like the Family Benefits Act, so well expressed by Brennan J. in Goldberg v. Kelly (1970), 90 S. Ct. 1011 at p. 1019, 397 U.S. at p. 265:

- We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it;

11 If mere deposit in a bank account subjects welfare payments to seizure, the use of bank accounts and electronic deposits would cease to be a convenience for welfare authorities and the recipients and would become a hazard for many recipients of public assistance who already have enough difficulty managing their money. It would require very express statutory language to remove from this vulnerable class of people the protection afforded by s. 5(1)(b) of the Family Benefits Act.

12 The appeal is therefore allowed and it is ordered that Mr. McIntosh repay to the appellant the $198.04 together with interest of $27.68 plus filing fees of $1 80.00 for a total of $405.72.

CAMPBELL J.
FARLEY J.:— I agree.
DESOTTI J.:— I agree.

Enforcement by the Family Maintenance Enforcement Program against Wages, Bank Accounts, and Statutory and other Benefits

*Prepared and updated September 20, 2013 by Alison Ward, lawyer, CLAS, based on materials prepared by Kathryn Ferriss, lawyer, Legal Services Society

Overview

The Family Maintenance Enforcement Program ("FMEP") is a public body created by the *Family Maintenance Enforcement Act* ("FME Act"). FMEP's job is to enforce existing court orders (or filed separation agreements) for child and spousal support. FMEP does **not** have the authority to change the amount of child or spousal support that someone is required to pay by a court order or filed separation agreement: only a family Court can change that amount, in response to the payor filing an application to reduce ongoing maintenance and cancel or reduce arrear owing under the current court Order or agreement.

The FME Act and Regulation give FMEP greater powers than most other creditors. For example, FMEP may place a hold on the driver's license of someone who is behind in paying child or spousal support, or prevent them from getting a passport. This handout does not deal with these non-monetary powers of FMEP: we will examine only FMEP's ability to collect money (from wages, bank accounts, and statutory and other benefits), and what options a debtor affected by FMEP's enforcement may have.

Resources:

Family Maintenance Enforcement Act:
http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96127_01

Family Maintenance Enforcement Act Regulation:
http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/346_88

FMEP website: http://www.fmep.gov.bc.ca/ including
Handbook for lawyers: http://www.fmep.gov.bc.ca/resources/lawyers/guide/
List of topics and fact sheets on enforcement:
http://www.fmep.gov.bc.ca/resources/information/

FMEP's Financial Collection Powers

If a support order is registered with FMEP and the payor is behind in payments required by the order, FMEP can attach monies including the payor's wages, statutory benefits, and funds in bank accounts. FMEP does this through a court document called a Notice of Attachment, issued under section 15 of the FME Act. Note that FMEP is authorized by its legislation to attach some benefits, such as CPP, EI and WCB benefits, which are otherwise exempt from garnishment and attachment.

(94)

Notices of Attachment

The *Family Maintenance Enforcement* Act has been determined by the courts to be "social legislation" in that "it is designed to address the evil of widespread default in payments required to be made by family maintenance payment orders." Therefore it has a purpose different from the *Court Order Enforcement Act (COEA)* and garnishment cases under the COEA should not be applied to attachment or garnishment cases under the FME Act without ensuring that "such an application would be consistent with the fairness and with the social purposes of the *Family Maintenance Enforcement* Act." *BC (Maintenance Enforcement Director)* v. *I.W.A. Forest Industry Pension Plan (Trustees of)* (1991), 61 BCLR (2d) 264 (BCCA).

BC Employment and Assistance

Benefits from the Ministry of Social Development and Social Innovation ("MDSI") are not attachable at source, although once the money is placed in a bank account, FMEP may argue it can be legally attached. However, FMEP will generally not take enforcement action against someone on welfare, except to attach the persons' income tax return or GST rebate.

Attachment of Federal Benefits (EI, OAS and CPP)

The Family Maintenance Enforcement Act Regulation, sections 13 and 13.1, authorize FMEP to attach certain federal benefits at source, namely EI, OAS and CPP benefits.

Section 13(6) specifies that 75% of these federal benefits are exempt from attachment under a Notice of Attachment. Attachment of federal benefits causes a considerable delay in the payor receiving his or her first cheque. As well, even if the payor receives his or her cheque with the FMEP deduction showing on his pay stub, it takes even longer for FMEP to receive any money from the federal government on behalf of this recipient. Until FMEP actually receives the money from the Federal government, FMEP will have no record of the money that was deducted from the payor's benefits.

Sometimes, family maintenance enforcement programs from other provinces file attachment or garnishment proceedings against federal benefits payable to a payor living in B.C. If this is the case, the Provincial Court of BC will have no jurisdiction to deal with those proceedings, and the payor will have to contact the enforcement program in the other province, to pursue any variation in the amount of federal benefits exempt from attachment.

Attachment of Wages

Section 13 of the FMEA Regulation sets out how much of a payor's wages are exempt from attachment by FMEP. Note that the back of FMEP's Notice of Attachment form has an easier explanation of how the exemptions are calculated.

Attachment of Other Debts owed to the Payor

Debts owed to the payor from other sources, such as ICBC, bank accounts and income tax refunds, are fully attachable by FMEP under section 15 of the FME Act. There are no exemptions.

95

Possible Remedies for Payors

Setting Aside a Notice of Attachment

The payor may apply to set aside a Notice of Attachment issued by FMEP, but only if the Notice of Attachment is based on a "material error." For example, the amount of arrears stated on the Notice is incorrect, or the person identified in the Notice of Attachment is not actually the payor. Often, even if the payor succeeds in this type of application, FMEP will simply withdraw the attachment proceedings and file a corrected application or notify the attachee of the correction required.

Section 16(2) of the FME Act requires that, before applying to Court to set aside a Notice of Attachment, the payor must first apply to FMEP itself to withdraw the Notice of Attachment. If FMEP refuses to withdraw the Notice of Attachment, the payor may then apply to Court under section 16(4) of the Act. In such an application, the following documents must be submitted to the Court Registry:

- Notice of Motion in Maintenance Enforcement Proceedings (Form 24). A copy of that form is attached. You can also find that form at http://www.ag.gov.bc.ca/courts/forms/pfa/pfa067a.pdf
- Affidavit in support of Motion (optional but recommended)

Changing the amount attached

Where a payor's wages or federal benefits have been attached, the payor can make an application under section 13.1 of the Family Maintenance Enforcement Regulation for an increase in the amount of their wages or benefits that are exempt from attachment by FMEP. The payor must first request that increase in writing from FMEP.

Per section 13.1(3) of the FMEA Regulation, to succeed in such an application the payor must show that an increase in the exemption is needed for them to meet their basic needs for food, clothing and shelter. The payor will first need to complete a Statement of Income and Expenses (found at http://www.ag.gov.bc.ca/courts/forms/pfa/pfa822.pdf) Once the Statement of Income and Expenses has been completed and the relevant documents attached, it must be sent to FMEP with a letter explaining the payor's financial situation and setting out any proposal that the payor wishes to make.

FMEP will not usually agree to reduce the amount attached if the reduction would mean they are collecting less than the monthly amount due under the current maintenance order. However, FMEP will sometimes suspend the attachment so that the payor can make an application to the appropriate court to vary the existing support order and/or apply to cancel or reduce arrears.

If FMEP declines to increase the amount of wages or benefits exempted from attachment, then the payor can apply to Provincial Court for an increase in the exemptions for wages and federal benefits set out in section 13 of the FMEA Regulation. Such an application is made to the Provincial Court Registry where FMEP is enforcing.

(96)

The payor will have to complete:

a) a Notice of Motion in Maintenance Enforcement Proceedings (Form 24, linked above – be sure to tick the box beside "an order changing the amount exempt from attachment" rather than "an order setting aside an attachment order of notice of attachment");
b) a Statement of Income and Expenses (linked above); and
c) Affidavit in support (optional but recommended)

The process to follow in applying to decrease the amount of wages or benefits attached by FMEP is set out in Rule 17 of the Provincial Court (Family) Rules at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/417_98_00

Again, the Court can only increase the exemption for wages or federal benefits if convinced that the increase is needed to allow the payor to meet their basic needs for food, clothing and shelter, as set out in section 13.1(3) of the FMEA Regulation.

(97)

TO BRING A NOTICE OF MOTION IN MAINTENANCE ENFORCEMENT PROCEEDINGS

Rule 17(3)

Step 1

COMPLETE the NOTICE OF MOTION. You may use a typewriter or print clearly and firmly. If you accessed this form from the Ministry of Justice website, you may also complete it at the computer and then print it. You may wish to submit written evidence in support of your notice of motion. To do so, complete and swear an AFFIDAVIT. Similarly, if you would like to present evidence from another witness, you may ask the witness to complete an Affidavit and have it sworn, then return it to you. Obtain a date and time for your hearing from the registry.



Step 2

FILE the NOTICE OF MOTION by taking or mailing it and any attached documents to the registry where the file is located, as shown on court documents received by you.

The staff will apply the registry stamp and they will return the copies you need for your records and for serving on the other party and anyone else who must be notified.



Step 3

MAKE ARRANGEMENTS TO SERVE the party or parties, and any one else who must be served, with a copy of the notice of motion and any attached document(s) such as affidavit(s). This must be done at least 7 days before the date of the court hearing.

You may either:

- mail a copy of the notice of motion to the last address for service which the party or parties has given to the court;
- fax a copy of the notice of motion, if the other party's address for service included a fax number;
  or
- have another person who is at least 19 years of age leave a copy of the notice of motion directly with the person (this is called personal service).

The purpose of service is to be sure the person(s) affected know what you are asking for and the court date. Normally only any parties must be served, but if you are asking for an order which would affect a person who is not a party, you must serve that person as well.



Note: Even if you are unable to serve affidavit(s) at least 7 days before the hearing, the court may allow you to use the as evidence anyway.

If the party, or anyone else who must be served, does not appear, be ready to prove that you served him or her, or that you were unable to do so. To prove service:

If you mailed or faxed the notice of motion, COMPLETE an AFFIDAVIT OF SERVICE on the back of the 'proof of service' copy of the notice of motion.

If you had someone personally serve the notice of motion, COMPLETE the AFFIDAVIT OF PERSONAL SERVICE on the back of the 'proof of service' copy of the notice of motion.

How to Complete this Form

Court File Number:

Copy the court file number, FMEP number (if any) and court location from the support/ maintenance order.

Case Name:

Copy the names of the parties as they appear on the support/maintenance order.

Filed by:

You must be sure that the address for service you give is correct because this is where any further notices or information will be sent to you. If you are a party and your address changes at any time, you must file a NOTICE OF CHANGE OF ADDRESS form with the court registry, and serve a copy of it on the other party.

IMPORTANT NOTE: If you do not want the other party to know your residential address, advise the court registry in writing and provide another address at which you can receive information and notices. Failure to accept service at address provided could result in a final order being made in your absence.

Notice to:

Provide the name, address and telephone number of the party or parties to be served and of any other person who must be served with this notice. Examples are:

- if you are asking for a document to be produced by a person who is not the other party, that person must be served.
- if the creditor is enrolled with the Family Maintenance Enforcement Program, the Director of Maintenance Enforcement must be served.
- if you are the debtor's employer, and you are applying to terminate a notice of attachment, both parties and the Director of Maintenance Enforcement must be served.

You may also include the fax number, if you know it.

Date and Time:

Contact the registry to obtain a date and time for the court hearing which is acceptable to both parties and the court.

What are you asking for?

Check the appropriate box(es) and fill in any required information.

Estimated Duration

Do not complete this section if you are representing yourself.

Information for the person served.

Sign your name and state today's date.

State name of lawyer, if any.

99

NOTICE OF MOTION IN MAINTENANCE ENFORCEMENT PROCEEDINGS

In the Provincial Court of British Columbia

Court File Number:
FMEP Number:
Court Location:

NOTICE OF MOTION IN MAINTENANCE ENFORCEMENT PROCEEDINGS

Case name as it appears on the order you want enforced.

In the case between:
NAME

And:
NAME

Your current address for service.

Filed by:
NAME
ADDRESS FOR SERVICE — CITY — APPLICANT
PROVINCE — POSTAL CODE — PHONE — FAX

Address for service of other party and anyone else who must be served.

Notice to:
NAME
ADDRESS FOR SERVICE — CITY — RESPONDENT
PROVINCE — POSTAL CODE — PHONE — FAX

Where and when is the hearing? Obtain a date and time from the registry.

I will apply to this Court at COURT LOCATION
on DATE _____ **at** TIME _____ **for:**

What are you asking for? Check the appropriate box(es) and fill in any required information.

- ☐ an order for access to information, as follows: _____
- ☐ an order extending the time for filing a statement of finances.
- ☐ an order requiring the debtor to file a statement of finances or prescribed documents.
- ☐ an order requiring the debtor to pay an amount on failing to file a statement of finances or prescribed documents.
- ☐ an order for payment by an attachee.
- ☐ an order determining liability under a notice of attachment or determining a related issue.
- ☐ an order changing the attached order dated: DATE _____
- ☐ an order changing the amount exempt from attachment.
- ☐ an order setting aside an attachment order or notice of attachment.
- ☐ an order discharging or postponing the registration of a maintenance order registered against land.
- ☐ an order requiring NAME _____ to attend a default hearing or a committal hearing before the Court and to file with the Court, by a date specified by the Court, financial information, financial statements or other prescribed documents under s. 39 of the Family Maintenance Enforcement Act.
- ☐ a restraining order, under s. 46 of the Family Maintenance Enforcement Act.
- ☐ an order that a corporation is jointly and separately liable with the debtor for payments required under the maintenance order under s.14.2(2) of the Family Maintenance Enforcement Act.
- ☐ an order under section 29.2 (2) of the Family Maintenance Enforcement Act that the Director of Maintenance Enforcement direct the Insurance Corporation of British Columbia to disregard a notice not to issue or renew the driver's licence of a debtor or a notice not to issue or renew the licence and corresponding number plates for any motor vehicle or trailer owned by a debtor.
- ☐ another order (specify): _____
- ☐ The hearing is expected to take: DURATION _____

Estimated Duration Only the Applicant's lawyer, if any, should provide an estimate.

Notice: If you do not appear, the Court may make an order in your absence.

Information for the person served.

☐ Any affidavits in support of this motion are attached.

Sign your name and state today's date.

Dated _____

State name of lawyer, if any.

Party's lawyer

Signature

PFA 067a 03/2013 Form 24
(OPO 7530054062)

COURT FILE

(100)



FINANCIAL POST

July 3, 2013

Canada's telecom giants seek clarity on CRTC's new wireless code

By Christine Dobby

Rogers, Bell and Telus plan to appeal timing of end to three-year contracts

The days of the three-year cellphone contract may be numbered, thanks to new rules that govern the wireless industry, but just how much time the controversial agreements have left is now the focus of a legal challenge.

Canada's largest carriers have filed a court motion seeking clarity on that point and arguing that the Canadian Radio-television and Telecommunications Commission has no power to interfere with the rates of pre-existing phone contracts.

That's because, they say, the CRTC's national code is set to come into final effect in June 2015, at which point about 20% or five million of their customers will still be under three-year contracts with some portion of the up-front device subsidy that entices buyers into lengthy terms still unpaid.

The code first takes effect on Dec. 2 and at that point new three-year contracts will effectively be off limits because the code restricts the amortization period for paying off subsidies on handsets to no more than two years.

But the carriers say they do not know what will happen to the remaining balances of pre-existing three-year deals in June 2015 and are not sure whether those subscribers can simply walk away at that point.

John Meldrum, vice-president of regulatory affairs at Regina-based regional carrier SaskTel, said in an interview the companies object to the CRTC using legal terms to regulate existing contract terms retroactively, a power he says the Supreme Court has made clear the commission does not have.

"[The CRTC] acknowledges that 20% will still be in effect – well 20% is not a small number – it's probably about five million contracts in Canada, that's my estimate," he said.

He noted that SaskTel itself entered into more than 10,000 three-year contracts with its subscribers during the month of May alone, all of which it expected at the time would still be valid 36 months from then.

Mr. Meldrum swore an affidavit that was filed with the motion brought by SaskTel and fellow large regional player Manitoba Telecom Service Inc. along with the country's three biggest carriers – BCE Inc., Rogers Communications Inc. and Telus Corp. – and smaller cellphone providers NorthernTel and Telebec.

The carriers are seeking leave to appeal to the Federal Court due to the code's provision that it should apply to "all contracts, no matter when they were entered into, by no later than 3 June 2015."

Since that is less than three years from the date of application of the code, they argue the code would override the terms of any three-year contract not yet terminated by then and that they will not be able to recover the full cost of device subsidies provided to those customers.

(101)

"They've effectively made the code retroactive to June 3, 2012 for any service we have with customers on a three-year term," Shawn Hall, a spokesman for Vancouver-based Telus, said in an interview Wednesday. "That sets a troublesome precedent if the government comes in and makes changes to consumer contracts retroactively."

He said the carriers behind the motion are seeking clarity from the courts "because we've been unable to get satisfactory clarification from the CRTC."

A tweet from the CRTC's Twitter account on June 6 said the code "does not apply to contracts signed before Dec. 2, 2013." On June 12, the Canadian Wireless Telecommunications Association wrote to the regulator seeking its input on whether the policy would in fact apply to contracts entered into before Dec. 2.

On June 18, Barbara Motzney, chief consumer officer at the CRTC, responded in a letter stating that based on confidential calculations filed during the hearing, only 20% of wireless customers would still be on unexpired contracts that pre-dated the code by June 3, 2015 and that the commission did intend that to be a mandatory date for its final implementation.

"Consequently after 3 June 2015, early cancellation fees for all wireless contracts will be determined in accordance with the formula set out in the Code," she wrote.

That would suggest that any customers remaining on three-year contracts at that time could cancel them immediately and at that time the code would in fact apply to contracts predating Dec. 2, 2013.

The industry lobby group posed two specific scenarios where consumers entered into three-year contracts, one in April 2013 before the code was published and a second in October 2013, before it comes into force.

In her responding letter, Ms. Motzney did not directly address what would happen to any remaining portion of device subsidies not paid off by June 3, 2015 in such cases.

A spokesman for the CRTC said Wednesday that since the matter is before the courts now, the commission would not comment.

The major cellphone providers, through their law firm Torys LLP, served the Federal Court motion Tuesday by email on other parties who appeared at or participated meaningfully in the public hearings the CRTC held to consult on the wireless code. They are seeking an expedited hearing of the appeal.

The list of respondents includes the new entrant carriers, individual Canadians who made submissions, public interest groups and government bodies such as the Competition Bureau and the Office of the Privacy Commissioner of Canada.

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Canadian Radio-television and Telecommunications Commission | Conseil de la radiodiffusion et des télécommunications canadiennes

Canada

The Wireless Code

The Canadian Radio-television and Telecommunications Commission (CRTC) has created this Wireless Code (the Code) so that consumers of retail mobile wireless voice and data services (wireless services) will be better informed of their rights and obligations contained in their contracts with wireless service providers (service providers).

The Wireless Code will

i. make it easier for individual and small business customers to obtain and understand the information in their wireless service contracts;
ii. establish consumer-friendly business practices for the wireless service industry where necessary; and
iii. contribute to a more dynamic wireless market.

The Code applies to all wireless services, whether purchased on a stand-alone basis or as part of a bundle, and whether purchased in person, online, or over the phone. All service providers must comply with the Code. All sections of the Code apply to postpaid services. The following sections of the Code also apply to prepaid services: A. 1-3; B. 2; E. 1, E. 4, and E. 5; F. 1-4; G. 1-4; and J. 1.

Definitions of terms used in the Code are provided at the end of the Code. Defined terms are indicated in ***italics and bold*** the first time they appear in the Code.

If any part of the Code or the customer's contract is ambiguous, or if it is unclear how the terms of the Code or the contract are to be applied, then the Code and the contract must be interpreted in a manner that is favourable to the customer.

A customer who believes that their service provider is not adhering to the Code should first try to resolve the problem directly with the service provider. If the customer is not satisfied with the service provider's response, they can contact the Commissioner for Complaints for Telecommunications Services Inc. (CCTS) as follows:

Mail: P.O. Box 81088, Ottawa ON K1P 1B1
Website: www.ccts-cprst.ca
Toll-free: 1-888-221-1687
TTY: 1-877-782-2384
Email: response@ccts-cprst.ca
Fax: 1-877-782-2924

A. Clarity	
1. Plain language	i. A ***service provider*** must communicate with ***customers*** using plain language. ii. A service provider must ensure that its ***written contracts*** and ***related documents***, such as ***privacy policies*** and ***fair use policies***, are written in a way that is clear and easy for customers to read and understand.
2. Prices	i. A service provider must ensure that the prices set out in the ***contract*** are clear and must indicate whether these prices include taxes.
3. *Unlimited services*	i. A service provider must not charge a customer any ***overage charge*** for services purchased on an unlimited basis. ii. A service provider must not limit the use of a service purchased on an unlimited basis unless these limits are clearly explained in the fair use policy.
B. Contracts and related documents	
1. *Postpaid service* contracts	i. A service provider must give the customer a ***permanent copy*** of the contract and related documents at no charge in the following circumstances:

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a. If the contract is agreed to in person, the service provider must give the contract and related documents to the customer immediately after the customer agrees to the contract.

b. If the contract is not agreed to in person (i.e. if it is agreed to over the phone, online, or otherwise at a distance), the service provider must send the contract and related documents to the customer within 15 calendar days of the customer agreeing to the contract. If a service provider fails to do this, or if the terms and conditions of the permanent copy of the contract conflict with the terms and conditions that the customer agreed to, the customer may, within 30 calendar days of receiving the permanent copy of the contract, cancel the contract without paying an ***early cancellation fee*** or any other penalty.

c. The service provider must also provide the customer with a paper copy of the contract upon request at no charge, at any time during the ***commitment period***.

ii. The permanent copy of the contract and related documents must be a paper copy, unless the customer expressly and knowingly decides that an electronic copy is acceptable.

iii. A service provider must provide a customer with a copy of the contract in an alternative format for people with disabilities upon request, at no charge, at any time during the commitment period.

iv. Contracts for postpaid services must set out all of the information listed below in a clear manner (items a-m):

Key contract terms and conditions

a. the services included in the contract and any limits on the use of those services that could trigger overage charges or additional fees;

b. the ***minimum monthly charge*** for services included in the contract;

c. the commitment period, including the end date of the contract;

d. if applicable
   i. the total early cancellation fee;
   ii. the amount by which the early cancellation fee will decrease each month; and
   iii. the date on which the customer will no longer be subject to the early cancellation fee;

e. if a ***subsidized device*** is provided as part of the contract,
   i. the retail price of the device, which is the lesser of the manufacturer's suggested retail price or the price set for the device when it is purchased from the service provider without a contract;
   ii. the amount the customer paid for the device; and
   iii. the fee to unlock the device, if any;

Other aspects of the contract

f. an explanation of all related documents, including privacy policies and fair use policies;

g. all one-time costs, itemized separately;

h. the trial period for the contract, including the associated limits on use;

i. rates for ***optional services*** selected by the customer at the time the contract is agreed to;

j. whether the contract will be extended automatically on a month-to-month basis when it expires, and if so, starting on what date;

k. whether upgrading the device or otherwise amending a contract term or condition would extend the customer's commitment period or change any other aspect of the contract;

l. if applicable, the amount of any security deposit and any applicable conditions, including the conditions for return of the deposit; and

m. where customers can find information about
   i. rates for optional and ***pay-per-use services***;

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	ii. the device manufacturer's warranty; iii. tools to help customers manage their bills, including notifications on data usage and ***roaming***, data caps, and usage monitoring tools; iv. the service provider's service coverage area, including how to access complete ***service coverage maps***; v. how to contact the service provider's customer service department; vi. how to make a complaint about ***wireless services***, including contact information for the ***Commissioner for Complaints for Telecommunications Services Inc. (CCTS)***; and vii. the Wireless Code.
2. *Prepaid service* contracts	i. A service provider must inform the customer of all conditions and fees that apply to the prepaid balance. ii. A service provider must explain to the customer how they can a. check their usage balance; b. contact the service provider's customer service department; and c. complain about the service, including how to contact the CCTS. iii. A service provider must provide this information separately if it does not appear on a prepaid card or in the written contract. iv. If a device is provided as part of a prepaid service contract, a service provider must also inform the customer of a. where applicable i. the total early cancellation fee; ii. the amount by which the early cancellation fee will decrease each month; and iii. the date on which the customer will no longer be subject to the early cancellation fee; b. the retail price of the device, which is the lesser of the manufacturer's suggested retail price or the price set for the device when it is purchased from the service provider without a contract; c. the amount the customer paid for the device; d. the fee to unlock the device, if any; and e. where customers can find information about device upgrades and the manufacturer's warranty. v. A service provider must give the customer a copy of the contract in an alternative format for people with disabilities upon request, at no charge, at any time during the commitment period.
C. Critical Information Summary	
1. Critical Information Summary	i. A service provider must provide a Critical Information Summary to customers when they provide a permanent copy of the contract for postpaid services. This document summarizes the most important elements of the contract for the customer. ii. A service provider must ensure that the Critical Information Summary contains all of the following: a. a complete description of all key contract terms and conditions (see item B. 1. (iv) a-e listed above); b. the total monthly charge, including rates for optional services selected by the customer at the time the contract is agreed to; c. information on all one-time charges and additional fees; and d. information on how to complain about the service provider's wireless services, including how to contact the service provider's customer service department and the CCTS.

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	iii. A service provider must ensure that the Critical Information Summary iv. accurately reflects the content of the contract; v. is either provided as a separate document from the written contract or included prominently on the first two pages of the written contract; and vi. is clear and concise (does not exceed two pages), uses plain language, and is in an easily readable font.
D. Changes to contracts and related documents	
1. Changes to key contract terms and conditions	i. A service provider must not change the key contract terms and conditions of a postpaid wireless contract during the commitment period without the customer's informed and express consent. ii. When a service provider notifies a customer that it intends to change a key contract term or condition during the commitment period, the customer may refuse the change. iii. As an exception, a service provider may only change a key contract term or condition during the commitment period without the customer's express consent if it clearly benefits the customer by either iv. reducing the rate for a single service; or v. increasing the customer's usage allowance for a single service.
2. Changes to other contract terms and conditions or related documents	i. If, during the commitment period, a service provider wishes to change other contract terms and conditions or the related documents, it must provide the customer with at least 30 calendar days' notice before making such changes. ii. This notice must explain the change and when it will take effect.
E. Bill management	
1. International roaming notification	i. A service provider must notify the customer, at no charge, when their device is roaming in another country. The notification must clearly explain the associated rates for voice, text messaging, and data services. ii. Customers may opt out of receiving these notifications at any time.
2. Cap on data roaming charges	i. A service provider must suspend national and international data roaming charges once they reach $100 within a single monthly billing cycle, unless the customer expressly consents to pay additional charges. ii. A service provider must provide this cap at no charge.
3. Cap on data overage charges	i. A service provider must suspend data overage charges once they reach $50 within a single monthly billing cycle, unless the customer expressly consents to pay additional charges. ii. A service provider must provide this cap at no charge.
4. Unsolicited wireless services	i. A service provider must not charge for any device or service that the customer has not expressly purchased.
5. *Mobile premium services*	i. If a customer contacts their service provider to inquire about a charge for a mobile premium service, the service provider must explain to the customer how to unsubscribe from the mobile premium service.
F. Mobile device issues	

1. Unlocking	i. A service provider that provides a ***locked device*** to the customer as part of a contract must a. for subsidized devices: unlock the device, or give the customer the means to unlock the device, upon request, at the rate specified by the service provider, no later than 90 calendar days after the contract start date. b. for unsubsidized devices: unlock the device, or give the customer the means to unlock the device, at the rate specified by the service provider, upon request.
2. Warranties	i. A service provider must inform the customer of the existence and duration of a manufacturer's warranty on a device before offering an extended warranty or insurance on that device.
3. Lost or stolen devices	i. When a customer notifies their service provider that their device has been lost or stolen, a. the service provider must immediately ***suspend*** the customer's service at no charge; and b. the terms and conditions of the contract will continue to apply, including the customer's obligation to pay i. all charges incurred before the service provider received notice that the device was lost or stolen; and ii. either the minimum monthly charge (and taxes), if the customer continues with the contract, or the applicable early cancellation fee, if the customer cancels the contract. ii. If the customer notifies the service provider that their device has been located or replaced and requests that their service be restored, the service provider must restore the service at no charge.
4. Repairs	i. A service provider must suspend wireless service charges during device repairs upon request if all of the following conditions are met: a. the device was provided as part of a contract with the service provider and is returned to the service provider for repair; b. the device is under the manufacturer's or the service provider's warranty; c. the service provider did not provide a free replacement device for use during the repair; and d. the customer would incur an early cancellation fee if they were to cancel their wireless services.
G. Contract cancellation and extension	
1. Early cancellation fees – General	i. If a customer cancels a contract before the end of the commitment period, the service provider must not charge the customer any fee or penalty other than the early cancellation fee. This fee must be calculated in the manner set out in sections 2. and 3. below. ii. When calculating the time remaining in a contract to determine the early cancellation fee, a month that has partially elapsed at the time of cancellation is considered a month completely elapsed.
2. Early cancellation fees – Subsidized device	i. When a subsidized device is provided as part of the contract, a. for ***fixed-term contracts***: The early cancellation fee must not exceed the value of the ***device subsidy***. The early cancellation fee must be reduced by an equal amount each month, for the lesser of 24 months or the total number of months in the contract term, such that the early cancellation fee is reduced to $0 by the end of the period.

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	b. for ***indeterminate contracts***: The early cancellation fee must not exceed the value of the device subsidy. The early cancellation fee must be reduced by an equal amount each month, over a maximum of 24 months, such that the early cancellation fee is reduced to $0 by the end of the period. ii. When calculating the early cancellation fee, a. the value of the device subsidy is the retail price of the device minus the amount that the customer paid for the device when the contract was agreed to; and b. the retail price of the device is the lesser of the manufacturer's suggested retail price or the price set for the device when it is purchased from the service provider without a contract.
3. Early cancellation fees – No subsidized device	i. When a subsidized device is not provided as part of the contract, a. for fixed-term contracts: The early cancellation fee must not exceed the lesser of $50 or 10 percent of the minimum monthly charge for the remaining months of the contract, up to a maximum of 24 months. The early cancellation fee must be reduced to $0 by the end of the period. b. for indeterminate contracts: A service provider must not charge an early cancellation fee.
4. Trial period	i. When a customer agrees to a contract through which they are subject to an early cancellation fee, a service provider must offer the customer a trial period lasting a minimum of 15 calendar days to enable the customer to determine whether the service meets their needs. ii. The trial period must start on the date on which service begins. iii. A service provider may establish reasonable limits on the use of voice, text, and data services for the trial period. iv. During the trial period, customers may cancel their contract without penalty or early cancellation fee if they have a. used less than the permitted usage; and b. returned any device provided by the service provider, in near-new condition, including original packaging. v. If a customer self-identifies as a person with a disability, the service provider must extend the trial period to at least 30 calendar days, and the permitted usage amounts must be at least double the service provider's general usage amounts for the trial period.
5. Cancellation date	i. Customers may cancel their contract at any time by notifying their service provider. ii. Cancellation takes effect on the day that the service provider receives notice of the cancellation.
6. Contract extension	i. To ensure that customers are not disconnected at the end of the commitment period, a service provider may extend a contract, with the same rates, terms and conditions, on a month-to-month basis. ii. A service provider must notify a customer on a fixed-term contract at least 90 calendar days before the end of their initial commitment period whether or not the contract will be automatically extended. iii. At the time that a service provider offers a customer a device upgrade, the service provider must clearly explain to the customer any changes to the existing contract terms caused by accepting the new device, including any extension to the commitment period.
H. Security deposits	

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1. Requesting, reviewing, and returning a security deposit	i. If a service provider requires a security deposit from a customer, the service provider must a. inform the customer of the reasons for requesting the deposit; b. keep a record of those reasons for as long as the service provider holds the deposit; c. specify in the written contract the conditions for the return of the security deposit; d. review the continued appropriateness of retaining the deposit at least once per year; and e. return the security deposit with interest to the customer, retaining only any amount owed by the customer, no more than 30 calendar days after i. the contract is terminated by either the customer or the service provider; or ii. the service provider determines that the conditions for the return of the security deposit have been met. ii. A service provider must calculate interest on security deposits using the Bank of Canada's overnight rate in effect at the time, plus at minimum one percent, on the basis of the actual number of days in a year, accruing on a monthly basis. iii. A service provider may apply the security deposit toward any amount past due and may require customers to replenish the security deposit after such use in order to continue providing service.
I. *Disconnection*	
1. When disconnection may occur	i. If the grounds for disconnecting a customer are failure to pay, a service provider can disconnect a customer's postpaid service only if the customer a. fails to pay an account that is past due, provided it exceeds $50 or has been past due for more than two months; b. fails to provide or maintain a reasonable security deposit or alternative when requested to do so by the service provider; or c. agreed to a deferred payment plan with the service provider and fails to comply with the terms of this plan. ii. Except with customer consent or in other exceptional circumstances, disconnection may occur only on weekdays between 8 a.m. and 9 p.m. or on weekends between 9 a.m. and 5 p.m., unless the weekday or weekend day precedes a statutory holiday, in which case disconnection may not occur after noon. The applicable time is that of the customer's declared place of residence. iii. If a service provider disconnects a customer in error, the service provider must restore service to the customer by the end of the next business day and must not impose reconnection charges.
2. Notice before disconnection	i. If a service provider intends to disconnect a customer, it must notify the customer before disconnection, except in cases where a. action is necessary to protect the network from harm; or b. the service provider has a reasonable suspicion that fraud is occurring or likely to occur. ii. In all other cases, a service provider must give reasonable notice to the customer at least 14 calendar days before disconnection. The notice must contain the following information: a. the reason for disconnection and amount owing (if any); b. the scheduled disconnection date; c. the availability of deferred payment plans; d. the amount of the reconnection charge (if any); and e. contact information for a service provider representative with whom the disconnection can be discussed.

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	iii. A service provider must provide a second notice to advise a customer that their service will be disconnected at least 24 hours before disconnection, except if a. repeated attempts to contact the customer have failed; b. action is necessary to protect the network from harm; or c. the service provider has a reasonable suspicion that fraud is occurring or likely to occur.
3. Disputing disconnection charges	i. A service provider must not disconnect a customer if a. the customer notifies the service provider on or before the scheduled disconnection date listed in the notice that they dispute the reasons for the disconnection; b. the customer pays the amount due for any undisputed portion of the charges; and c. the service provider does not have reasonable grounds to believe that the purpose of the dispute is to evade or delay payment.
J. Expiration of prepaid cards	
1. General	i. A service provider must keep open the accounts of customers with prepaid cards for at least seven calendar days following the expiration of an activated card, at no charge, to give the customer more time to "top up" their account and retain their prepaid balance.

The Wireless Code – Definitions	
Canadian Radio-television and Telecommunications Commission (CRTC)	A public organization that regulates and supervises the Canadian broadcasting and telecommunications systems to ensure that Canadians have access to a world-class communication system.
Commissioner for Complaints for Telecommunications Services Inc. (CCTS)	An independent organization dedicated to working with customers and their telecommunications service providers to resolve complaints relating to their telecommunications services. The CCTS (i) responds to and resolves complaints from customers in order to ensure that they are treated in a way that is consistent with the Wireless Code; and (ii) collects data on complaints related to the Wireless Code. This data will be published on the CCTS's website at www.ccts-cprst.ca.
Commitment period	The term or duration of the contract. For fixed-term contracts, the commitment period is the entire duration of the contract. For indeterminate contracts, the commitment period is the current month or billing cycle.
Contract and written contract	A contract is a binding agreement between a service provider and a customer to provide wireless services. A written contract is a written instrument that expresses the content of the contract.
Customers	Individuals or small businesses subscribing to retail mobile wireless services.
Device subsidy	The difference between (i) the lesser of the manufacturer's suggested retail price of a device or the price set for the device when it is purchased from the service provider without a contract; and (ii) the amount a customer paid for the device when they agreed to the contract.
Disconnection	The termination of wireless services by a service provider.
Early cancellation fee	A fee that may be applied when a customer's service is cancelled before the end of the commitment period.
Fair (or acceptable) use policy	A policy that explains what is considered to be unacceptable use of the service provider's wireless services and the consequences of unacceptable use (e.g. using the service to engage in an activity that constitutes a criminal offence). Violations of a fair or acceptable use policy may result in (i) disconnection or

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	service suspension; or (ii) a modification of the services available to the customer.
Fixed-term contracts	Contracts that have a set duration (usually one, two, or three years).
Indeterminate contracts	Indeterminate contracts do not have a set duration. They automatically renew each month.
Key contract terms and conditions	The elements of the contract that the service provider cannot change without the customer's express consent. Key contract terms and conditions are listed in section B. 1. (iv) a-e of the Code.
Locked device	A wireless device that is programmed to work only with the network of the service provider that sold the device to the customer.
Minimum monthly charge	The minimum amount that customers will have to pay for wireless services each month if they do not use optional services or incur any additional fees or overage charges. This charge may be subject to taxes, as set out in the contract.
Mobile premium services (or premium text messaging services)	Text message services that customers may subscribe to for an additional charge, usually on a per-message basis.
Optional services	Services that a customer can choose to add to their wireless plan, usually for an additional charge, such as caller ID or call forwarding.
Overage charge	A charge for exceeding an established limit on the use of a service.
Pay-per-use services	Services that a customer can choose to add to their wireless plan, such as international roaming, which are typically measured and charged on a usage basis.
Permanent copy	An inalterable copy (e.g. a paper copy or PDF version) of the contract, as of the date of signing or the date of the latest amendment.
Postpaid services	Wireless services that are paid for after use, usually upon receipt of a monthly bill.
Prepaid services	Wireless services that are purchased in advance of use, such as the use of prepaid cards and pay-as-you-go services.
Privacy policy	A policy that explains how service providers will handle customers' personal information.
Related documents	Any documents referred to in the contract that affect the customer's use of the service provider's services. Related documents include, but are not limited to, privacy policies and fair use policies.
Roaming	The use of wireless services outside the service provider's network area.
Service coverage maps	An illustration of the extent of the service provider's network, showing where coverage is available.
Service provider	A provider of retail mobile wireless voice and data services.
Subsidized device	A wireless device that is sold to a customer by a service provider at a reduced price as part of a contract. A wireless device that is (i) purchased by the customer at full price; or (ii) not purchased as part of the contract is not a subsidized device.
Suspension (of a customer's service)	A temporary halt in wireless service that can result from a lack of payment or hitting a pre-determined spending or usage limit. The customer's account and contract remain in force during service suspension.
Unlimited services	The unlimited use of specific services (e.g. unlimited local calling), for a fixed price.
Wireless services	Retail mobile wireless voice and data services.

Date Modified: 2013-06-03

Student loans

*Prepared by Alison Ward, lawyer, CLAS, and last updated October 7, 2013

1. Effect of bankruptcy on student loans

Bankruptcy normally erases most (but not all) debts. Section 178 of the federal *Bankruptcy and Insolvency Act* ("BIA") specifies which debts are not erased by a discharge from bankruptcy.

Student loans are treated differently than most debts in bankruptcy. Sections 178(1)(g) and 178(1.1) of the *Bankruptcy and Insolvency Act* provide that student loans will not be discharged from (i.e. forgiven through) bankruptcy if the person either:

a) declared bankruptcy while they were still a full-time or part-time student; OR

b) declared bankruptcy within seven years of the date they ceased to be a full-time or part-time student.

This means that if someone files for bankruptcy within seven years of leaving school, their student loan debt can remain owing even after the debtor has been discharged from all the other debts she declared in her Assignment in Bankruptcy. However,
if a person files for bankruptcy more than seven years after they ceased to be a student, their student loans will usually be automatically discharged during the bankruptcy process, and the loans will no longer be owed.

There is a kind of exception to this seven year rule: it is found in section 178(1.1) of the *BIA*, as follows:

> *178 (1.1) At any time after five years after a bankrupt who has a debt referred to in paragraph (1)(g) ceases to be a full- or part-time student, as the case may be, under the applicable Act or enactment, the court may, on application, order that subsection (1) does not apply to the debt if the court is satisfied that*
>
> > *(a) the bankrupt has acted in good faith in connection with the bankrupt's liabilities under the debt; **and***
> >
> > *(b) the bankrupt has and will continue to experience financial difficulty to such an extent that the bankrupt will be unable to pay the debt.*

Under section 178(1.1), a person whose student loans were not discharged from bankruptcy because of the rules in section 178(g), can apply to the Supreme Court in Bankruptcy to have their student loans discharged from bankruptcy if:

a) the person ceased to be a full-time or part-time student at least five years ago;
b) the person satisfies the judge that they have acted in good faith in relation to their student loan debt (e.g. they did not refuse to pay the loan when they could have afforded to do so, etc.); and
c) the person satisfies the judge that they have, and will continue to, experience financial difficulty to such an extent that the person will be unable to pay the student loan debt.

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d) ***When does someone "cease to be" a full or part-time student?***

This is a key question, as student loans are discharged like most other debts unless the person declared bankruptcy *within 7 years of the date they ceased to be a full-time or part-time student.*

How do you figure out when that 7 year period ends? Let's say someone (Peter) completed an undergraduate degree in June 2001, graduating with student loans of $38 000. Peter works for four years at a low wage job, then returns to university for teachers' college from 2006 to June 2008, with $20 000 worth of student loans from teachers' college. Unfortunately Peter can't find a job as teacher, and files an assignment in bankruptcy on August 1, 2008, 2 months after finishing teachers' college. Peter has never made any payments on any of his student loans. Can he have any of his student loans discharged? After all, it is more than 7 years since he finished his undergraduate studies. But only two months since he finished teachers' college.

This question came up in two BC Supreme Court cases in 2013[1][2], and led the Court to clarify the state of the law in BC. The answer (in *Re Mallory*) was that the undergraduate student loans could be discharged. The Court found that the particular legislation (including loan agreement) under which the student loan in question is advanced determines when an individual "cease to be a student" for the purposes of that loan. That is, there can be multiple dates under which a person ceases to be a student for the purposes of BIA section 178 (not only one date in their lifetime). The same reasoning would apply to determining when someone has ceased to be a student for 5 years,

Summary

Despite these many rules, a debtor with student loan debt can still declare bankruptcy at any time, and can include their student loans in their Assignment in Bankruptcy. A debtor who does that will be protected from further court action by the student loan provider, unless the student loan provider gets special permission from court to sue the debtor in relation to their student loans. Where the debtor has been out of school for less than 7 years, the debtor should be made aware that the student loans will not be discharged along with other debts, but *may* be discharged (upon application to court) once the student has ceased to be a student (in relation to particular loans) for at least 5 years, for the financial hardship exception in section 178(1.1) of the *BIA.*

2. Limitation periods for student loans

a) Canada Student Loans

The limitation period that applies to federal student loans is found in sections 16.1 and 16.2 of the *Canada Student Financial Assistance Act.*

The federal government cannot sue on student loans if 6 years have passed since the date when the right to sue arose, unless the debtor has acknowledged the debt (either before or after the end of the 6 year limitation period).

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[1] *Dreger (Re)*, 2013 BCSC 200 (CanLii) at http://canlii.ca/t/fw2mx

[2] *Malllory, (Re)*, 2013 BCSC 202 (CanLii) at http://canlii.ca/t/fw2mz

A person can acknowledge a federal student loan debt by:

a) Making a signed written acknowledgment of the money owing; or a signed written promise to pay;

b) Making a partial payment of the money owing; or

c) Acknowledging the money owing in the course of bankruptcy proceedings or other proceedings dealing with the payment of debts.

If a person acknowledges a federal student loan debt as outlined above, the 6-year limitation clock is normally re-started on the date of the last acknowledgment. This is true even if the acknowledgment comes **after** the original 6-year limitation period has expired, which is unusual as most limitation periods cannot be re-started after the initial limitation period has expired.

b) BC student loans:

Limitation periods for BC student loans became more complicated with the introduction of the new provincial *Limitation Act*, S.B.C. 2012, c. 13 on June 1, 2013. Some BC student loans will still be governed by the former *Limitation Act* R.S.B.C. 1996, c. 266, while others may be covered by the new *Limitation Act*.

i) Former Limitation Act:

BC student loans where the right to sue arose before June 1, 2013, will still be governed by the former *Limitation Act* (e.g. where, for example, payments were first in default before June 1, 2013).

For these loans, the BC government cannot sue on BC student loans after **6 years** from date when the right to sue on the debt arose (subject to acknowledgment of the debt within the 6 years). See sections 3(5), 5 and 9 of the former BC *Limitation Act*

Under the former *Limitation Act*, a person can acknowledge a BC student loan debt by:

a) Making a signed, written acknowledgment of the money owing;

b) Making a partial payment of the money owing; or

c) Acknowledging the money owing in the course of bankruptcy proceedings

Unlike the case with federal student loans, an acknowledgment that is made after the 6 year limitation period expires on a BC loan does <u>not</u> revive the government's right to sue under the former *Limitation Act*.

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ii) New Limitation Act

BC student loans where a claim was discovered on or after June 1, 2013, will be governed by the new *Limitation Act* (e.g. where, for example, payments are *first* in default on or after June 1, 2013).

For these loans, the BC government cannot sue on BC student loans after **6 years** from the day on which the claim is discovered (subject to acknowledgment of the debt within the 6 years). See sections 24 and 38 of the BC *Limitation Act* and section 86.1 of the BC *Financial Administration Act*

A person can acknowledge a BC student loan debt by:

a) Making a written, signed (by hand or electronic signature) acknowledgment of the money owing;

b) Making a partial payment of the money owing; or

c) Acknowledging the money owing in the course of bankruptcy proceedings.

It is unclear whether an acknowledgement of a BC student loan made *after* the 6 year limitation period under the new Limitation Act will revive the government's right to sue under the new Limitation Act. We will have to wait and see how judges interpret the legislation *(but bear in mind that the earliest a 6 year limitation period under the new Act can expire is June 2, 2019).*

For student loans from other provinces

These are governed by the local provincial legislation. Ask a lawyer if you need to know about limitations on a provincial student loan from a province other than BC.

Limitation periods and government's right of set-off

The government can set-off income tax refunds and other federal money against both provincial and federal student loan debts. See sections 16.1(2) and 16. 2(4) of the *Canada Student Financial Assistance Act* and s. 38 of the BC *Financial Administration Act.*

For federal loans, the government keeps this right of set-off forever, even after the limitation date has expired.

For BC student loans governed by both the former and the new *Limitation Act*, it can be argued that the B.C. government only keeps its right of set-off until the six year limitation period expires. This is based on:

a) Under the former Limitation Act, section 9 and the definition of "action" in section 1 "action" includes any proceeding in a court and any exercise of a self help remedy"

b) Under the new *Limitation Act,* section 27, which says:

> ***27****(1) In this section,* ***"non-judicial remedy"*** *means a remedy that a person is entitled, by law or by contract, to exercise in respect of a claim without court proceedings.*
>
> *(2) If a claimant is prevented from commencing a court proceeding in relation to a claim as a result of the expiry of a limitation period under this Act, the claimant is not entitled to exercise against the person against whom the claim is or may be made, or against any other person, any non-judicial remedy that the claimant would, but for this section, be entitled to exercise in relation to the claim.*

3. Student loan forgiveness and Repayment Assistance Program

In July 2012, all "direct lend" BC student loans (meaning government financed student loans that were cashed by a student on or after August 1, 2000) were automatically moved to the National Student Loans Service Centre (NSLSC) in Mississauga, Ontario. Previously, the NSLSC administered only Canada student loans, and BC administered BC student loans. Now, however, both these BC and Canada student loans are managed as a single Canada-B.C. integrated loan by the NSLSC.

If you are dealing with student loans that were cashed before August 1, 2000, different rules may apply.

Canada Student Loans are governed by the *Canada Student Financial Assistance Act* and *Regulation,* which provides specific terms on which loans can be forgiven, reduced or managed. In BC, there is no specific legislation that applies to student loans issued by BC. Rather, all debt forgiveness and reduction/repayment programs that apply to BC student loans, are determined only by *policy* set by the BC government.

New for 2013, the BC government's current policy manual regarding BC student loans is available on the Student Aid BC website at https://studentaidbc.ca/sites/all/files/school-officials/policy_manual_13_14.pdf The policy is a 272 page document that details eligibility criteria for BC student loans, outlines repayment terms and loan forgiveness programs, and describes the appeals policy that applies to BC student loans There is also a general description of those policies on the Student Aid BC website at https://studentaidbc.ca/repay/understand-loan-repayment

Based on that policy, and the federal student loans legislation, there are programs in place that may let your client apply for forgiveness of some or all of her loan, put the debt in remission, get interest relief, or otherwise get help with an unmanageable student loan debt.

Canada and BC student loans and disability forgiveness

Both BC and Canada Student Loans can be forgiven based on permanent disability.

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Canada student loans criteria for disability forgiveness

Most Canada student loans can be forgiven for severe permanent disability under sections 11 and 11.1 of the *Canada Student Financial Assistance Act.*

Section 11.1 says:

> *11.1 All obligations of a borrower in respect of a loan made under an agreement entered into under section 6.1 terminate if the Minister is satisfied, on the basis of information specified by the Minister and provided by or on behalf of the borrower, that the borrower, by reason of the borrower's* ***severe permanent disability****, is* ***unable to repay the loan*** *and* ***will never be able to repay it****.*

"*Severe permanent disability*" is defined in section 2 of the *Canada Student Financial Assistance Regulation*, as follows:

> *"severe permanent disability" means a functional limitation caused by a physical or mental impairment that* ***prevents*** *a borrower from performing the daily activities necessary to participate in studies at a post-secondary school level and in the labour force and is expected to remain with the person for their expected life*

This test of "severe permanent disability" applies to Canada Student Loans issued from August 1, 1995 on. Disability forgiveness for these loans is available regardless of when a person's disability arose, and whether or not their loan is in good standing.

For federal student loans negotiated between August 1, 1995 and July 31, 2000, the student loan must also still be held by the financial institution that issued it. People in that category who want to apply for forgiveness of their loan based on permanent disability must contact the financial institution that holds their loan, ask for an application form, and submit the completed application to that financial institution.

BC Student Loans criteria for disability forgiveness

BC's program for student loan forgiveness based on disability is called the "BC Provision for Students with Severe Disabilities" (see page 139 of the Student Aid BC policy manual linked above).

If a student with both Canada and BC student loans is approved by the Canada Student Loans program for the federal permanent disability benefit program, that student does not need to apply separately for disability forgiveness of their BC student loans. Instead, they are *automatically* eligible for the Provision for Students with Severe Disabilities, and their outstanding BC loan balance will be reduced to zero.

If a student only has BC student loans (and no Canada student loans), they must apply for the BC Provision for Students with Severe Disabilities. The criteria are the same as those for the federal permanent disability benefit program, described above, and the application is made through the National Student Loan Service Centre.

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BC student loan's policy provides that if a person has had their BC student loans forgiven through the BC Provision for Students with Severe Disabilities, they are not eligible for any further BC student loans.

Repayment Assistance Plan ("RAP") for borrowers with low incomes

The Repayment Assistance Program (RAP) program replaced the former 'interest relief' and 'debt reduction in repayment' programs that ended as of August 1, 2009. Students currently in either program will continue until the end of their current agreement, at which point they are eligible to apply for the Repayment Assistance Plan.

The RAP program applies to all integrated BC – Canada student loans.

As the CanLearn Website says, "under the Repayment Assistance Plan (RAP), you can:

- You can make affordable payments based on your gross family income and family size. Your loan payments would never exceed 20% of your gross family income.
- Your monthly student loan payments will either be reduced, or you will not have to make any payments.
- You have a maximum repayment period of 15 years (or 10 years for qualified borrowers with a permanent disability).
- Enrolment is not automatic and you would have to re-apply for this plan every 6 months.

To qualify for RAP, you must:

- be a resident of Canada (or on an international internship or a reservist deployed abroad),
- be at least 6 months has passed since you graduated or left school,
- your loan must not be in default,
- have not been restricted from the Canada Student Loans Program for further assistance; and
- meet the income threshold set for the program."

Most of the rules regarding RAP are found in sections 1 and 2 (definitions) and sections 19 to 26 of the *Canada Student Financial Assistance Regulation.* A copy of those sections is attached, or you can find them on www.canlii.org

It appears that eligibility for RAP can only be backdated by 6 months (see *Canada Student Financial Assistance Regulation, section 20.2*). Therefore, if a borrower is interested in applying for RAP, it is advisable to do so as soon as possible.

You can find a copy of the Repayment Assistance Plan application form at http://www.canlearn.ca/eng/main/publications/slf.shtml A copy is also attached.

There are two forms of RAP:

a) RAP for non-disabled borrowers; and
b) RAP for borrowers with a permanent disability

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a) RAP for non-disabled borrowers

The attached printouts describe the basics of this program.

- No borrower should have a repayment period of more than **15 years;**
- Monthly payment amounts are based on the borrower's family size and family income (not just the interest rate and amount of principal);
- Borrowers will not make payments of more than 20% of their family income, if the loan is covered by RAP; and
- In some cases, a borrower may not have to make any monthly payments until their monthly income increases. From my quick reading from the Canada Student Financial Assistance legislation, it appears that a single person with a monthly income of under $1 684 would not have to make any monthly payments under RAP (however they would have to apply to RAP to have that put in effect). For a family unit of 2, the income threshold is $2 631, for a family of 3; $3, 399; for a family of 4; $4 009. See Schedule 1 to the Canada Student Financial Assistance Regulation, and sections 19(2) and 20(2) of that Regulation.

There is a "repayment assistance estimator" available online at http://tools.canlearn.ca/cslgs-scpse/cln-cln/rae-ear/rae-ear-1-eng.do? to calculate what kind of payments someone might be eligible to make through RAP.

b) RAP for borrowers with a permanent disability (RAP-PD)

The attached printout also describes the basics of this program. To qualify for this form of RAP, a borrower must have a "permanent disability."

The term "permanent disability" is defined in section 1 of the *Canada Student Financial Assistance Regulation* as:

> *"a functional limitation caused by a physical or mental impairment that restricts the ability of a person to perform the daily activities necessary to participate in studies at a post-secondary school level or the labour force and is expected to remain with the person for the person's expected life"*

This program differs from RAP for non-disabled borrowers mainly in that:

- borrowers with a permanent disability should never have a repayment period longer than **10 years** (instead of 15); and
- Monthly payments amounts are based on family income, family size, **and** disability-related expenses (allowable uninsured medical expenses, special care and other expenses directly related to the disability).

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- If a loan is covered by RAP-PD, a borrower should not have to make payments of more than 20% of their monthly family income, after monthly, uninsured disability-related expenses have been deducted from their family income; and

- In some cases, a borrower may not have to make any monthly payments until their monthly income increases. From my quick reading from the Canada Student Financial Assistance legislation, it appears that a single person with a monthly income, *minus monthly disability –related expenses not covered by public health care or private insurance*, of under $1 684 would not have to make any monthly payments under RAP (however they would have to apply to RAP to have that put in effect). For a family unit of 2, the income threshold is $2 631, for a family of 3; $3, 399; for a family of 4; $4 009. See Schedule 1 to the *Canada Student Financial Assistance Regulation,* and sections 19(2) and 20(2) of that Regulation.

iii) Resources

The following websites have a number of helpful fact sheets regarding student loans:

- BC Ministry of Advanced Education site on student loan repayment: http://www.aved.gov.bc.ca/studentaidbc/repay/welcome.htm

- HRSDC's Canlearn site at www.canlearn.ca

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Canada Student Financial Assistance Regulations, SOR/95-329

PART V

REPAYMENT ASSISTANCE PLAN

First Stage

19. (1) Subject to section 15 and section 9 of the *Canada Student Loans Regulations*, the Minister may, on application in the prescribed form containing the prescribed information, provide the first stage of a repayment assistance plan to a borrower for a period of six months if

(*a*) the borrower resides in Canada;
(*b*) [Repealed, SOR/2012-68, s. 6]
(*c*) all of the risk-shared loan agreements and guaranteed student loan agreements are held by a lender, or, in the case where an event referred to in any of paragraphs 15(1)(*c*) to (*g*) or paragraphs 9(1)(*c*) to (*g*) of the *Canada Student Loans Regulations* has occurred, by the Minister or a lender;

(*d*) no more than 120 months have elapsed

(i) in respect of student loans or guaranteed student loans made to the borrower as a full-time student, since the day on which the borrower most recently ceased to be a full-time student under section 8 or, in the case of a borrower to whom only guaranteed student loans have been made, section 4.1 of the *Canada Student Loans Regulations*, and

(ii) in respect of student loans made to the borrower as a part-time student, since the day on which the borrower most recently ceased to be a full-time student under section 8 or a part-time student under section 12.3, as the case may be; and

(*e*) the borrower's monthly affordable payment calculated under subsection (2) is less than their monthly required payment calculated under subsection (3).

(2) The monthly affordable payment is equal to

(*a*) $0, if the borrower's monthly family income is no more than the minimum monthly income threshold for their family size determined in accordance with Schedule 1; or
(*b*) the borrower's monthly family income multiplied by the lesser of the amounts determined by the following formulae:

$0.2A$

$1.5[((X - Y)) \div 100Z+0.01]A$

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where

A

is, in relation to student loans, guaranteed student loans and provincial loans, the ratio of the borrower's outstanding principal to the sum of the borrower's outstanding principal and the outstanding principal for which instalments are due for any spouse or common-law partner of the borrower,

X

is the borrower's monthly family income,

Y

is the monthly income threshold for the borrower's family size determined in accordance with Schedule 1,

Z

is the monthly increment for the borrower's family size determined in accordance with Schedule 1.

(3) The monthly required payment is equal to

(*a*) the outstanding principal of the student loans, guaranteed student loans and provincial loans made to the borrower as a full-time student, amortized over a period of the greater of

(i) six months, and

(ii) 120 months minus the number of months that have elapsed since the day referred to in subparagraph (1)(*d*)(i) plus the number of months since that day during which the borrower benefited from any special interest-free periods under section 19 or 20 or section 17 or 18 of the *Canada Student Loans Regulations*, as they read immediately before the coming into force of this section, or repayment assistance under this section; and

(*b*) the outstanding principal of the student loans made to the borrower as a part-time student, amortized over a period of the greater of

(i) six months, and

(ii) 120 months minus the number of months that have elapsed since the day referred to in subparagraph (1)(*d*)(ii), plus the number of months since that day during which the borrower benefited from any special interest-free periods under section 19 or 20 as they read immediately before the coming into force of this section, or repayment assistance under this section.

(4) A borrower shall receive no more than 60 months, in the aggregate, of special interest-free periods granted under section 19 or 20 or section 17 or 18 of the *Canada Student Loans Regulations*, as they read immediately before the coming into force of this section, and repayment assistance under this section

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(*a*) in respect of any student loan or guaranteed student loan made to the borrower as a full-time student, since the day referred to in subparagraph (1)(*d*)(i); and

(*b*) in respect of any student loan made to the borrower as a part-time student, since the day referred to in subparagraph (1)(*d*)(ii).

19.1 (1) A borrower shall, no later than the day that is 30 days after a repayment assistance period ends, pay to the lender or the Minister, as the case may be, the federal portion of the monthly affordable payments calculated under subsection 19(2) in respect of that period.

(2) The amount of interest payable by the borrower for a month during a repayment assistance period on the outstanding principal shall be reduced by the lender or the Minister, as the case may be, by the federal portion of the difference between the monthly required payment calculated under subsection 19(3) and the monthly affordable payment calculated under subsection 19(2). That reduction shall only be made in relation to the months for which the borrower complies with subsection (1).

(3) If the reduction referred to in subsection (2) is made by the lender, the Minister, on being notified of the reduction by the lender in the prescribed form, shall pay to the lender the amount of the reduction.

(4) In this section, "federal portion" means the ratio of outstanding principal in relation to student loans and guaranteed student loans to the outstanding principal in relation to those loans and provincial loans.

(5) Payments made under this section shall be attributed in proportion to the outstanding principal of each student loan or guaranteed student loan.

Second Stage

20. (1) Subject to section 15 and section 9 of the *Canada Student Loans Regulations*, the Minister may, on application in the prescribed form, provide the second stage of a repayment assistance plan to a borrower for a period of six months if

(*a*) the borrower meets the conditions set out in paragraphs 19(1)(*a*) and (*c*);
(*b*) the borrower

(i) has a permanent disability, or

(ii) has received 60 months, in the aggregate, of the periods referred to in subsection 19(4) or at least 120 months has elapsed,

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(A) in respect of any student loan or guaranteed student loan made to the borrower as a full-time student, since the day referred to in subparagraph 19(1)(*d*)(i), and

(B) in respect of any student loan made to the borrower as a part-time student, since the day referred to in subparagraph 19(1)(*d*)(ii); and

(*c*) the borrower's monthly affordable payment calculated under subsection (2) is less than their monthly required payment calculated under subsection (3).

(2) The monthly affordable payment is equal to

(*a*) in the case of a borrower who has a permanent disability

(i) $0, if the borrower's monthly family income, less their monthly disability-related expenses not covered by their public health care or private insurance, is no more than the monthly income threshold for their family size determined in accordance with Schedule 1; and

(ii) the borrower's monthly family income multiplied by the lesser of the amounts determined by the following formulae:

$0.2A$

$1.5[((W - Y)) \div 100Z+0.01]A$

where

A
is, in relation to student loans, guaranteed student loans and provincial student loans, the ratio of the borrower's outstanding principal to the sum of the borrower's outstanding principal and the outstanding principal for which instalments are due for any spouse or common-law partner of the borrower,
W
is the borrower's monthly family income less their monthly disability-related expenses not covered by their public health care or private insurance,
Y
is the monthly income threshold for the borrower's family size determined in accordance with Schedule 1;
Z
is the monthly increment for the borrower's family size determined in accordance with Schedule 1;

(*b*) in any other case, the amount referred to in subsection 19(2).

(3) The monthly required payment is equal to

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(*a*) the outstanding principal of the student loans, guaranteed student loans and provincial loans made to the borrower as a full-time student, amortized over a period of the greater of six months and

(i) in the case of a borrower who has a permanent disability, 120 months minus the number of months that have elapsed since the day referred to in subparagraph 19(1)(*d*)(i); and

(ii) in any other case, 180 months minus the number of months that have elapsed since the day referred to in subparagraph 19(1)(*d*)(i); and

(*b*) the outstanding principal of the student loans made to the borrower as a part-time student amortized over a period of the greater of six months and

(i) in the case of a borrower who has a permanent disability, 120 months minus the number of months that have elapsed since the day referred to in subparagraph 19(1)(*d*)(ii), and

(ii) in any other case, 180 months minus the number of months that have elapsed since the day referred to in subparagraph 19(1)(*d*)(ii).

20.1 (1) A borrower shall, no later than the day that is 30 days after a repayment assistance period ends, pay to the lender or the Minister, as the case may be, the federal portion of the monthly affordable payments calculated under subsection 20(2) in respect of that period.

(2) The amount owing as outstanding principal and interest for a month during a repayment assistance period by a borrower shall be reduced by the lender or Minister, as the case may be, by the federal portion of the difference between the monthly required payment calculated under subsection 20(3) and the monthly affordable payment calculated under subsection 20(2). That reduction shall only be made in relation to the months for which the borrower complies with subsection (1).

(3) If the reduction referred to in subsection (2) is made by the lender, the Minister, on being notified of the reduction by the lender in the prescribed form, shall reimburse the lender the amount of the reduction.

(4) In this section, "federal portion" means the ratio of outstanding principal in relation to student loans and guaranteed student loans to the outstanding principal in relation to those loans and provincial loans.

(5) Payments made under this section shall be attributed in proportion to the outstanding principal of each student loan or guaranteed student loan.

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Commencement of Repayment Assistance Period

20.2 A repayment assistance period shall begin no earlier than the later of

(*a*) the first day of the month that is six months before the day on which the borrower applies for the assistance,

(*b*) the day on which the principal amount and any interest commence to be payable by the borrower, and

(*c*) the day on which these regulations come into force.

Condition

20.3 If any accrued interest remains unpaid on the day on which repayment assistance begins, the borrower shall, on or before the day that is 30 days after the repayment assistance period ends,

(*a*) pay to the lender or the Minister, as the case may be, the unpaid accrued interest; or

(*b*) if they have not already done so, enter into a revised agreement for the payment of a period of up to three months of the unpaid accrued interest and pay to the lender or the Minister, as the case may be, any remaining unpaid accrued interest.

Administration

21. (1) With the written authorization of the Minister, a lender

(*a*) who holds a borrower's risk-shared loan agreement may exercise the powers given to the Minister under subsections 15(3) and (4) and sections 19 and 20; and
(*b*) who holds a borrower's guaranteed student loan agreement may exercise the powers given to the Minister under sections 19 and 20 and subsections 9(4) and (5) of the *Canada Student Loans Regulations*.

(2) The Minister shall provide the lender any information that is necessary to enable the lender to act under subsection (1).

22. (1) If an application is made for repayment assistance, notice of a decision in respect of that application shall be given to the borrower and the lender or, if the lender is acting under subsection 21(1), to the borrower and the Minister.

(2) The notice shall set out

(*a*) the day on which the repayment assistance begins and ends;
(*b*) the amount of the payment required under subsection 19.1(1) or 20.1(1); and

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(*c*) the fact that the decision to grant repayment assistance is subject to the condition set out in section 20.3.

22.1 [Repealed, SOR/2009-212, s. 4]

Reconsideration

23. (1) The Minister may, on the written request of the borrower and based on documentary evidence provided by the borrower, reconsider a borrower's application for repayment assistance if

(*a*) the borrower's application has been rejected for the sole reason that the borrower did not meet the criterion set out in paragraph 19(1)(*e*) or 20(1)(*c*); and

(*b*) unforeseen and unavoidable circumstances beyond the control of the borrower or their spouse or common-law partner have led to the borrower incurring extraordinary expenses.

(2) The Minister shall provide a notice of the determination to the borrower in the case of a direct loan and to the borrower and the lender in all other cases.

Mistake

24. (1) If repayment assistance is granted because of an error by the borrower in their application, the Minister may cancel or reduce the assistance.

(2) The Minister shall provide a notice of the cancellation or reduction to the borrower, in the case of a direct loan, and to the borrower and the lender, in all other cases, specifying

(*a*) the date of the notice; and

(*b*) the day on which the repayment assistance is to be cancelled or reduced.

(3) A borrower shall, within 30 days after the date of the notice,

(*a*) repay to the Minister or the lender, as the case may be, the amount of repayment assistance that the borrower was not entitled to receive; or
(*b*) enter into a revised agreement for the repayment of that amount.

(4) A lender shall, without delay after the date of the notice, repay to the Minister any amount paid by the Minister as a result of the error.

25. [Repealed, SOR/96-368, s. 18]

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Effect on Loan Agreement

26. If a repayment assistance period has been granted to a borrower, the provisions of any loan agreement or guaranteed student loan agreement that was in effect between the borrower and the lender or between the borrower and the Minister, as the case may be, on the day on which the borrower applied for that period shall be suspended until the earliest of

(*a*) the day on which repayment assistance is terminated in accordance with subsection 15(4),

(*b*) the end of that repayment assistance period, and

(*c*) in respect of the borrower's consolidated student loan agreement or consolidated guaranteed student loan agreement, if any, the day on which the borrower again becomes a full-time student in accordance with subsection 5(3) or 7(2).

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CanLearn

Repayment Assistance Plan

The Repayment Assistance Plan (RAP) makes it easier for you to manage your student loans by allowing you to pay back what you can reasonably afford.

If your loans were issued to you by Prince Edward Island, your province offers a different repayment assistance program for your provincial loan. Contact your provincial or territorial student financial assistance office to find out more.

Repayment Assistance Estimator

Having trouble paying your student loan? Enter your loan information in the Repayment Assistance Estimator to see if you are eligible to receive repayment assistance.

Under the Repayment Assistance Plan (RAP):

- You can make affordable payments based on your gross family income and family size. Your loan payments would never exceed 20% of your gross family income.
- Your monthly student loan payments will either be reduced, or you will not have to make any payments.
- You have a maximum repayment period of 15 years (or 10 years for qualified borrowers with a permanent disability).
- Enrolment is not automatic and you would have to re-apply for this plan every 6 months.

Eligibility

To qualify for the Repayment Assistance Plan, you must:

- be a resident of Canada (or on an international internship or a reservist deployed abroad),
- be at least 6 months has passed since you graduated or left school,
- your loan must not be in default,
- have not been restricted from the Canada Student Loans Program for further assistance; and
- meet the income threshold set for the program

Note: If you miss a payment while on the Repayment Assistance Plan, you won't be able to receive any additional repayment assistance and/or Canada Student Loans and Grants until you have made up for the missed payments and have brought your account back up-to-date.

Apply

To apply:

- complete an online application through your National Student Loans Service Centre (NSLSC) account (you can register for an online account first if you do not have one already); or
- download and complete a RAP application and mail or fax it to the NSLSC.

For more information on how to apply, contact the NSLSC.

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How the Repayment Assistance Plan works

Stage 1:

The Government of Canada and your provincial government cover the interest owing that the payment you can afford does not cover. This may last for up to 60 months during the 10-year period after you leave school.

Stage 2:

This stage starts once you complete Stage 1 or have been repaying the loan for 10 years after leaving school. The Government of Canada and your provincial government continue to cover the interest and begin to cover a portion of the principal amount. The balance of your loan is gradually paid off so you won't have any student loan debt 15 years after leaving school (or 10 years for qualified borrowers with a permanent disability).

Once you have been approved for and receive a stage 2 benefit, you cannot receive additional student loans or grants until your current loans have been paid off. However, you can still get interest-free status for your existing student loans.

Repayment Assistance Plan for Borrowers with a Permanent Disability

The Repayment Assistance Plan for Borrowers with a Permanent Disability (RAP-PD) is available to borrowers with permanent disabilities having difficulty paying back their student loans. The Plan makes it easier to manage your provincial student loan and Canada Student Loan debt by allowing you to pay back only what you can reasonably afford.

If your loans were issued to you by Prince Edward Island, your province offers a different repayment assistance program for your provincial loan, contact your provincial student financial assistance office to find out more.

Under the Repayment Assistance Plan for Borrowers with a Permanent Disability:

> You would make affordable student loan payments based on your gross family income, family size and permanent disability-related expenses, which include allowable uninsured medical expenses, special care and other expenses directly related to your permanent disability. Loan payments would not exceed 20 percent of your gross family income.
>
> Your monthly student loan payments will either be reduced, or you will not have to make any payments.
>
> You would have a maximum repayment period of 10 years.
>
> Enrolment would not be automatic and you would have to re-apply for this plan every 6 months.

Eligibility

You qualify if:

> you have a permanent disability;
>
> you are residing in Canada, are on an international internship or are a reservist deployed abroad; and
>
> at least six months have passed since you graduated or left school.

Note: If you miss a payment while on the Repayment Assistance Plan, you won't be able to receive any other repayment assistance, Canada Student Loans or grants until you have brought your account back up-to-date.

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Apply

To apply:

- complete an online application and Permanent Disability Expense form through your NSLSC account (you can register for an online account first if you do not have one already).
- download a RAP-PD application and Permanent Disability Expenses Form, fill it out, and mail or fax it to the NSLSC.

For more information, contact the NSLSC.

Note: If you received a benefit under the plan and have been out of school for five years, you cannot receive any more student loans or grants until your existing loans are paid in full. You are still eligible to receive interest-free student status if you return to school, however.

Date modified: 2013-07-30

Human Resources and Skills Development Canada | Ressources humaines et Développement des compétences Canada

PROTECTED WHEN COMPLETED - B

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REPAYMENT ASSISTANCE PLAN (RAP) APPLICATION

IMPORTANT – See the instructions on Page 3 to complete this form. Please type or print in block letters. All areas must be completed or your application will be returned.

SECTION 1 - APPLICANT INFORMATION

Last Name	First Name	
Mailing Address		Social Insurance Number (SIN)
		Do you reside in Canada? ☐ No ☐ Yes
Primary Telephone Number	Alternate Telephone Number	Application Reference Number

Marital Status	Family Size	
☐ Married/Common Law ☐ Single		Do you have a Permanent Disability? To be used for consideration for Repayment Assistance Plan for borrowers with a Permanent Disability. ☐ No ☐ Yes

SECTION 2 - STATEMENT OF MONTHLY FAMILY INCOME: You may be required to provide proof of income.

See the Section 2 number 6. of the attached Instructions Sheet	Month 1 Income received during the month you sign and date the application	Month 2 Income received during the month before month 1	Month 3 Income received during the month before month 2
Your Total Gross Family Income	$	$	$

If you indicated $0 as Gross Family Income for any month, indicate below how you are meeting your living expenses:

☐ Supported by parent(s) ☐ Supported by other family member ☐ Supported by a friend ☐ Using personal savings

☐ Other (please describe): _____

SECTION 3 – GOVERNMENT STUDENT LOAN INFORMATION

3a) If you have any Federal (Full-Time or Part-Time) or Provincial Student Loans in repayment please provide the outstanding loan balances & payment below:

Name of Financial Institution(s) and/or Service Provider	Indicate if Federal (Canada) or which Province	Current Balance	Regular Monthly Payment
		$	$
		$	$
		$	$

3b) If your spouse has any Federal (Full-Time or Part-Time) or Provincial Student Loans in repayment provide the outstanding loan balances & payment below:

Total outstanding balance of all student loans, combined	$	Total Regular Monthly Payment of all student loans, combined	$

SECTION 4 - APPLICANT'S SIGNATURE

By signing below:

- **You certify** that all information that you have provided in your RAP application and to any previous Canada Student Loan is true and complete, to the best of your knowledge.
- **You acknowledge** that the federal government, the provincial or territorial government(s) (including the Student Loan Corporation of NL) and any of their agents or contractors, the NSLSC, consumer credit grantor(s), credit bureau(s), credit reporting agency(ies), any person or business with whom you have or may have had financial dealings and your Financial Institution(s) may directly or indirectly collect, retain, use, disclose, and exchange among themselves any personal information related to this application for the purposes of carrying out their duties under the federal act(s) and regulation(s) or the applicable provincial act(s) and regulation(s) or the provincial programs relating to student financial assistance including for administration, enforcement, debt collection, audit, verification, research and evaluation purposes. Where your consent is required to permit the direct or indirect collection, retention, use or disclosure of personal information required by law, by signing below, **you provide your consent.**
- **You acknowledge** that you owe the outstanding loan balance on each debt identified in Section 3a) for the purpose of any applicable limitation legislation.
- **You understand** that if you fail to sign this RAP application, you will not receive any assistance under RAP.

Application Date (YYYY-MM-DD) _____ Applicant's Signature _____

REPAYMENT ASSISTANCE PLAN

ELIGIBILITY OVERVIEW

1. Your loan(s) are in repayment status and you may need to submit further documentation for your Integrated Student Loans, Canada Student Loans, or Provincial Student Loans, as applicable. To obtain the required forms or agreements, contact the National Student Loans Service Centre or your Financial Institution or complete and sign the documentation that has been provided. You may be required to provide additional supporting documentation as proof of all income reported in section 2 in order to determine eligibility for the Repayment Assistance Plan (RAP).
2. You must reside in Canada to be eligible for the program. For the purposes of this application, if you are participating in an international internship program or are a member of the Canadian Armed Forces stationed abroad, you qualify.
3. You may be ineligible for repayment assistance if you are currently restricted from eligibility for any student loans.
4. If you have outstanding interest that you have not paid, you can chose to add it to your principal balance (capitalize) if you have not previously used this option. You may only capitalize up to three months of interest to the principal balance of your loan, once for the lifetime of your loan. You must enter into a new agreement to alter your payment terms.
5. You may be restricted from future financial assistance if you provide false or misleading information, including by omission.

REPAYMENT ASSISTANCE PLAN

CONTACT INFORMATION

If you need help completing this application or have other questions concerning your student loans, please contact the National Student Loans Service Centre or your Financial Institution.

National Student Loans Service Centre **On-line: CanLearn.ca**
Toll Free: 1 888 815-4514 (within North America) **800 2 225-2501 (outside North America)** **TTY: 1 888 815-4556**

FAST FACTS ABOUT THE REPAYMENT ASSISTANCE PLAN (RAP)

If you have student loans from Alberta, British Columbia, Ontario, New Brunswick, Newfoundland and Labrador, Nova Scotia or Saskatchewan, this single application will cover both your Federal and Provincial loans under the applicable Federal and Provincial RAP programs and Interest Relief for some provincial loans.

If you are approved for RAP, your loan payment terms will be altered during your approved period of RAP in accordance with the applicable Federal and Provincial RAP programs. More specifically, if you are approved for RAP, your monthly payment amount will be reduced to an affordable payment that will never exceed 20% of your family income, and may be reduced to a zero payment amount. During an approved period of RAP, all payments will be applied to your principal first. If you are not approved for RAP, you will remain responsible for making your regular loan payments in accordance with your payment terms.

Periods of Assistance - RAP is available in 6-month blocks of time (to a maximum of 180 months) at any point during your loan repayment.

Re-Application – At the end of your 6-month RAP term, if you wish to continue with repayment assistance, you must re-apply. If not, you are responsible for making your regular loan principal and interest payments in accordance with your regular payment terms. Depending on the impact of RAP on your Outstanding Loan Balance, your payment amount may increase or your amortization period may be extended.

Restrictions – If you are approved for RAP, you may be subject to restrictions IF (1) you fail to make all your affordable payments by the end of the month following your 6 month RAP period, (2) you receive "write down" benefits in RAP Stage 2, or (3) you are on RAP-PD and more than five years have passed since your completion of studies. Restrictions will prevent you from obtaining further loans and grants until you have paid off your existing student loans. Further details on restrictions are available through NSLSC or at CanLearn.ca.

Dates – You must sign and date your application and ensure that the National Student Loans Service Centre or your Financial Institution receives your application within 40 days of your signature date. The National Student Loans Service Centre or your Financial Institution will send a letter to you with the result of your application.

NOTICE OF COLLECTION OF PERSONAL INFORMATION

ll-free in Canada/USA).

The personal information that is collected and used for administration of the Canada Student Loans Program (CSLP) is authorized by the *Canada Student Financial Administration Act (CSFAA)* and the *Canada Student Loan Act*, and is administered in accordance with the *Privacy Act*.
The Social Insurance Number (SIN) is collected by the Minister of Human Resources and Skills Development under the express authority of the *CSFAA* and in accordance with the Treasury Board Secretariat Directive on Privacy Protection regarding use of the SIN. The SIN will be used for the administration of the CSLP under the *CSFAA*. The SIN will be used as a file identifier and, along with the other information you provide, will also be used to validate your application, and to administer and enforce the CSLP. You must provide your SIN and the other personal information requested on this form to be considered for the CSLP.

Your personal information will be stored by Canada in Personal Information Bank No. HRSDC PPU 030. You have the right to the protection of, and access to, your personal information. How to obtain access to your personal information is available in the publication InfoSource, available at Service Canada Centres, by calling 1-800 O-Canada (1-800-622-6232) or at infosource.gc.ca.
The information collected on this form will be shared with provincial governments, financial institutions and the National Student Loans Service Centre. It could also be shared with other federal government institutions, the Student Loan Corporation of NL and its agents, and any previous lender for the purpose of the administration and enforcement of the *CSFAA* or the *CSLA*.
Administration and enforcement of the CSLP means development and operation of the program, including investigations into allegations of wrongdoing, audits, and policy analysis, research and evaluation. These activities may involve the matching of various sources of data that are under the control of the Government of Canada.

NOTICE OF COLLECTION OF PERSONAL INFORMATION (relevant to borrowers with ON student loans)

The personal information provided in connection with this application, including your Social Insurance Number ("SIN"), is necessary for the proper administration of the Ontario Student Assistance Program ("OSAP"). This information is being collected and will be used by the Ministry of Training, Colleges and Universities ("the ministry") to administer and enforce OSAP including: determining eligibility; verifying the application and any Interest Relief granted; maintaining and auditing the applicant's file; and collecting loans, overpayments, and repayments. Your SIN will be used as a general identifier in administering OSAP. The ministry administers and enforces OSAP under the authority of the *Ministry of Training, Colleges and Universities Act*, R.S.O. 1990, c. M.19, as amended, and R. R.O. 1990, Reg. 773, Reg. 774 and Reg. 775, as amended, and O. Reg. 268/01, as amended; the Ontario *Financial Administration Act*, R.S.O.1990, c. F.12, as amended; the *Canada Student Financial Assistance Act* and *Regulations*, S.C. 1994, c.28, as amended; and, the Canada Student Financial Assistance regulations, SOR 95-329. If you have any questions about the collection or use of this information, contact the Director, Student Support Branch, Ministry of Training, Colleges and Universities, PO Box 4500, 189 Red River Road, 4th Floor, Thunder Bay ON P7B 6G9.

NOTICE OF COLLECTION OF PERSONAL INFORMATION (relevant to borrowers with BC student loans)

The personal information in relation to this application, or subsequently collected from you relevant to this application, is collected by or on behalf of BC under the authority of section 26(c) of the BC *Freedom of Information and Protection of Privacy Act* ("FOIPPA") for the purposes of assessing your on-going eligibility for and administering repayment assistance, administering and enforcing your British Columbia student loan(s), and administering the British Columbia Student Assistance Program, including verifying and investigating information provided in connection with this application. Questions about the collection and use of your personal information can be directed to the Executive Director, StudentAid BC, Ministry of Advanced Education, PO Box 9173, Stn Prov Govt, Victoria, BC V8W 9H7 (call 250-387-6100 (Victoria), 604-660-2610 (BC Lower Mainland) or 1-800-561-1818 (toll-free in Canada/USA).

INSTRUCTIONS TO COMPLETE YOUR REPAYMENT ASSISTANCE APPLICATION

To ensure that your Repayment Assistance Application is processed as quickly as possible, it is important that you fill it out completely and correctly, and provide all supporting documentation.
Please use the checklist below to ensure you have covered all the steps.

SECTION 1 – APPLICANT INFORMATION

1. **Enter your personal information.** ☐

2. **Indicate if you are a Canadian resident.**
You must reside in Canada to be eligible for Repayment Assistance.
- If you are a Member of the Canadian Armed Forces who is stationed abroad or if you are participating in an international internship program for a maximum time period of one year, you qualify as a Canadian resident.
- You must provide a letter from the employer/program that outlines the start and end dates of the term. ☐

3. **Indicate your family size**
Identify the number of people in your family residing with you permanently, including yourself, spouse or common-law partner and dependants, as applicable. **Dependants** are children under 21 years of age and living with you or in full-time school attendance. If you are single, with no dependants, enter "1" for your family size. ☐

4. **Indicate your marital status.**
Single includes the following: separated, widowed, divorced, single parent and not living common-law.
Spouse means your partner if you are married or common-law. ☐

5. **Indicate if you are permanently disabled.**
This information is necessary if you wish to be assessed for the Repayment Assistance Plan for Persons with Permanent Disabilities. ☐

SECTION 2 – STATEMENT OF MONTHLY GROSS FAMILY INCOME PRIOR TO DEDUCTIONS

6. **Calculate your monthly gross family income - Gross family income is before taxes and deductions.**
- Family Income is you and your spouse's combined income, if you are married or living common-law.
- Examples of income include: employment earnings, investment earnings (cashed in Registered Retirement Savings Plan), payments received through social programs (Employment Insurance, Worker's Compensation, Canada or Quebec Pension Plan and superannuation), support payments (child and/or spousal support), monetary gifts or lottery winnings, or other income such as awards, scholarships, fellowships, bursaries and grants.
- The following items are NOT considered as income: income tax refunds, GST/HST credits, Federal and Provincial Child Tax benefits, Refundable tax credits (Provincial sales tax, Property Tax Credits, Universal Child Care Benefit, Supplements for Working Families, Student loan disbursements. ☐
- Deduct the amount of any child support payments or spousal support payments, from your gross monthly income.
- Proof of Income: If you are requested to provide proof of income, please provide photocopies and keep the originals for your files. If you are self-employed, a monthly business bank statement, a letter from your Financial Institution, or a letter signed by an accountant is acceptable proof of income.

7. **Zero Gross Family Income**
If you and, if applicable, your spouse/partner had no income for any of the months on the application, you must **describe on the Repayment Assistance Application** how you live or lived on no income. ☐

SECTION 3 - GOVERNMENT STUDENT LOAN INFORMATION

8. **Information about your and your spouse's Federal (Full-Time or Part-Time) or Provincial Student Loans that are currently in repayment.**
Complete 3a) with your Student Loan information and if applicable 3b) with your spouse's Student Loan information.

These are the details of your student loans (not a student line of credit). Example: ☐

Financial Institution	Province of Issue	Current Balance	Regular Monthly Payment
CIBC	Ontario	$5200	$325

SECTION 4 – APPLICANT'S CERTIFICATION AND CONSENT

9. **Sign and date your completed application.** ☐

10. **Mail or fax your application and copies of supporting document(s) to the National Student Loans Service Centre.**
Mailing Address: National Student Loans Service Centre, P.O. Box 4030, Mississauga, ON, L5A 4M4
Fax Number: 1-888-815-4657 ☐

Show me the Money

- Show me the Money notes;
- Appendices A to F;
- Common procedural questions with scanned attachment; and
- Resources for Small Claims Court with attached appendix.

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 and updated October 2, 2013).

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,

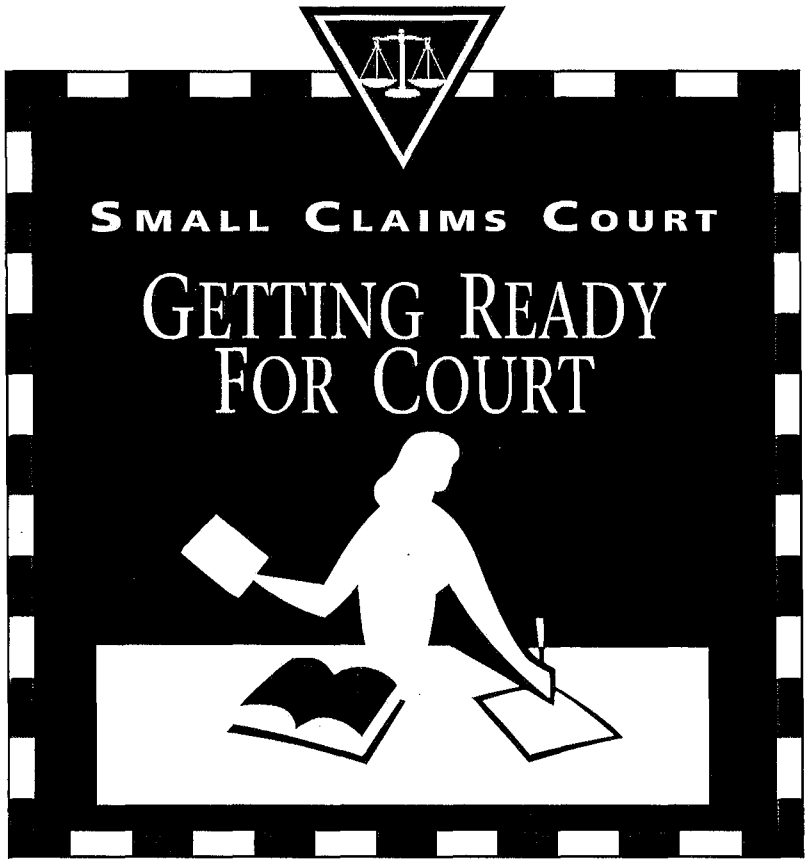
Name of Agency

Ms. X Advocate

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

Appendix B

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

(B)

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

(B)

STATEMENT OF FINANCES

MONTHLY INCOME		MONTHLY EXPENSES	
Net Salary	$_____	Rent	$_____
Commissions	$_____	Mortgage	$_____
Tips and Gratuities	$_____	Property Taxes	$_____
Unemployment Insurance	$_____	Utilities (heat &light)	$_____
Pension	$_____	Phone	$_____
Investments	$_____	Cablevision	$_____
Rentals	$_____	House/Tenant Ins.	$_____
Business Income	$_____	Life Insurance	$_____
Child Tax Benefit	$_____	Food	$_____
Maintenance (if any)	$_____	Restaurant Meals	$_____
Workers' Compensation	$_____	Sundries & Personal Grooming	$_____
Monthly Income of Spouse	$_____	Clothing	$_____
Law Spouse living with me	$_____	Laundry & Dry Cleaning	$_____
Income of Children (if any)	$_____	Motor Vehicle (lease or loan)	$_____
Other	$_____	(license, insurance, fuel & service)	$_____
		Transportation (public)	$_____
		Newspapers & Subscriptions	$_____
		Entertainment	$_____
SUB-TOTAL:	$_____	Alcohol & Tobacco	$_____
		Gifts	$_____
Income Assistance	$_____	Church & Charities	$_____
		Maintenance Payments	$_____
A. INCOME TOTAL	$_____	Child Care & Babysitting	$_____
		School Expenses/Children's	
		Activities, Lessons	$_____
		Other	$_____
		B. EXPENSES TOTAL	$_____

B

MONTHLY DEBTS

Credit Card(s): (please specify)

_____ $_____
_____ $_____
_____ $_____

Bank or Finance Company: (please specify)

_____ $_____
_____ $_____
_____ $_____

Department Store(s): (please specify)

_____ $_____
_____ $_____
_____ $_____

Other:

_____ $_____
_____ $_____
_____ $_____

C. DEBT PAYMENT TOTAL: $_____

VALUE OF ASSETS

Real Estate Equity

Market Value $_____
Mortgage Balance $_____

Automobile Equity

Make and Year $_____
Market Value $_____
Loan Balance $_____

Bank or Other Account
(include RRSP's) $_____
Stocks & Bonds $_____
Life Insurance $_____
Money owing to you $_____
Name of Debtor_____

Personal Property $_____
Cash $_____
Other $_____

If you need more space for any item on this Statement,
Attach an extra sheet and sign it.

Date:_____
Signed:_____
Print Name: _____

A. INCOME TOTAL $_____
B. EXPENSES TOTAL - $_____
SUB-TOTAL = $_____
C. DEBT PAYMENT TOTAL - $_____
BALANCE = $_____

Appendix C

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

Small Claims Court Factsheets You Can Download:

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

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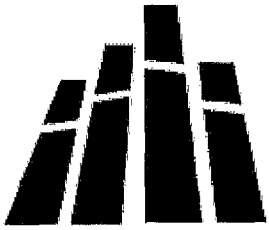
Drupal

Source URL: http://thelawcentre.ca/self_help/small_claims_factsheets

Links:

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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Appendix D

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

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.

Appendix D

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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 [1]

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.

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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.

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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

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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. [2]
Click here to obtain a blank Summons form which you can use. [3]

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 [4] 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

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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** [5].

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. [6]
Click here to obtain a copy of a blank Affidavit of Service form you can use. [7]

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

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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?

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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?

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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. [7]

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.

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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. [9] 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

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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

Appendix E

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Garnishing Orders

Prepared by Glenn Gallins
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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.

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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.** [1]

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. [2]

Click here to obtain a blank Affidavit in Support of a Garnishing Order Before Judgment which you can use. [3]

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;

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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:

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"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. [4]
Click here to obtain a blank Garnishing Order Before Judgment form. [5]

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** [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 [7]

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** [8], 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.

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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** [9]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** [10]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. [11]

Click here to obtain a blank Affidavit in Support of a Garnishing Order After Judgment form which you can use. [12]

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

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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). [13]

Click here to obtain a blank Garnishing Order (After Judgment) form which you can use. [14]

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** [15];

   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** [6] called "Serving Documents."

If the Garnishee is the B.C. Government, the Court Order Enforcement Act [7] 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** [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. [16]

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

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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. [17]

Click here to obtain a blank Application Under Part 1 of the GAPDA which you can use. [18]

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

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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** [8], 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. [14] 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.

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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. [19]
   Click here to obtain a blank Consent to Payment Out of Court that you can use. [20]

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. [21]
   Click here to obtain a Notice of Payment Out which you can use. [22]

   The Notice may be served personally on the Judgment Debtor. Section 13 (3) of the Court Order Enforcement Act [23] 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) [24], 13(2) [23] and 9(5) [25] of the Court Order Enforcement Act and **Factsheet 6** [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.

   Click here to obtain a blank Affidavit of Service form. [26]

Please Click Here to Provide Us With Feedback [27]

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[4] http://thelawcentre.ca/sites/default/files/file/small_claims_forms/garnordb42.pdf
[5] http://www.ag.gov.bc.ca/courts/forms/scl/psc002.pdf

Provincial Court Small Claims Handbook

THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA

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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.

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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

Fax filing in Small Claims is a confusing topic. 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. **The easiest solution is to call the Registry where you want to file, and ask them if a particular document can be filed by fax, or if it must be filed in person (by mail or in-person attendance).**

Otherwise, each time you want to know if a client can file something by fax, you must look at:

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, the 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.

When transmitting documents to a Provincial Court registry by fax, you must use a specified fax cover sheet, which is Form 20 under the Small Claims Rules. A sample copy is attached.

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) 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.*

So, 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 Small Claims form #16), following the instructions on the form, and filing it at the registry.

A copy of an Application to a Registrar is attached. The Application should be completed to 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 (which is a Small Claims form, sample attached) 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 deals with what fees and expenses 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 only.

Some common procedural questions in Small Claims Court

Attachments:

1. Rule 17.1 of the Small Claims Rules, "Procedures in Fax Filing Project Registries";
2. Provincial Court Practice Direction, Fax Filing Pilot Project;
3. Fax cover sheet, Small Claims Form #20;
4. Application to a Registrar, Small Claims Form #16;
5. Statement of Finances, Small Claims Form (not numbered)

Attachment #1

Court Rules Act; Small Claims Act

SMALL CLAIMS RULES

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.

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*.

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;

(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.

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).

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.

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.

Attachment #2

THE HONOURABLE HUGH C. STANSFIELD
CHIEF JUDGE

THE PROVINCIAL COURT
OF BRITISH COLUMBIA

SUITE 602, 700 W. GEORGIA STREET
BOX 10287, PACIFIC CENTRE
VANCOUVER, B.C. V7Y 1E8
Tel: (604) 660-2864
Fax: (604) 660-1108

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, 2010. All other provisions of this directive, other than reference to the end date, remain unchanged."

(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, 2010. 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

(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.*

(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.

(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)

Hugh C. Stansfield
Chief Judge

June 30, 2008

Attachment #3

Fax Cover Sheet in the Provincial Court of British Columbia (Small Claims)

This form must be used when transmitting documents to the court registry by fax for filing.

THIS FORM IS NOT TO BE EMAILED

This is a pilot project, not available at all Court locations, and is subject to limitations set out in Court Rules and Practice Directives which are found at the Court Services Branch, Ministry of Justice website at http://www.ag.gov.bc.ca/courts/fax/index.htm.

It is the responsibility of the person transmitting a document to ensure that the document is filed in the court registry within the required filing time. The registry takes no responsibility for difficulty experienced when transmitting a document by fax to the registry. The registry cannot guarantee that any document will be filed on the day it is received in the registry.

Documents transmitted to the court registry will be processed in the order they are received. Confirmation of acceptance or refusal will be forwarded to you as soon as possible at the return fax number set out below or by mail if indicated.

To:

court location

fax number

Fax numbers for transmitting documents to court registries are available through the Court Services Branch website at http://www.ag.gov.bc.ca/courts/fax/index.htm or through Enquiry BC at 1-800-663-7867

From:

name - firm or individual

contact name

phone number

address

city

province

postal code

Notification of acceptance or refusal of filing will be sent by either fax or mail. Please choose one of the following:

☐ Notification by mail to address above

☐ Notification by fax to: _____

Type of document: (e.g. Application to Obtain an Order, Reply)	**No. of pages in document**	**Statutory fee amount**
Total no. of pages in submission (Maximum 20 including the cover sheet) ▶		$ Fee total
Plus confirmation fee ▶		$ 10.00
Total statutory fees due ▶		

Attached:

file number or name (style of cause) e.g. - 013654 or "Steward vs. Parakeet"

comments

Court Services Branch may use your contact information for the purposes of conducting an evaluation of the fax service.

Registry Use Only - Imprint

Payment Information:

I authorize you to bill my credit card or BC OnLine account the total of the statutory fee for filing and the confirmation fee. I include the payment information for that purpose. *(Note: BC OnLine is available only in the Prince George Court Registry)*

credit card type: Visa / MasterCard *(circle one)*

print name as it appears on the credit card

authorizing signature (credit card)

OR

BC OnLine account number:

print name of BC OnLine account

authorizing signature (BC OnLine account)

credit card account number

expiry date on credit card

Please note: The credit card information provided on this form will not be retained. Upon authorization of the payment request, all credit card information will be destroyed.

Attachment #4

APPLICATION TO THE REGISTRAR

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

REGISTRY FILE NUMBER
REGISTRY LOCATION

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 _____ PROV. British Columbia 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 _____

APPLICATION TO THE REGISTRAR

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

1-COURT REGISTRY 2-APPLICANT 3-OTHER PARTY

Attachment #5.

STATEMENT OF FINANCES

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

REGISTRY FILE NUMBER
REGISTRY LOCATION

I, _____, _____,
state:

(STRIKE OUT ANYTHING THAT DOES NOT APPLY TO YOU AND INITIAL.)

1. I am married / single / other (specify): _____

2. I support and maintain (specify number):
   _____ Children under 18
   _____ other dependants

3. Listed below is an accurate "Statement of Finances" of my household.

MONTHLY INCOME		MONTHLY EXPENSES	
Net Salary	$	Rent	$
Commissions	$	Mortgage	$
Tips and Gratuities	$	Property Taxes	$
Unemployment Insurance	$	Utilities (heat & light)	$
Pension	$	Phone	$
Investments	$	Cablevision	$
Rentals	$	House/Tenant Insurance	$
Business Income	$	Life Insurance	$
Child Tax Benefit	$	Food	$
Maintenance (if any)	$	Restaurant Meals	$
Workers' Compensation	$	Sundries & Personal Grooming	$
Monthly Income of Spouse/Common-Law Spouse living with me	$	Clothing	$
Income of Children (if any)	$	Laundry & Dry Cleaning	$
Other	$	Motor Vehicle (lease or loan)	$
SUB-TOTAL	$	(license, insurance, fuel & service)	$
Income Assistance	$	Transportation (public)	$
A. INCOME TOTAL	$	Newspapers & Subscriptions	$
		Entertainment	$
		Alcohol & Tobacco	$
		Gifts	$
		Church & Charities	$
		Maintenance Payments	$
		Child Care & Babysittting	$
		School Expenses/Children's Activities, Lessons	$
		Other	$
		B. EXPENSES TOTAL	$

CONTINUED OVER →

MONTHLY DEBTS

Credit Card(s): (please specify)

_____ $_____

_____ $_____

_____ $_____

Bank or Finance Company: (please specify)

_____ $_____

_____ $_____

_____ $_____

Department Store(s): (please specify)

_____ $_____

_____ $_____

_____ $_____

Other:

_____ $_____

_____ $_____

_____ $_____

C DEBT PAYMENT TOTAL $_____

VALUE OF ASSETS

Real Estate Equity

Market Value $_____

Mortgage Balance $_____

Automobile Equity

Make and Year _____

Market Value $_____

Loan Balance $_____

Bank or Other Account (include RRSP's) $_____

Stocks & Bonds $_____

Life Insurance $_____

Money owing to you $_____

Name of Debtor _____

Personal Property $_____

Cash $_____

Other $_____

If you need more space for any item on this Statement, attach an extra sheet and sign it.

Date: _____

Signed: _____

Print Name: _____

A. INCOME TOTAL		$_____
B. EXPENSES TOTAL	-	$_____
SUB-TOTAL	=	$_____
C. DEBT PAYMENT TOTAL	-	$_____
BALANCE	=	$_____

Copies of this form:
If you have been summonsed to court, bring the original of this *Financial Statement* and two copies to court to be filed. One copy is for you and the other is for the other party.

Reminder:
Be sure to bring any documents specifically required by a summons you may have received.

If there are no documents mentioned on the summons, you should bring the following items to support your Statement of Finances:

- Copies of your last 2 years' Income Tax Returns and T-4 slips
- If you are not employed, recent proof of the source and amount of your income (such as your 3 most recent Employment Insurance benefit statements)
- copies of your last 2 months utility bills for hydro, telephone and cable
- copies of your last 6 monthly bank statements for all bank accounts
- copies of any mortgage or rent agreements and receipts for the last 6 months
- any other documents you feel are important to establish your financial situation

Resources for Provincial (Small Claims) Court

* Prepared by Alison Ward, Barrister and Solicitor, CLAS, November 18, 2011 and updated October 2, 2013

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 8 to 15 about unsecured creditors' options are relevant to enforcing monetary orders in Small Claims Court.

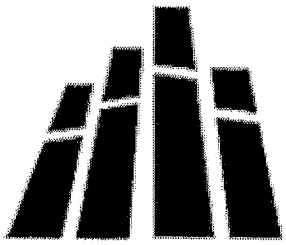
   - a chapter on Small Claims Court Procedure (see chapter 20 at http://www.lslap.bc.ca/main/?Manual_download) The section on enforcement of orders is quite short, from pages 47 to 50 of that chapter.

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.php?pub=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 21, Enforcing judgments against Chattels; Chapter 22, Enforcing judgments against land; Chapter 27, Garnishment and Set-off; Chapter 29, 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 information about what to expect in the court process. The site has basic information about enforcing court orders at http://www.smallclaimsbc.ca/court-decisions



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

Small Claims Court Factsheets You Can Download:

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

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Major funding for The Law Centre is provided by The Law Foundation of British Columbia

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Drupal

Source URL: http://thelawcentre.ca/self_help/small_claims_factsheets

Links:
[1] http://thelawcentre.ca/self_help/small_claims_factsheets/waiver_01
[2] http://thelawcentre.ca/self_help/small_claims_factsheets/waiver_02

TAB 3: Employment

- **Employment Overview (Day 2)**
    - Materials available at the workshop and online after the conference

Orange sheet

- **EI Appeals and the Social Security Tribunal Workshop (Day 2)**

EMPLOYMENT INSURANCE

QUALIFYING FOR REGULAR BENEFITS

Interruption of Earnings

- 7 days during which no work is performed and no earnings are received

Number of Hours Needed

Regional Rate of Unemployment	Hours
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

Qualifying Period



Red = Qualifying Period (52 weeks)

New Entrants and Re-entrants

- New / Re-entrants need 910 hours to qualify for EI
- Claimant is a new /re-entrant if they had less than 490 hours of workforce attachment in year prior to the qualifying period

Qualifying Period



Red = Qualifying Period (52 weeks)

Blue = New Entrants (52 weeks before qualifying period, 490 hours)

Late Applications



Antedates

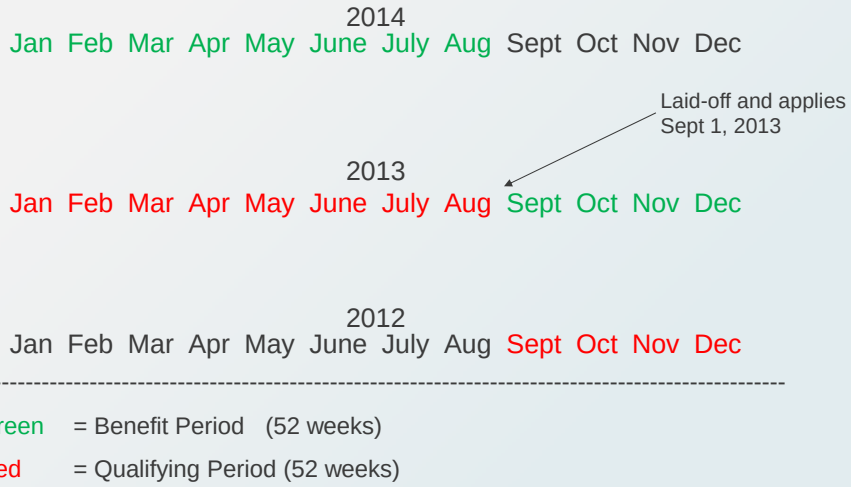
- Basically means backdating the application to the week the client stopped working
- Commission will automatically antedate if application filed within 4 weeks
- Beyond that must show good cause for delay

Disqualifications

- Lose job due to your own misconduct
  - "Misconduct" means willful conduct inconsistent with the due and faithful discharge of employment duties.
- Voluntarily quitting without just cause
  - "Just cause" means the claimant had no reasonable alternative to quitting given all the circumstances, including those set out in section 29(c) of the EI Act

WHAT DO I GET IF I QUALIFY?

THE BENEFIT PERIOD



Green = Benefit Period (52 weeks)

Red = Qualifying Period (52 weeks)

Weeks of Benefits

- Determined by number of insurable hours in qualifying period and unemployment rate in region
- Must all be claimed before benefit period ends
- Don't need to claim benefits in consecutive weeks

How Much Money Do I Get?

- 55% of average weekly earnings

Regional Rate of Unemployment	Number of Weeks
not more than 6%	22
more than 6% but not more than 7%	21
more than 7% but not more than 8%	20
more than 8% but not more than 9%	19
more than 9% but not more than 10%	18
more than 10% but not more than 11%	17
more than 11% but not more than 12%	16
more than 12% but not more than 13%	15
more than 13%	14

Waiting Period

- All claimants must serve a 2 week waiting period during which they cannot receive benefits.

STAYING ON REGULAR BENEFITS

- Be available and looking for work.
- Accept suitable employment.
- Remain in Canada.
- Follow directions from EI staff.
- Report to EI.

New Definition of Suitable Employment

General considerations

- Health and physical capabilities
- Hours of work not incompatible with family obligations or religious beliefs
- Nature of work not contrary to moral or religious beliefs
- Commuting time not greater than 1 hour (unless claimant should expect a higher commuting time based on region or previous job).

Creates 3 different categories of workers with different responsibilities for each:

- Long-Tenured Workers
- Frequent Claimants
- Everyone else

Long-Tenured Workers

- Fewer than 36 weeks of benefits in last 5 years
- Paid at least 30% of the maximum employee premiums in 7 of last 10 years.

Must Accept

- In first 18 weeks of claim, any job in same occupation at 90% of previous pay
- After that, any job in a similar occupation at 80% of previous pay.

Frequent Claimants

- In last 5 years, has received at least 60 combined weeks of regular benefits over 3 different claims.

Must accept:

- In first 6 weeks of claim, any job in a similar occupation at 80% of previous pay
- After that, any job at which the claimant is qualified to work at 70% of previous pay.

Everyone Else

- In first 6 weeks, any job in same occupation at 90% of previous pay
- From week 6 until week 18, any job in similar occupation at 80% of previous pay.
- After that, any job at which the claimant is qualified to work at 70% of previous pay.

Earnings while on EI

- **You can work part-time and get EI.**
- **Earning threshold is 90% of benefit rate.**
- **50% of earnings will be deducted up to threshold, 100% above threshold.**

SPECIAL BENEFITS

5 Kinds of Special Benefits

- Sickness (medical) benefits
- Pregnancy
- Parental
- Compassionate Care
- Parents of critically ill children

* All require 600 hours to qualify *

Medical Benefits

- Maximum of 15 weeks
- Unable to work due to illness, injury or quarantine
- Would have been available to work had it not been for the illness, injury or quarantine

Pregnancy Benefits

- Maximum 15 weeks
- Can establish a claim up to 8 weeks before due date
- Entitlement to maternity benefits ends 17 weeks after delivery

Parental Benefits

- Maximum of 35 weeks
- Must be collected within 52 weeks of child being born or placed with parents
- Either partner may collect parental benefits, parents can split benefits

Compassionate Care Benefits

- Maximum 6 weeks
- Payable if claimant is caring for a family member who faces a significant risk of death in the next 26 weeks.
- “Family” is broad and includes anyone who considers you like a close relative.

Parents of Critically Ill Children

- 35 weeks of benefits
- Leave from work to provide care or support to a child with a life-threatening illness or injury.

Penalties

- Can be imposed if claimant knowingly provided false or misleading information
- Generally a monetary penalty, however, Commission may impose a “warning” instead.
- Can appeal the amount of a penalty if the Commission considered an irrelevant factor or failed to consider a relevant factor.

Violations

- In addition to a penalty, Commission may impose a “violation”
- Violations increase the number of hours a claimant requires to qualify for EI for the next 260 weeks
- Increase in weeks depends on severity of violation measured by benefits wrongly paid

New Appeal System

	Deadline	New evidence?
Commission Reconsideration	30 days	Yes
Appeal to Social Security Tribunal General Division	30 days	Yes
Appeal to Social Security Tribunal Appeal Division	30 days	Generally no. - Error of law or jurisdiction - Procedural unfairness - Perverse and capricious finding of fact unsupported by the record

Appeals to the General Division

An appeal must be in the form set out by the Tribunal on its website and contain all of the following information before it will be considered complete:

- a copy of the decision;
- the date the decision was communicated to the appellant;
- the appellant's full name, address, telephone number and, if any, facsimile number and email address;
- The name, address, telephone number and, if any, facsimile number and email address of any representative;
- the grounds for the appeal;
- any documents or submissions that the appellant relies on in their appeal;
- an identifying number of the type specified by the Tribunal on its website for the purpose of the appeal; and
- a declaration that the information provided is true to the best of the appellant's knowledge.

Summary Dismissal

- A big change in the new system is that the General Division can summarily dismiss any appeal that has no prospect of success without a hearing.
- The General Division must give notice that it is thinking about doing this and allow for submissions.

General Division Decision Making

- No longer an automatic in person hearing. Most will be by teleconference or videoconference. Can even be by written question and answer.
- Likely (though not for sure) have Charter jurisdiction.

Appeals to the Appeal Division

- Now need leave to appeal.
- Leave to appeal will be denied if appeal has no reasonable chance of success.
- No leave to appeal is needed if the General Division summarily dismissed.

Applications for Leave to Appeal

An application for leave to appeal must be in the form set out by the Tribunal on its website and contain all of the following information for it to be considered complete:

- a copy of the decision in respect of which leave to appeal is being sought;
- the applicant's full name, address, telephone number and, if any, facsimile number and email address;
- The name, address, telephone number and, if any, facsimile number and email address of any representative;
- any statements of fact that were presented to the General Division and that the applicant relies on in the application;
- the grounds for the application;
- an identifying number of the type specified by the Tribunal on its website for the purpose of the application; and
- a declaration that the information provided is true to the best of the applicant's knowledge.

Appealing a Summary Dismissal

An appeal from a decision to summarily dismiss must be in the form set out by the Tribunal on its website and contain:

- a copy of the decision to summarily dismiss;
- the appellant's full name, address, telephone number and, if any, facsimile number and email address;
- the name, address, telephone number and, if any, facsimile number and email address of any representative;
- any statements of fact that were presented to the General Division and that the appellant relies on in the appeal;
- the grounds for the appeal;
- an identifying number of the type specified by the Tribunal on its website for the purpose of the appeal; and
- a declaration that the information provided is true to the best of the appellant's knowledge.

Other changes in new SST system

- No extensions of time for late appeals beyond 1 year
- Second adjournment only granted in “exceptional circumstances”
- Send appeals and information directly to SST only
- If the client has an advocate, the SST will generally communicate with advocate only
- SST will only reconsider one of its decisions once, and request must be made within 1 year of the decision.

Insurability Rulings and Appeals

- The Canada Revenue Agency has exclusive power to determine certain EI matters, such as:
  - Whether the employment is covered by EI
  - If so, when employment began and ended
  - How many hours and earnings the person had

Insurability Appeals

	Deadline	New Evidence
Request for initial ruling	Worker - June 30 of next calendar year Commission – Anytime	Yes
Appeal to Minister of National Revenue	90 days	Yes
Appeal to Tax Court	90 days	Yes

Research Resources

- Digest of Benefit Entitlement Principles
- Annotated EI Act
- Service Canada website
- Social Security Tribunal Website
- CUBs (Decisions by the Umpire)
  - EI Jurisprudence Library
  - Decisions favorable to workers

TAB 4: Family and child protection

- **Update on the new Family Law Act and case law (Day 1)**
  - powerpoint

  Separating sheet

  - update on case law

Orange sheet

- **Overview of child protection (Day 1)**
  - Materials available at the workshop and online after the conference

Orange sheet

- **Information for advocates helping clients draft affidavits (Day 2)**
  - powerpoint

  Separating sheet

  - Preparing affidavits article

  Separating sheet

  - Affidavit A

  Separating sheet

  - Affidavit B

  Separating sheet

  - Affidavit C

Orange sheet

- **MCFD and Aboriginal Clients (Day 3) (see Aboriginal issues)**

Family Law Act **Update**



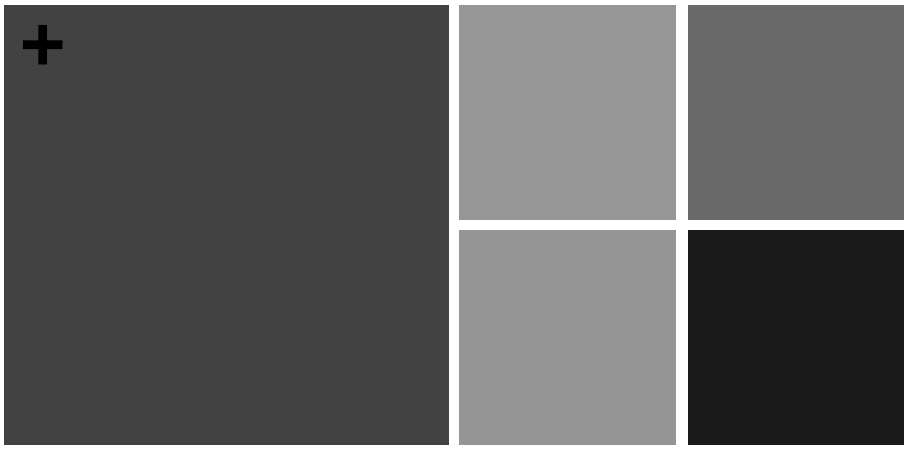


Legal Services Society
2013 Training Conference

John-Paul Boyd
Canadian Research Institute for Law and the Family
8 October 2013

Overview

- How we got here from there
- Determining the applicable legislation
- Determining the best interests of children
- Determining and defining guardianship
- Relocation, relocation, relocation
- Determining and varying support
- Family violence, protection orders and misconduct



How we got here from there.

A brief history



- Bill 16 tabled on 11 November 2011 and passed as *Family Law Act* twelve days later
  - No meaningful debate in legislature, but remarks of Attorney General have proven useful
- Royal assent given 24 November 2011
- Amendments to PCFR and SCFR published on 18 June 2012
  - Implement new terminology, new concepts
  - Define new procedures
  - Remove references to concepts not carried forward
  - Some unrelated but substantive changes included

+ A brief history

- Effective date of 18 March 2013 announced on 19 June 2012
- Regulations to *Family Law Act* published on 26 November 2012
  - Role of Family Justice Counsellors
  - Establishes training required of persons, including non-lawyers, serving as family law mediators, family law arbitrators and parenting coordinators
  - Adopts and adapts Child Support Guidelines for the *Family Law Act*
  - Sets limit of $10,000 for children's property managed by guardians without court order
  - Provides form for appointment of standby and testamentary guardians

+ A brief history

- Further amendments to PCFR and SCFR published on 5 February 2013
  - New rules for evidence, and due dates for evidence required in applications for appointment as guardian (PCFR 18.1, SCFR 15-2.1)
  - Set out new form required for guardianship applications (PCFR Form 34, SCFR Form F101)
- *Family Law Act* and rules amendments in force 18 March 2013
  - Much judicial consternation about: cases closed before effective date but with judgment reserved; cases in the middle of trail; applications brought to vary cases decided under old act
  - No transitions provisions except in respect of property

The Divorce Act versus the Family Law Act.

Operational incompatibility

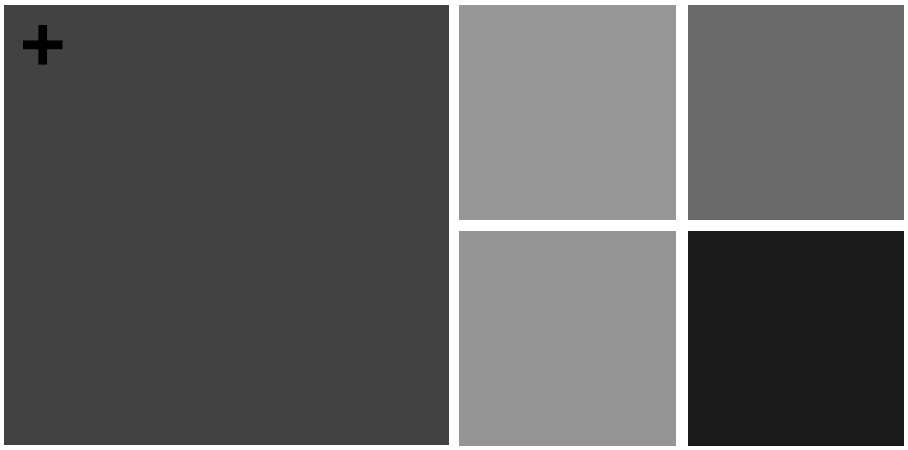
Hansen v Mantei-Hanson, 2013 BCSC 876, Humphries J.

- Relocation case; DA pled in claim, DA and FRA in counterclaim. When there is no "operational incompatibility" between federal and provincial legislation order can be made under either act although it is preferable to use federal legislation; when operational incompatibility exists, doctrine of paramountcy prevails and federal legislation must be used. Court reviews mobility authorities under DA and FRA and provisions of FLA and concludes "the new Act is not easily and conveniently compatible with the *DA* because the concept of guardianship in the new Act subsumes the concept of custody."

Filling the gaps

Rashtian v Baragoush, 2013 BCSC 994, N. Smith J.

- Parenting case; DA and FRA pled in claim, FRA in counterclaim. Court relies on *Hansen v Mantei-Hansen* to "deal with custody" under the DA, "supplemented as necessary by orders under the *FLA* on guardianship."



The best interests of the child.

+ Factor-by-factor analysis

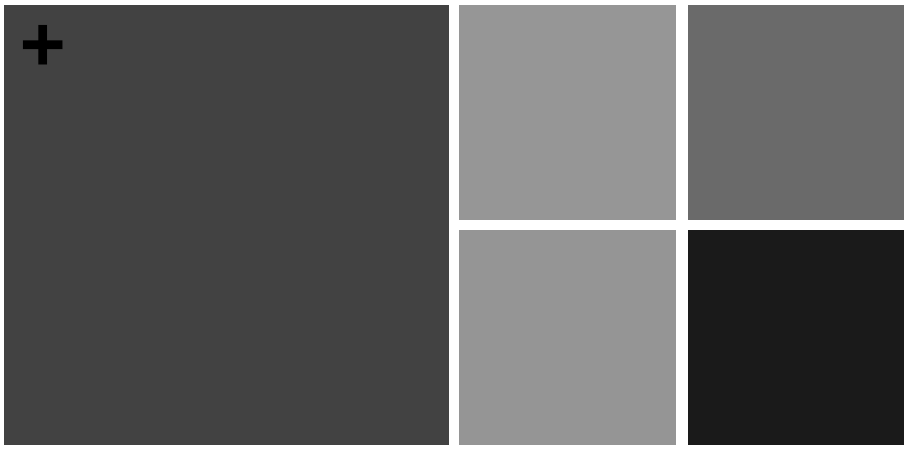
G.B. v L.A.P., 2013 BCSC 1490, Watchuk J.

- Application to determine choice of child's kindergarten. Court determines that as matter concerns child's education, it is "an issue respecting guardianship" which will also affect the parenting arrangements for the child. Court holds that applicable test is that set out in FLA s. 37, and that court must consider "all of a child's needs and circumstances" under s. 37(1) in addition to the s-s. (2) factors. Court then conducting analysis by reviewing facts in light of each of s. 37(2) factors.

+ Application to Divorce Act cases

Pozzobon v Pozzobon, 2013 BCSC 1226, Grauer J.

- Application under DA to vary order on parenting arrangements. Although matter brought under DA, court holds that factors at FLA s. 37(2) to provide "a useful basis for analyzing where the best interests" of the child lie.



Determining standing as guardian.

Presumption of guardianship



S.T.H. v R.M.G., 2013 BCPC 114, Hamilton J.

- Application by father for sole guardianship of two children. Parties had joint custody and joint guardianship of one child under consent order, but order non addressing status in relation to second child. As a result of consent order, parties found to both be guardians of first child under FLA s. 251; court concludes that both parties are guardians of second child under s. 39(1). Court holds that legislature intended to establish a presumption of guardianship.

+ Effect of interim orders

J.C.P. v J.B., 2013 BCPC 94, Merrick J.

- Parties separated after birth of child, interim order providing father with access and entitlement to be advised of matters concerning the child's health care. Application to determine effect of FLA s. 251 as to whether father is "person with contact" or guardian in advance of trial. Mother arguing order provides only access and that father therefore not guardian. Court observes that interim order did not determine custody or guardianship and that purpose of s. 251 is as guide to interpretation of pre-FLA orders, not intended to deprive party of substantive rights. Court concluding that terms of order regarding health care providing father with measure of guardianship in any event, and that father is therefore a guardian.

+ Regular care of child

T.F. v A.D., 2013 BCPC 205, G. Brown J.

- Application to determine parenting arrangements of child following interim order for sole custody to mother. Court observes that as a result of interim order, mother is "technically speaking" the child's only guardian. However, given extent of father's contact with child, court "makes" father a guardian under FLA s. 39(3)(c).

No presumptions, please

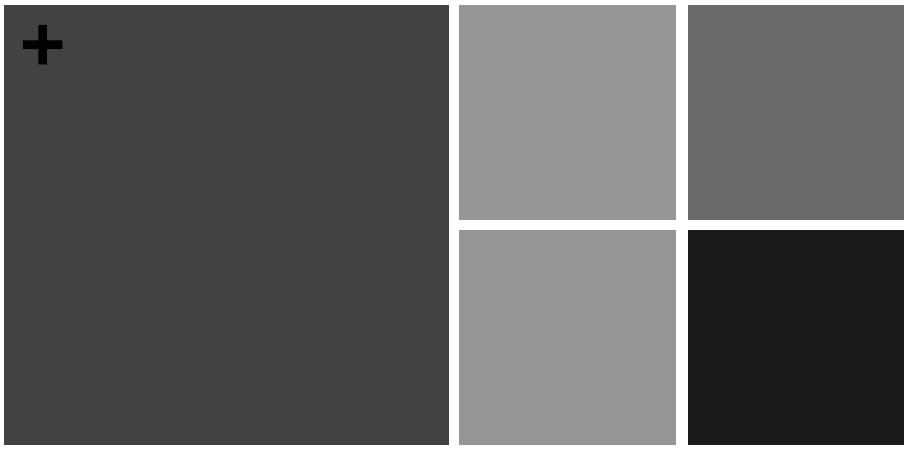
Director and L.M.P., 2013 BCPC 206, Frame J.

- Father seeking guardianship of child in combined CFCSA and FLA proceeding. Father never resided with child, had not regularly cared for child and no agreement between parents that father be a guardian, court concluding father not a guardian under FLA s. 39.

Loss of guardianship by agreement

T.C. v S.C., 2013 BCPC 217, Dhillon J.

- Parties separating in 2007, a few months after birth of child, and signing separation agreement under which mother having sole guardianship and father having unspecified access, but not determining custody. Father's access later specified by order giving him equivalent of every other weekend and two evenings each week. Threshold issue arising on relocation application as to father's status. Court concluding that under FLA ss. 251(2) and 39(2), parties making agreement under which father not a guardian, and therefore without standing to object to relocation under s. 68.



Applying for guardianship.

Affidavit not required

D. v D., 2013 BCPC 135, Merrick J.

- Combined CFCSA and FRA action. Relatives seeking orders appointing themselves as guardians in place of parents. Court relieves applicants of obligation to file Form 34 affidavit required by PCFR 18.1(4), holding that the affidavit "is not required as the evidence at trial establishes the information required in each case." Court concludes that evidence supports appointment of two of three relatives.

+ Affidavit required

M.C. v D.C., 2013 BCPC 212, Low J.

- Application by father for guardianship under FLA s. 39(1). Father not complying with PCFR 18.1, arguing that requirements only apply to person seeking guardianship under s. 39(3). Court holds that PCFR 18.1 makes no distinction in status and is mandatory, and that person applying for guardianship must file PCFR Form 34 affidavit before application can be heard.

+ Records checks required

Director and L.M.P., 2013 BCPC 206, Frame J.

- Pretrial application to determine whether applicant must obtain criminal records check and nature of check required. Court notes that nothing in FLA s. 51 or in PCFR 18.1 requires production of records check, just text of Form 34. Court reviews different species of records checks, their costs and their drawbacks. Court concluding that FLA required vulnerable sector criminal records check, however applicant unable to obtain this on his own and legislation inadequate to allow court to make order against police. Court concluding that only recourse is to ask, but not order, the applicant to attend the police and request a fingerprint search.

+ Interim guardianship, part one

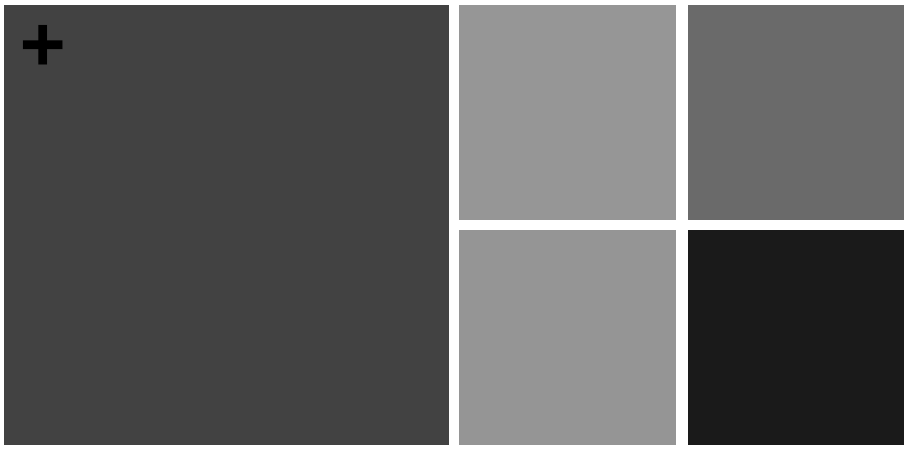
T.C. v S.C., 2013 BCPC 217, Dhillon J.

- Mother applying to relocate with child, father lacking standing to object to relocation under s. 68. Court exercising power under s. 261(1) and PCFR 18.1(2) to make interim order appointing the father as a guardian because order is "in the best interests of the child and also in the interests of the administration of justice to permit a parent who has had a significant role in the life of a child to have relocation application considered on the basis of the parent having the status of a guardian of the child," and because "to deny standing to the father to argue for his parental rights is to fail to consider a just and reasonable approach in this family law dispute." Father required to file supporting materials within 60 days under PCFR 18.2(4).

+ Interim guardianship, part two

D.P. v. S.S. and L.S., 2013 BCPC 181, Gallagher J.

- Applications by all parents and maternal grandmother, for guardianship of child. Both parents struggled with drugs and alcohol, mother placed child into care of grandmother many years ago. Court holds that father not presumptively a guardian as he never lived with the child and that grandmother not a guardian as she is not a parent. Court gives interim guardianship to all parties for 90 days to allow time for filing the affidavits required by PCFR 18.1, and orders that all three have parental responsibilities under FLA s. 41 and that the mother and father have specified parenting time with the child.



Applying for removal of guardianship.

"Sole" guardianship, part one

J.L.M. v G.A.T., 2013 BCPC 96, Frame J.

- Application for "sole guardianship" by mother. Parties living together at time of child's birth and father therefore guardian under FLA s. 39(1). Court concludes presumption of guardianship under s. 39(1) is subject to s-s. (2), and that court may use s-s. (2) to order that a person is not a guardian. Court holds that it would have made an order to a similar effect under s. 51(1)(b) terminating guardianship if it had not concluded that it had jurisdiction under s. 39(2).

+ "Sole" guardianship, part two

S.T.H. v R.M.G., 2013 BCPC 114, Hamilton J.

- Application by father for sole guardianship. Court holds that only way to give a guardian "sole guardianship" is to remove the other guardian under s. 51(1)(b), however FLA provides no guidance regarding factors to consider. Court turns to s. 37(1) for proposition that only best interests of child are to be considered and reviews each factor set out in s. 37(2) to conclude that both parents will remain guardians.

+ "Sole" guardianship, part three

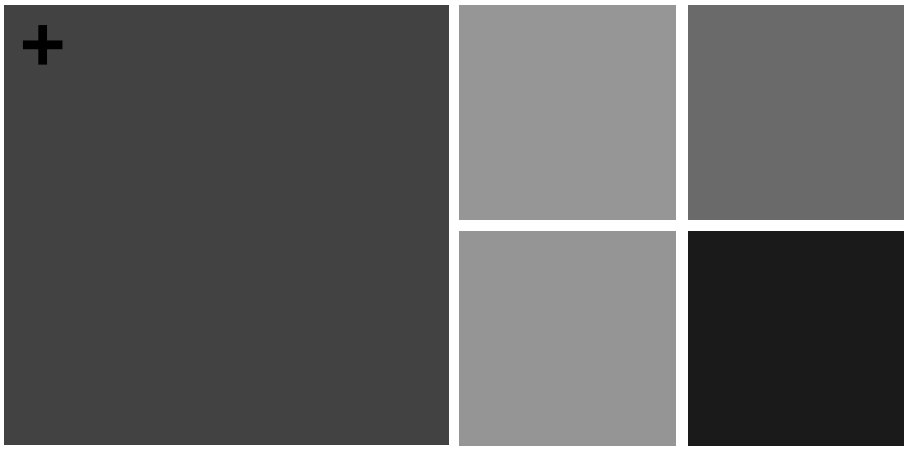
D.G. v A.M., 2013 BCPC 134, Burdett J.

- Father applying for "sole guardianship" of child in combined CFCSA and FLA case. On the facts, both parents guardians under FLA s. 39(1). Court not removing mother as guardian but ordering that child remain in care of father, with mother having supervised parenting time and father having "sole parental responsibilities," save that mother will have right to information about child's health and education under s. 41(1)(j).

Test to remove guardianship

D. v D., 2013 BCPC 135, Merrick J.

- Combined CFCSA and FRA action. Relatives seeking orders appointing themselves as guardians and removing parents. Court holds that such orders should not be made unless in the best interests of the children, and "can only occur in the most extreme situations" after assessing "whether, through an allocation of parenting responsibilities, it continues to be in the best interests of the children that the parent remain a guardian." Court not satisfied that guardianship status of parents should be terminated.



Defining and distributing guardianship rights.

+ Alternating responsibilities

Rashtian v Baragoush, 2013 BCSC 994, N. Smith J.

- Court orders that parties have joint custody, and as DA "does not deal with guardianship," and does not make order disturbing presumption under FLA s. 39(1) that parties are guardians. Further to s. 211 assessment, court allocated parenting time between parties and orders that all parental responsibilities be exercised by the parent having parenting time under s. 42(2).

+ Delegating responsibilities

J.L. v L.D., 2013 BCPC 201, G. Brown J.

- Parents having joint custody and joint guardianship of two children by court order. Following intervention by MCFD, children's care during mother's parenting time given to maternal grandmother; the eldest child stopping seeing the father for other reasons. Court considers circumstances of mother and makes order that parents continue to be the only guardians of the children, that they share all of parental responsibilities, but that the mother's responsibilities would be delegated to the grandmother pursuant to s. 43(2) along with her parenting time under s. 42(1).

+ Eliminating responsibilities

T.F. v A.D., 2013 BCPC 205, G. Brown J.

- Application to determine parenting arrangements of child. In light of parties' disagreements on parenting issues and father's instability, arrest on drug charges and bullying behaviour toward mother, all parental responsibilities under s. 41 allocated to mother.

+ Sharing some but not others

K.L.G. v D.J.T., 2013 BCSC 1684, N. Brown J.

- Parties consenting to an order that they share all parental responsibilities under FLA s. 41, except for three. Mother would have sole responsibility for day-to-day decision-making under s. 41(a) as well as for giving or refusing consent on behalf of the child under s-s. (h). Allocation of right to make decisions respecting the child's residence under s. 41(b) to be determined by court after trial.

Joyce model adapted for FLA

G.P. v. M.J.R.P., 2013 BCSC 746, Crawford J.

UPON THE COURT being advised that the name and birth date of each child is as follows:

(child 1), born (born 1)

(child 2), born (born 2)

(the "Children)"

AND UPON being satisfied that _____and_____ are the guardians ("the Guardians") of the Children under s. 39(1)/s.93(3) of the *Family Law Act*;

THIS COURT ORDERS THAT:

1. Parenting time and residency shall be agreed upon by the Guardians, and shall be shared on the basis of the father's work schedule.
2. Father shall have primary responsibility for school and activity registration and designating the children's medical professionals and shall provide the institutions and professionals with the contact information for both guardians.

+

3. Both Guardians may request and receive from third parties health, education or other information respecting the children.
4. During a Guardian's parenting time, that Guardian may exercise the parental responsibility of making day-to-day decisions affecting the Children provided however that such Guardian must advise the other Guardian(s) of any matters of a significant nature affecting the Children occurring during his/her parenting time.
5. Each Guardian will consult the other Guardian(s) about any important decisions that must be made in respect of the Children and will try to reach agreement concerning these important decisions.
6. In the event the Guardians cannot reach agreement with respect to any major decision despite their best efforts, father will have final decision-making power, provided however that the other guardian may seek mediation or, under s. 49 of the *Family Law Act*, seek a review of any such decision if he/she believes that such decision is contrary to the best interests of the Children.

+ Joyce model adapted for DA

C.K.B.M. v G.M., 2013 BCSC 836, Melnick J.

The parties will have joint custody of the child of the marriage on the following terms:

1. in the event of the death of a party, the surviving party will have sole custody of the child;
2. each party will have the obligation to advise the other party of any matters of a significant nature affecting the child;
3. each party will have the obligation to discuss with the other party any-significant decisions that have to be made concerning the child, including significant decisions about the health (except emergency decisions), education, religious instruction and general welfare of the child;
4. the parties will have the obligation to discuss significant decisions with each other and the obligation to try to reach agreement on those decisions;
5. in the event that the parties cannot reach agreement on a significant decision despite their best efforts, the party with the primary residence of the child will be entitled to make those decisions and the other party will have the right to apply for an order respecting any decision the party considers contrary to the best interests of the child, under s. 16(1) of the *Divorce Act;* and
6. each party will have the right to obtain information concerning the child directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third-party caregivers.

+ Joyce model adapted for FLA

Hansen v Mantei-Hanson, 2013 BCSC 876, Humphries J.

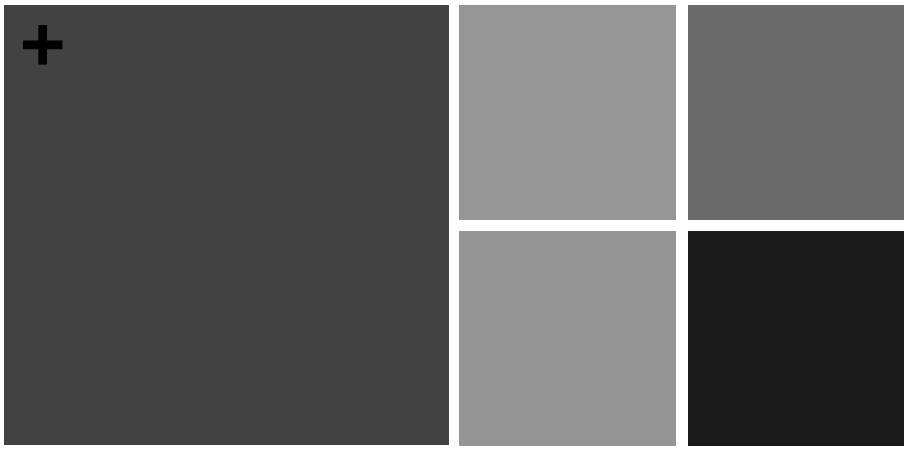
1. Each parent will have the same duties, rights, responsibilities and input in respect of the children which they had while co-parenting, except for those responsibilities of everyday parenting that go with physical care and control of the children, which will be exercised by each parent during their respective times with the children.
2. In the event of the death of a spouse, the surviving spouse will have sole custody of the children, and the children will reside with the surviving spouse.
3. Each parent will have the obligation to advise the other parent of any matters of a significant nature affecting the children
4. Each parent will have the obligation to discuss with the other parent any significant decisions to be made about the health (except emergency decisions), education, religious instruction and general welfare of the children.
5. The parents will have the obligation to discuss significant decisions respecting the children with each other and the obligation to try to reach agreement on those decisions.
6. In the event that the parents cannot reach agreement on a significant decision respecting the children despite their best efforts, the parent with primary residence will be entitled to make those decisions and the other parent will have the right to apply to the court to review any decision the parent considers contrary to the best interests of the children.
7. Each parent will have the right to obtain information concerning the children directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third party care givers.

Frame model

L.J.P. v D.L.B., 2013 BCPC 104, Frame J.

Each party shall:

1. put the best interests of the child before the parent's own interest;
2. do everything necessary to ensure the child is disrupted as little as possible by the separation; and
3. exchange information about the wellbeing of the child, including progress in school, extracurricular activities and any illnesses of the child while he is in the care of the other parent.



Relocation.

+ Defining relocation

Berry v Berry, 2013 BCSC 1095, Master MacNaughton

- Application by father to prevent mother from changing the place of residence of the children, heard after mother had moved from Surrey to North Vancouver. Court holds that tests under FLA ss. 46 and 69 are child-centred and focus "on children's relationships and the impact of a change in residence on those relationships," and that "to qualify as a relocation, the impact must be significant." Court concludes that move within a municipality is not "significant."

+ Absence of order or agreement

L.J.P. v D.L.B., 2013 BCPC 104, Frame J.

- Application to determine choice of child's school after mother moving and parties establishing informal shared parenting arrangement. Parent opposing move sought order requiring parties to participate in dispute resolution on the strength of FLA ss. 45(1)(d) and 224(1). Court concludes that issue must be determined under s. 46 in absence of order or agreement. After helpful review of leading mobility authorities, including DA cases, court concludes that child should reside with moving party despite absence of factor clearly compelling a decision one way or the other.

+ Moving as parental responsibility

K.L.G. v D.J.T., 2013 BCSC 1684, N. Brown J.

- Mother seeking to relocate with children. Court determines relocation claim under FLA s. 46 in absence of order or agreement on parenting arrangements, framing issue in terms of whether mother "should be granted the right to decide where the children will reside" under s. 41(b). Court reviews guiding principles applicable to mobility applications set out in *Nunweiler v Nunweiler* against factors prescribed by s. 37 to determine which of the *Nunweiler* factors "no longer applies." Court then reviews each of s. 37(2) factors, and concludes that mother should have exclusive parental responsibility under s. 41(b) to determine the place of the child's residence.

+ Substantially equal time

M.K.A. v A.F.W., 2013 BCSC 1415, Master Young

- Father's application under FLA s. 69 to prevent moved from relocating. Parties' separation agreement giving father parenting time every Thursday evening to Saturday evening and sharing of holidays. Court concludes that father does not have substantially equal parenting time as has child for "approximately 36 percent of the time," and applying s. 69(4) test to determine matter.

+ Essential cases, part one

L.J.R. v S.W.R., 2013 BCSC 1344, Betton J.

- Mother applying to relocate. Court provides thorough step-by-step approach to analysis of relocation applications. Court concludes that reasonableness of arrangements proposed depends on location at issue. Court reviews each of the good faith factors set out in FLA s. 69(6) to determine whether factor is subjective, objective or both, and considers each factor in light of facts. Court then analyses the best interests of the child by application of each of the s. 37(2) factors to the facts.

+

1. Is the party objecting to the move a guardian? If yes, continue. If no, the party lacks standing unless appointed as a guardian of the child.

2. Is there a written agreement or a court order respecting parenting arrangements in place? If yes, proceed under s. 69. If no, proceed under s. 46. Remember that it is immaterial whether the agreement or order is interim or final in nature.

3. Assuming you are proceeding under s. 69, **does the objecting guardian have substantially equal parenting time with the moving guardian?** If yes, apply the test under s. 69(5). If no, apply the test under s. 69(4).

4. Has the moving guardian proposed reasonable arrangements to continue the child's relationship with other guardians and persons with contact? If yes, continue to the issue of good faith. If no, the application must be rejected. Remember that the reasonableness of the proposed arrangements depends on the proposed destination.

5. Does the moving guardian seek to move in good faith? If yes, continue to the issue of the best interests of the child. If no, the application must be rejected. Remember that the determination of good faith may require an assessment of each of the factors set out in s. 69(6) and that these factors may entail both subjective elements concerning the guardian's intentions and objective elements concerning the facts of the case.

6. Is the proposed move in the best interests of the child? If yes, the move should be allowed. If no, the application must be rejected. Remember that the determination of the child's best interests requires an assessment of each of the factors set out in s. 37(2).

+ Essential cases, part two

T.C. v S.C., 2013 BCPC 217, Dhillon J.

- Mother applying to relocate after remarrying and after order giving father equivalent of every other weekend and two evenings each week. Court holds parenting time not "substantially equal." Court interprets good faith test as requiring that mother not moving for "improper reasons," following *Nunweiler v Nunweiler*, and that move is likely to enhance the child's quality of life or her own. Court interprets reasonable arrangements test as requiring the mother to "show how the father's relationship with the child can be preserved, not augmented or enhanced." Court analyzing best interests of child considering each of s. 37(2) factors.

+ Out of time

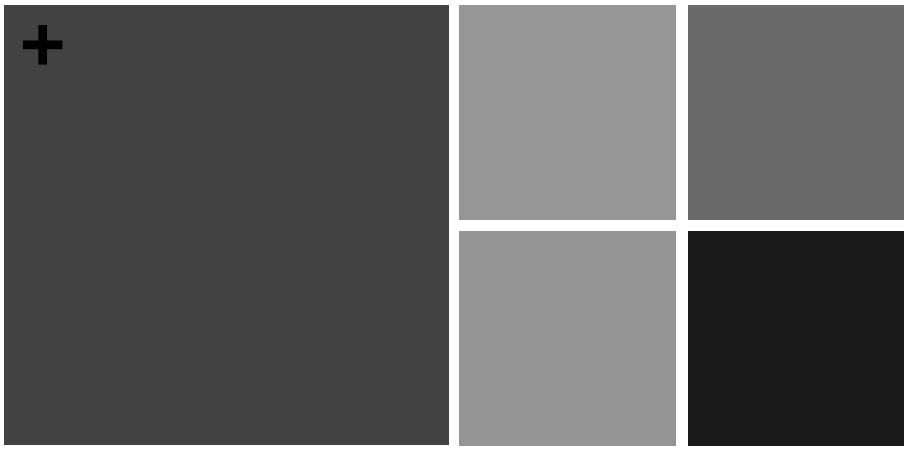
S.B. v N.L., 2013 BCPC 233, Morgan J.

- Father not filing application until 29 days after deadline in FLA s. 68, and not recalling whether he received mother's notice of move. Court holds that degree of proof of delivery depends on "potential repercussions of missing the s. 68 time limit." Court concludes that it's authority to permit or prohibit a relocation under s. 69(2) is not fettered by passing of deadline set out in s. 68. However, to give "full effect" to the goal of s. 68, the court should generally recognize the 30-day limit. In those cases where it is "clear" that a complete analysis be performed under s. 69(3), the court should consider: the reasonableness of the explanation for not filing an objection; the length of delay in filing; and the degree of prejudice to the respondent in allowing the late objection, measured by the date of the proposed relocation and the planning already undertaken.

After the move

J.P. v J.B., 2013 BCPC 168, Merrick J.

- Relocation application resulting in order allowing mother to move. Father seeking to vary parenting arrangements. Court concludes that FLA s. 70 prevents court from "fundamentally changing the parenting arrangements," and that s. 70 intended to "preserve existing arrangements to the extent that is reasonably possible."



Dealing with support.

+ Mutatis mutandis, part one

S.M.L. v R.X.R., 2013 BCPC 123, Donegan J.

- Court reviews FLA ss. 147 and 150, and CSG ss. 1 and 3, and concludes that "basic principles regarding child support" continue to apply under FLA. Court concludes, however, that grounds for varying support orders under FLA s. 152 have been expanded: support orders may be varied retroactively and prospectively; and, orders may be varied for reasons other than a change circumstances.

+ Mutatis mutandis, part two

D.M.P. v G.E.A., 2013 BCPC 117, Skilnick J.

- Application by mother for enforcement and variation of child support retroactive to 1994. Court reviews FLA s. 152(1) allowing for retroactive claims and concludes that case law on retroactive claims unaffected. Court provides excellent summary of *D.B.S. v S.R.G*.

+ Mutatis mutandis, part three

Jensen v Jensen, 2013 BCSC 1373, Master Young

- Application to extinguish arrears accumulating under 1997 order. Court observes that FLA s. 174 is "virtually the same" as FRA s. 96(2).

+ Withdrawing minors

M.A. v F.A., 2013 BCSC 1077, Bruce J.

- In applications to vary child support, question arising as to whether incarcerated 18 year old entitled to support. Court reviews FLA s. 147(1) on obligation to support minors who have "voluntarily withdrawn" and DA s. 2(1) defining child of the marriage as minor who "has not withdrawn." Court concludes that difference in language between DA and FLA would not lead to a different result. Court holds that if child is incarcerated, custodial parent doesn't contribute to the child's support and isn't required to contribute to support of the child, child has voluntarily withdrawn from the change of that parent and is not entitled to child support.

+ The woes of stepparents

D.J. and K.J. v C.K. and T.K., 2013 BCPC 197, Birnie J.

- Stepfather in continuing relationship with mother under FRA order to pay child support to father, father seeking to vary order. Pretrial application to address effect of FLA s. 149(3), applicant arguing that respondent cannot apply to vary order as order could not be made under FLA until the stepfather and mother have separated. Court cites *D.B.S. v S.R.G.* for propositions that once a child support order is made, the payor is under continuing obligation to provide support in accordance with income, and that right to apply to vary is thus intrinsic to child support order. Repeal of FRA did not extinguish any rights interests acquired under the FRA.

+ Retroactive variation downwards

S.M.L. v R.X.R., 2013 BCPC 123, Donegan J.

- Application by payor for retroactive variation of child support. Court holds that grounds for varying support orders under FLA s. 152 have been expanded: support orders may be varied retroactively and prospectively; and, orders may be varied for reasons other than a change circumstances. Applying test in s. 152(2), court finds applicant not demonstrating change in circumstances, no lack of disclosure and no discovery of previously unavailable evidence; application dismissed.

+ Retroactive variation upwards

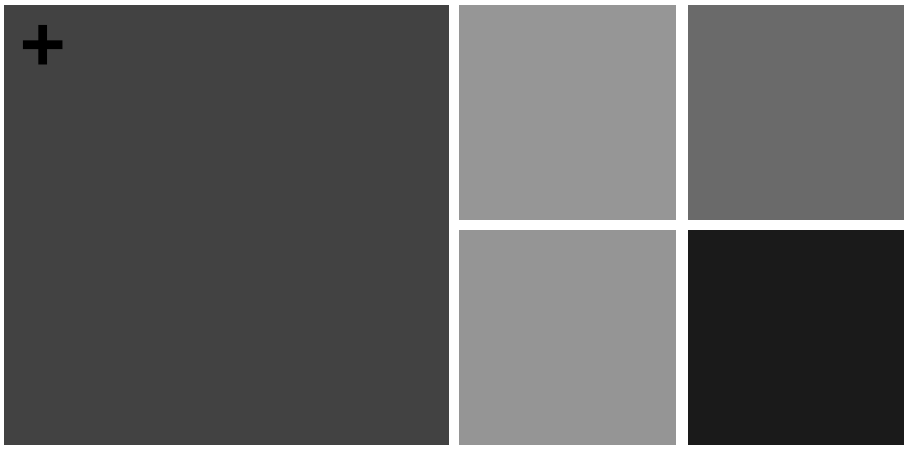
D.M.P. v G.E.A., 2013 BCPC 117, Skilnick J.

- Application by recipient under FLA s. 152 for enforcement and variation of child support retroactive to commencement of 1994 order. Court holds that at least one of s. 152(2) factors must be proven before retroactively varying order, and finds change of circumstances as defined by CSG s. 14. Court applies *D.B.S. v S.R.G.* to determine whether award should be made allows application; arrears of $121,000 owing.

+ Cancellation of interest

Jensen v Jensen, 2013 BCSC 1373, Master Young

- Court dismissing application to extinguish arrears accumulating under 1997 order. Court declines to reduce or cancel interest accumulating on the arrears under s. 174, holding that "the claimant has waited for years for this money and the respondent has made no effort to pay, so he should pay her interest on every outstanding monthly payment."



Dividing property and debt.

Amending old pleadings, part one



Reynolds v Huard, 2013 BCSC 1251, Master McCallum

- Unmarried parties separating in 2003; action commenced in 2008 seeking trust interest in property, with trial set for 2014 after several adjournments. Claimant applying to amend pleadings to claim property relief under FLA. Given that claim under FRA Part 5 never advanced, court concludes claimant seeking to bring a new claim rather than amend an existing claim. New claim statute barred as a result of FLA s. 198(2) requirement that claims by unmarried spouses be brought within two years of separation.

+ Amending old pleadings, part two

Bressette v Henderson, 2013 BCSC 1661, Griffin J.

- Unmarried parties separating in 2012; claimant commencing action seeking orders in relation to jointly-owned property and trust interest in other property. Claimant amending claim to plead under FLA; respondent objecting on basis that whole of relationship occurred before FLA came into effect. Court holds that FLA s. 252 does not address property rights of unmarried spouses, and that amendments were made within limitation period of s. 198(2). Court notes that a "decision on the transition provisions will have significant implications on the rights of common-law spouses who separated within two years of the *FLA* coming into force" and declines to decide the issue in the absence of "full legal argument." However, court holding that an equal division of family property would be significantly unfair under s. 95 and that it would make the same order the FLA as under the common law.

+ Dividing property under the FLA

Asselin v Roy, 2013 BCSC 1681, Harvey J.

- Parties cohabiting in 1987, signing cohabitation agreement in 1990 and separating in 2011. Trial concerning the division of property, parties electing to apply FLA; claimant seeking to have agreement set aside. Court finds parties to be spouses under FLA s. 3 and divides property applying FLA Part 5, with the triggering event being the date of separation. Court holds that FLA intended "to create more certainty for litigants in the division of their assets," and that the "broad judicial discretion formerly available under the *FRA* has been replaced with a more formulaic approach to both the identification and division of family property."

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- Respondent concedes agreement significantly unfair within meaning of s. 93 as to one property acquired after the execution of the agreement but not with respect to others. Claimant arguing that agreement unfairly entered into, not witnessed and signed without disclosure or legal advice. Court holds that s. 93 requires two-part test, the first assessing the formation of an agreement and the second assessing its effect; court concludes that agreement is "procedurally unfair" under s. 93(3) and should be set aside.

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- After setting aside agreement, court then identifies which property is family property and which is excluded, noting that "the court merely has to determine that such property existed on the date of separation and at least one spouse owned it or had a beneficial interest in it." Noting that onus lies on party to prove that property is excluded property, court determines family property, property proven to be excluded property and family debt. Court not finding equal division unfair and ordering equal division, remarking that court will "leave it to others to formulate an intelligible definition of 'significantly unfair'."

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- Court notes significant deficits in evidence provided as to: value of property at date of cohabitation, value of pensions at date of cohabitation and at present, value of inheritances when received and at present, use of inheritances during relationship, and source of funds used to acquire property during relationship. Comments that "future litigants referencing this decision would be well advised to avoid some of the problems encountered by the parties in this litigation by preparing a Scott Schedule detailing the assets and liabilities of each party as of the date of separation," and, one expects, at the date of the commencement of the spousal relationship.

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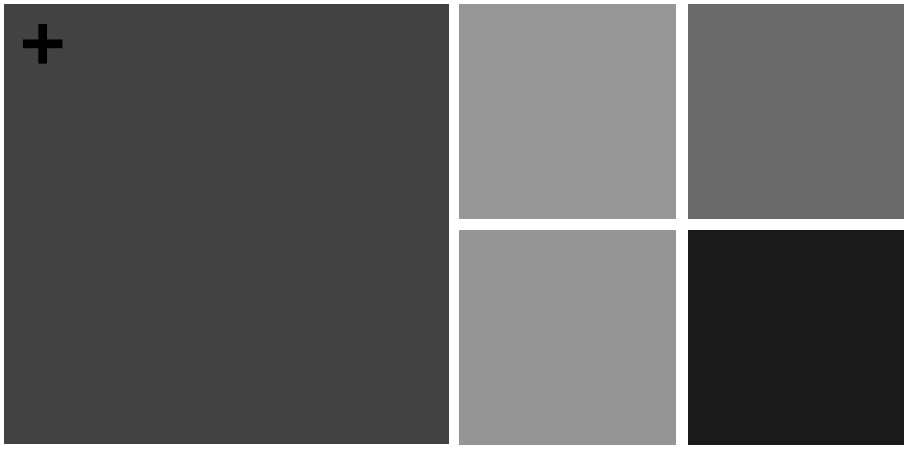


Family violence and protection orders.

+ "Family member"

D.J.K. v. J.J.K., 2013 BCPC 223, Donegan J.

- Application for protection order by father in respect of his adult child. Applicant determined to be "family member" under FLA s. 1, and "at-risk family member" under s. 182. Order made that respondent have no direct or indirect with applicant except by telephone and that police remove respondent from applicant's property.

+ Protection of children, part one

D.N.L. v C.N.S., 2013 BCSC 809, Pearlman J.

- Review of parenting arrangements in context of spanking allegation against father investigated by MCFD. Court notes terms of FLA s. 37(3) that order is not in best interests of child unless it maximally protects child's well-being and irrelevance of conduct unless, under s. 37(4), it substantially affects a s-s. (2) factor. Court makes no finding as to whether spanking constitutes family violence under s. 1, but observes that father's behavior disturbs child, causes her anxiety, diminishes her trust in him and causes her emotional harm. Considering child's views, court terminates father's overnight time with child.

+ Protection of children, part two

Van Kooten v More, 2013 BCSC 1076, Masuhara J.

- Trial between unmarried spouses concerning property, support and parenting issues. Court finds "some evidence" of family violence, but that incidents not related to the child nor as "dramatic" as alleged by mother and concluding that incidents do not place the child at risk or interfere with parties ability deal with each other. Court imposes "equal parenting regime."

+ Harassment and threats

N.P. v I.V., 2013 BCSC 1323, N. Brown J.

- Application for protection order granted on basis of "history of harassment and threats, not to mention breaches of previous probation orders." No contact and no go orders made in respect of the mother, children and stepfather, as well as order not to possess weapons.

+ Litigation harassment, part one

M.W.B. v A.R.B., 2013 BCSC 885, N. Brown J.

- Extremely high-conflict parties applying to vary and enforce trial decision, father seeking to have primary residence of one child. Court observes that family violence is matter to be considered in assessing child's best interests under FLA s. 37(2), and that definition of family violence includes harassment threats, restricting financial autonomy and damaging property. Court concludes that mother's conduct of litigation and behaviour after trial meeting definition of family violence and to be considered in assessing child's best interests. Court reviews each s. 37(2) factor and making order sought by father.

+ Termination of protection orders

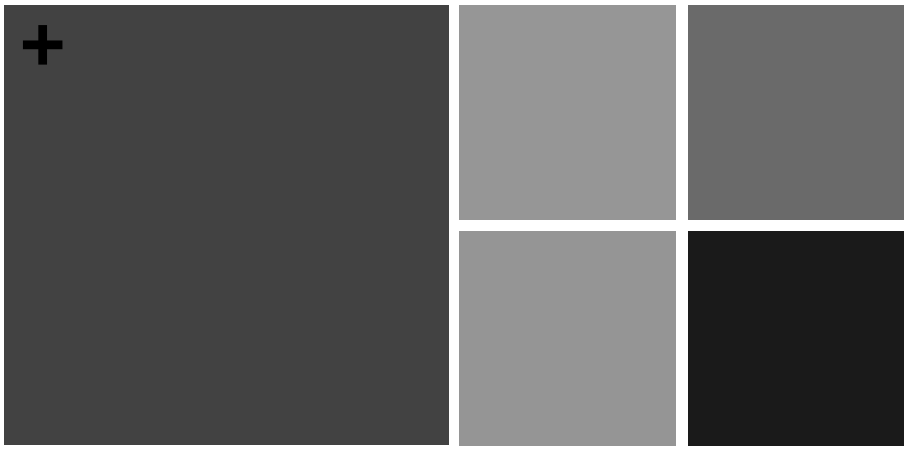
Chancellor v Chancellor, 2013 BCSC 1519, Barrow J.

- Application by father for termination of restraining orders made in 2009 and 2011. Court considers history of family violence, including criminal charges, under FLA s. 184(1)(a), mother's fear of father under s-s. (f) and the risk posed by a pending judgment under s-s. (g), and ordering continuation of restraining orders.

Expiration date

L.M. v. L.S., 2013 BCSC 796, Romilly J.

- Application for protection order following complaint of violence against the claimant. Court concludes parties feel "absolute animosity" toward each other and makes protection order upon considering FLA s. 184 (a), (b) and (c). Each required required to not attend the residence of the other and to not communicate except by email or text for the purpose of arranging access; order to expire in five year, with leave to the parties to apply to shorten or extend under s. 187.



People behaving badly.

+ Litigation harassment, part two

M.J.S. v. A.D., 2013 BCPC 230, Saunders J.

- Application by paternal grandfather for leave to intervene and be added as a party under PCFR 20; application by mother to prohibit grandparents from making further applications under FLA s. 221. Earlier dismissing grandparents' application for access. Application for intervenor status dismissed as: rights of grandparents not material or connected to issues between parents; grandparents cannot seek to vary orders in guise of intervenor; granting status would result undue burden for mother. Application for prohibitory order under s. 221(1) allowed. Court further making order for payment of $2000 by grandparents under s. 221(2)(c)(ii) "because of the ongoing and relentless abuse of the court's process."

+ Failure to produce

J.D.G. v J.J.V., 2013 BCSC 1274, Punnett J.

- Claimant failing to produce financial statement within time following service of claim, failing to produce JCC and failing to produce within time specified by order made at JCC. Application for contempt finding and fine pursuant to FLA s. 213 brought by respondent; statement produced two days before hearing. Court reviewing comments on FRA s. 92 in White Paper, text of FLA s. 213, government FLA materials and Hansard transcript of AG's remarks to conclude that the FLA "intended to give the court more powers to make orders as to the conduct of parties" and that s. 213 "is to be used to secure proper disclosure in a timely and cost efficient way," and "therefore requires a robust application to accomplish that end." Court ordering that respondent have costs thrown away fixed at $1500 and that claimant pay penalty of $500 to the respondent.

Family Law Act **Update**





Legal Services Society
2013 Training Conference

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Reported Cases Considering the *Family Law Act* Between 18 March and 24 September 2013[*]

John-Paul Boyd
25 September 2013

D.B.K.* v *D.M.K., 2013 BCSC 500, Ball J., 22 March 2013

Application for orders on parenting issues filed before FLA in effect. Court applies FLA s. 6(3) for the proposition that an agreement respecting a family law dispute is binding on the parties. Court urges parties to pursue non-court mechanisms to resolve future disputes. Court characterizes agreements filed with the court as "court orders" with same effect.

Chen v Ho, 2013 BCSC 533, Gray J., 28 March 2013

Unmarried parties seeking orders on property entitlements and spousal support, heard entirely before FLA in effect. Property interests dealt with under unjust enrichment and law of trusts following *Kerr v Baranow* and *Pecore v Pecore*. Entitlement to spousal support agreed, quantum and duration determined under SSAG, order presumably made under FLA.

D.J.K. v. J.J.K., 2013 BCPC 223, Donegan J., 2 April 2013

Application for protection order by father in respect of his adult child. Applicant determined to be "family member" under FLA s. 1 and "at-risk family member" under s. 182. Order made that respondent have no direct or indirect with applicant except by telephone and that police remove respondent from applicant's property.

K.J.B. v G.A.B., 2013 BCSC 562, Ball J., 2 April 2013

Variation of interim parenting order made before FLA in effect. Court finds no change in circumstances justifying change in order, relying on FLA s. 216(3) rather than s. 47. Court nonetheless makes order that the parties "share parenting time and exercise shares parenting responsibilities" on the terms of the interim order.

M.K.M. v P.S.M. and S.S.M., 2013 BCSC 579, Verhoeven J., 4 April 2013

Orders sought on parenting arrangements, support and division of property between a high-conflict couple and the father's cousin, heard entirely before FLA in effect. Under transitional provisions, FRA applied to divide property. Court analyzes

[*] This paper digests cases published on CanLII up to and including 24 September 2013. Cases of special significance are indicated with underlining.

parenting issues using law established under the DA and FRA, with liberty to the parties to apply "with respect to the exact nature of the orders" as they will be drawn under the FLA. Parenting coordinator appointed under FLA s. 15; mother given sole custody under DA; order for retroactive spousal support made considering DA and FLA.

G.A.G.R. v. T.D.W., 2013 BCSC 586, Butler J., 5 April 2013

Hague Convention has the force of law in BC pursuant to FLA s. 80, convention applied to determine application for return of child to El Salvador. HC art. 12 read in conjunction with FLA s. 37(2)(b) to receive views of the child. Application dismissed.

D.L.D. v R.C.C., 2013 BCSC 590, M. Caldwell, 5 April 2013

Submissions on parenting issues under DA and FRA. FLA s. 37(1) cited for proposition that court must consider only the best interests of the child, and that *status quo* is to be considered in context and is not a trump card. Court orders that parties will both remain guardians with the respondent having the right to a final decision on parental responsibilities in the event of an impasse. Financial restraining order made under FLA s. 91.

Kim v Hong, 2013 BCSC 587, Griffin J., 5 April 2013

Case on property and support heard entirely before FLA in effect. As parties did not express disagreement on guardianship issues, court makes no order under FLA. Statutory basis of orders for child support and spousal support unclear.

Silverman v Silverman, 2013 BCSC 601, Grauer J., 8 April 2013

Applications to vary final order on parenting arrangements. Court applies FLA s. 45(1)(d) and *parens patriae* jurisdiction to appoint parenting coordinator and defining role of parenting coordinator to include: matters under FLA s. 17(a); special expenses; conduct of parties' parenting time and parental responsibilities, as set out in order; and, matters under FLA Reg. s. 6(3) and (4). Parties to "continue with joint guardianship of the children."

Peterson v Lebovtiz, 2013 BCSC 651, Ball J., 16 April 2013

Application to terminate spousal support with retroactive effect, heard before FLA in effect. Court notes "grossly unfair" test under FRA continued under FLA, and that applicant "has acted arbitrarily or unreasonably to … hide his financial circumstances," thereby adversely affecting his ability to pay support and constituting misconduct under FLA s. 166(b). Application dismissed with costs to respondent.

O.C.C. v A.C., 2013 BCSC 682, N. Brown J., 19 April 2013

Application for review of interim Provincial Court order under JRPA, on basis of court's informal conduct of hearing and failure to put parties under oath or affirmation. Court notes enormous ambit of procedural alternatives available to judges under PCFR and that "a certain element of procedural informality, especially with unrepresented litigants, is often necessary, even desirable, and that the new *FLA* explicitly calls for as much procedural informality as possible."

H.J.S. v K.C.S., 2013 BCSC 998, Barrow J., 19 April 2013

Competing applications to enforce or set aside a separation agreement dealing with property, heard by summary trial. Application to set aside brought under FLA s. 93, court cites s. 252 to conclude FLA of no application, but comments that s. 93 "is an attempt to codify the law" in *Miglin v Miglin* and *Rick v Brandsema*, and applying s. 93 principles to analyze agreement. Court defines "substantial unfairness," not "*significant* unfairness," as "a substantial deviation from what would be the result upon the application of the applicable statutory regime."

J.C.P. v J.B, 2013 BCPC 94, Merrick J., 23 April 2013

Parties separating after birth of child. Application to decide effect of FLA s. 251 in determining whether party is person with contact or guardian, brought in advance of trial but after an interim order providing father with access and an entitlement to be advised of matters concerning the child's health care. Mother arguing order provides only access and that father therefore not guardian. Court observes that interim order did not determine custody or guardianship and viewing purpose of s. 251 as guide to interpretation of pre-FLA orders and not intended to deprive party of substantive rights. Court concluding that terms of order regarding health care providing father with measure of guardianship in any event, and that father is therefore a guardian.

Trudeau v Panter, 2013 BCSC 706, Rogers J., 23 April 2013

Proceeding between unmarried parties for interest in property and spousal support. Property claims determined under law of unjust enrichment. Court determines that parties did not meet indicia of being in a "marriage-like relationship," required for status as spouses under FLA s. 3(1)(b) citing Court of Appeal in *Gostlin v Kergin*. Court concluding that "the evidence does not support the proposition that they were committed to a permanent relationship," and that parties therefore not spouses under either FRA or FLA.

S.R.M. v N.G.T.M., 2013 BCSC 719, M. Baker, 25 April 2013

Application for disclosure of psychologist's records. Respondent objecting on basis that under FLA s. 37(1) court may only consider best interests of children, that their

interests will be negatively affected if documents are produced, that FLA suggests a narrowing of relevance and that FLA must be considered in action under DA. Court verges on discussion of paramountcy issue but concludes best interests of children are the paramount consideration under the DA and that the requested records were relevant.

G.P. v. M.J.R.P., 2013 BCSC 746, Crawford J., 30 April 2013

Application to vary interim order giving father sole custody and both parents joint guardianship. Court observes that under FLA both parties are guardians. Court provides adaptation of Joyce model:

> UPON THE COURT being advised that the name and birth date of each child is as follows:
> (child 1), born (born 1)
> (child 2), born (born 2)
> (the "Child(ren)"
>
> AND UPON being satisfied that _____and_____ are the guardians ("the Guardians") of the Child(ren) under s. 39(1)/s.93(3) of the *Family Law Act*;
>
> THIS COURT ORDERS THAT:
>
> 1. Parenting time and residency shall be agreed upon by the Guardians, and shall be shared on the basis of the father's work schedule.
>
> 2. Father shall have primary responsibility for school and activity registration and designating the children's medical professionals and shall provide the institutions and professionals with the contact information for both guardians.
>
> 3. Both Guardians may request and receive from third parties health, education or other information respecting the children.
>
> 4. During a Guardian's parenting time, that Guardian may exercise the parental responsibility of making day-to-day decisions affecting the Child(ren) provided however that such Guardian must advise the other Guardian(s) of any matters of a significant nature affecting the Child(ren) occurring during his/her parenting time.
>
> 5. Each Guardian will consult the other Guardian(s) about any important decisions that must be made in respect of the Child(ren) and will try to reach agreement concerning these important decisions.
>
> 6. In the event the Guardians cannot reach agreement with respect to any major decision despite their best efforts, father will have final decision-making power, provided however that the other guardian may seek mediation or, under s. 49 of the *Family Law Act*, seek a review of any such decision if he/she believes that such decision is contrary to the best interests of the Child(ren).

S.T.H. v R.M.G., 2013 BCPC 114, Hamilton J., 30 April 2013

Application by father for sole guardianship of two children. Parties had joint custody and joint guardianship of one child under consent order. Order did not address their status in relation to second child. Court holds that as a result of consent order parties are both guardians of first child under FLA s. 251, and that both parties are guardians of second child under s. 39. Court concludes that only device to give a guardian "sole guardianship" is to remove the other guardian under s. 51(1)(b), however FLA provides no guidance regarding factors to consider. Court turns to s. 37(1) for proposition that only best interests of child are to be considered and reviews each factor set out in s. 37(2) to conclude that both parties will remain guardians. Court holds that under FLA, government meant to establish a presumption of guardianship and elected not to enact a provision allowing a presumptive guardian to apply for sole guardianship, except by termination of another guardian's status as a guardian.

J.E.H. v P.L.H., 2013 BCSC 752, Abrioux J., 1 May 2013

Trial on property division, care of children and support, heard after settlement of issues regarding parenting schedule and concluding before FLA in effect. Court provides very helpful survey of case authorities on determining parenting schedules and allocation of decision-making authority. Decision based on best interests of the children and specific facts of case. Court observes that the principles of the DA do not apply to guardianship, and concludes that same order would have resulted under either FRA or FLA. Property issues resolved by application of FRA; statutory basis of orders for child support and spousal support unclear.

J.L.M. v G.A.T, 2013 BCPC 96, Frame J., 1 May 2013

Application for sole guardianship by mother. Parties living together at time of child's birth and father therefore guardian under FLA s. 39(1). Court concludes presumption of guardianship under s. 39(1) is subject to s. 39(2), and that s-s. (2) allows court to make an order that a person is not a guardian. Court observes that Provincial Court not clearly empowered by FLA to make declaratory orders, but that s. 39 would be meaningless without that power. Court noting that s. 31 gives the court to make declaratory orders in relation to parentage. Court holds that it would have made an order to a similar effect under s. 51(1)(b) terminating guardianship if it had not concluded that it had jurisdiction under s. 39(2).

D. v D., 2013 BCPC 135, Merrick J., 2 May 2013

Combined CFCSA and FRA actions. Parents were guardians of children as a result of FLA s. 251 and earlier order for sole custody and joint guardianship; three relatives seeking orders appointing themselves as guardians and removing guardianship from parents. Court relieves applicants of obligation to file Form 34 under PCFR 18.1(4), holding that the affidavit "is not required as the evidence at trial establishes

the information required in each case." Court conlcuding that evidence supports appointment of two of three relatives. As to termination of guardianship, court holds that such orders should not be made unless in the best interests of the children, and "can only occur in the most extreme situations" after assessing "whether, through an allocation of parenting responsibilities, it continues to be in the best interests of the children that the parent remain a guardian." Court not satisfied that guardianship status of parents should be terminated, and makes orders allocating parental responsibilities and parenting time among four guardians. Court additionally making conduct orders under ss. 222 and 223 preventing parents from bringing further applications without permission of a judge.

A.K. v M.K., 2013 BCSC 1275, Holmes J., 3 May 2013

Trial of claims between married spouses on parenting arrangements for child following earlier divorce order. Claims made under both DA and FLA, and previous interim orders unclear as to statutory basis. Court holds that "to the extent that there is any inconsistency" between the DA and the FLA, the doctrine of paramountcy "might" suggest that the DA should govern. However, "it would respond more closely to the evidence and submissions the parties presented" to apply the FLA; the court would have made orders to the same result under the DA. Court determines that both spouses are guardians and orders that they share all parental responsibilities, with either having the right to apply to court in the event of a disagreement.

L.J.P. v D.L.B., 2013 BCPC 104, Frame J., 6 May 2013

Relocation application where no order or agreement is in place. Parent opposing move seeking order requiring parties to participate in dispute resolution on the strength of FLA ss. 45(1)(d) and 224(1). Court provides helpful review of mobility authorities, and applies s. 46 to conclude that child should reside with moving party despite absence of factor clearly compelling a decision one way or the other. Court confirms that the parents are guardians and directs that parties attend counselling under s. 224 to improve their communication skills. Court adopts Joyce-like guardianship proposed by counsel including a term that:

> Each party shall:
>
> 1. put the best interests of the child before the parent's own interest;
>
> 2. do everything necessary to ensure the child is disrupted as little as possible by the separation; and
>
> 3. exchange information about the wellbeing of the child, including progress in school, extracurricular activities and any illnesses of the child while he is in the care of the other parent.

L.M. v. L.S., 2013 BCSC 796, Romilly J., 7 May 2013

Trial on parenting arrangements and a protection order between married spouses separating following complaint of violence against the claimant. Court cites *Yu v Jordan* for the proposition that "where proceedings are pleaded on the basis of the *Divorce Act* and the provincial family law legislation, clarity about which statute the relief is granted under is ideal," and makes orders for custody and access under DA. Court makes protection order upon considering FLA s. 184 (a), (b) and (c), and requires each party to not attend the residence of the other and to not communicate except by email or text for the purpose of arranging access; order to expire in five years, with leave to the parties to apply to shorten or extend.

Nguyen v Nguyen, 2013 BCSC 812, Jenkins J., 8 May 2013

Case regarding enforceability of marriage agreement and other issues. As property-related proceedings commenced before the FLA came into effect, FLA inapplicable under FLA s. 252(2).

D.N.L. v C.N.S., 2013 BCSC 809, Pearlman J., 8 May 2013

Review of parenting arrangements in context of spanking allegation against father that was investigated by MCFD. Court observing terms of FLA s. 37(3) that order is not in best interests of child unless it maximally protects child's well-being and irrelevance of conduct unless, under s. 37(4), it substantially affects a s-s. (2) factor. Court makes no finding as to whether spanking constitutes family violence under s. 1, but observing that father's behavior disturbs child, causes her anxiety, diminishes her trust in him and causes her emotional harm. Considering child's views, court terminates father's overnight time with child.

Collier v Campbell, 2013 BCSC 825, Fitzpatrick J., 10 May 2013

Application terms of consent order made at time of divorce regarding parenting arrangements and child support. Court cites statutory under both DA and FLA and makes orders on parenting arrangements, child support and special expenses; statutory basis of orders for child support and spousal support unclear.

C.P. v B.C., 2013 BCPC 112, Donegan J., 10 May 2013

Interim application regarding father's parenting time and child support. Child's relationship with father severely impaired, and although child wishing to see father frequently, not wishing overnight visits. Child support, including retroactive order, made under FLA. Court observes that both parties are guardians. Court gives "considerable weight" to child's views, citing *L.E.G. v A.G.* and reviews each of FLA s. 37(2) factors. Court makes conduct orders under s. 222 requiring father and child to engage in counselling, parties to attempt mediation and use of parenting

coordinator. Court then exercises authority under s. 223 to make case management order adjourning matter while parties attempt to resolve dispute.

C.K.B.M. v G.M., 2013 BCSC 836, Melnick J., 13 May 2013

Applications to vary order on parenting arrangements. Claims advanced under both DA and FRA; given reference to child as "child of the marriage" and applying doctrine of paramountcy, court concludes that order made under DA following *Yu v Jordan*. Court adopts the following formulation of the Joyce model for the DA:

> The parties will have joint custody of the child of the marriage on the following terms:
>
> 1. in the event of the death of a party, the surviving party will have sole custody of the child;
>
> 2. each party will have the obligation to advise the other party of any matters of a significant nature affecting the child;
>
> 3. each party will have the obligation to discuss with the other party any-significant decisions that have to be made concerning the child, including significant decisions about the health (except emergency decisions), education, religious instruction and general welfare of the child;
>
> 4. the parties will have the obligation to discuss significant decisions with each other and the obligation to try to reach agreement on those decisions;
>
> 5. in the event that the parties cannot reach agreement on a significant decision despite their best efforts, the party with the primary residence of the child will be entitled to make those decisions and the other party will have the right to apply for an order respecting any decision the party considers contrary to the best interests of the child, under s. 16(1) of the *Divorce Act;* and
>
> 6. each party will have the right to obtain information concerning the child directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third-party caregivers.

Rossi v Barbieri, 2013 BCSC 832, Kloegman J., 13 May 2013

Respondent applies for dismissal of action on grounds that the claimant does not meet the FRA or FLA definition of spouse. Court finds parties not living together for at least two years and dismissing action.

S.M.L. v R.X.R., 2013 BCPC 123, Donegan J., 14 May 2013

Application by payor for retroactive variation of child support. Court reviews FLA ss. 147 and 150, and CSG ss. 1 and 3, and concludes that "basic principles regarding child support" continue to apply under FLA. Court also concludes that grounds for varying support orders under FLA s. 152 have been expanded: support orders may be varied retroactively and prospectively; and, orders may be varied for reasons other than a change circumstances. However, applicant not demonstrating change in

circumstances, lack of disclosure or discovery of previously unavailable evidence; application dismissed.

J.L. v L.D., 2013 BCPC 201, G. Brown J., 15 May 2013

Parties having joint custody and joint guardianship of their two children with a week-on/-off parenting arrangement by court order. As a result of an intervention by the MCFD, the children's care was given from their mother to their maternal grandmother; eldest child stops seeing the father for other reasons. Father seeking to be the only guardian of the youngest child and to have time with the elder child at her discretion. Court reviews unfortunate circumstances of mother and makes order that parties continue to be the only guardians of the children and that they share all of the parental responsibilities enumerated in FLA s. 41, but that the mother's responsibilities would be delegated to the maternal grandmother pursuant to s. 43(2) and that her parenting time would be delegated to the maternal grandmother under s. 42(1).

D.P. v. S.S. and L.S., 2013 BCPC 181, Gallagher J., 16 May 2013

Application by all parties, parents and maternal grandmother, for guardianship and parenting time of a child. Both parents struggled with drugs and alcohol, mother placed child into care of material grandmother many years ago. Court holds that father not presumptively a guardian as he never lived with the child; the maternal grandmother is not a guardian as she is not a parent; and that the mother "appears" to be a guardian as a result of living with the children briefly at the child's birth. Court gives interim guardianship to all three parties for 90 days to allow time for affidavits required by PCFR 18.1 to be filed, and orders that all three have parental responsibilities under FLA s. 41 and that the mother and father have specified parenting time with the child. Court makes conduct order under s. 224(1)(a) that parties attend mediation on a monthly basis until further court order.

M.W.B. v A.R.B., 2013 BCSC 885, N. Brown J., 21 May 2013

Extremely high-conflict parties applying to vary and enforce trial decision, father seeking to have primary residence of one child. Court observes that family violence is matter to be considered in assessing child's best interests under FLA s. 37(2), and that definition of family violence includes harassment, threats, restricting financial autonomy and damaging property. Court concludes that mother's conduct of litigation and behaviour after trial meeting definition of family violence and thus to be considered in assessing child's best interests. Court reviews each s. 37(2) factor and making order sought by father.

Hansen v Mantei-Hansen, 2013 BCSC 876, Humphries J., 21 May 2013

Trial concerning place of children's residence, in BC with father or in Saskatchewan with mother. DA pled in claim, DA and FRA in counterclaim. Citing *Vaandering v*

Vaandering and *Spiers v Spiers*, court holds that when there is no "operational incompatibility" between federal and provincial legislation an order can be made under either act although it is preferable to use federal legislation, and when an operational incompatibility exists the doctrine of paramountcy prevails and federal legislation must be used. Court reviews mobility authorities under DA and FRA and provisions of FLA and concludes "the new *Act* is not easily and conveniently compatible with the *Divorce Act* because the concept of guardianship in the new *Act* subsumes the concept of custody." Court determines that DA applies and analyzes children's best interests under that act to conclude that parties would have joint custody, on the following terms, with the children's residence with the father:

1. Each parent will have the same duties, rights, responsibilities and input in respect of the children which they had while co-parenting, except for those responsibilities of everyday parenting that go with physical care and control of the children, which will be exercised by each parent during their respective times with the children.

2. In the event of the death of a spouse, the surviving spouse will have sole custody of the children, and the children will reside with the surviving spouse.

3. Each parent will have the obligation to advise the other parent of any matters of a significant nature affecting the children.

4. Each parent will have the obligation to discuss with the other parent any significant decisions to be made about the health (except emergency decisions), education, religious instruction and general welfare of the children.

5. The parents will have the obligation to discuss significant decisions respecting the children with each other and the obligation to try to reach agreement on those decisions.

6. In the event that the parents cannot reach agreement on a significant decision respecting the children despite their best efforts, the parent with primary residence will be entitled to make those decisions and the other parent will have the right to apply to the court to review any decision the parent considers contrary to the best interests of the children.

7. Each parent will have the right to obtain information concerning the children directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third party care givers.

A.J.H. v L.C.H., 2013 BCSC 900, Rogers J., 22 May 2013

Parties making agreement under FRA providing mother with sole custody and father with access; father applying to set aside sole custody provision. Court confirms that under FLA s. 251, mother is child's only guardian. Court declines to vary agreement as no evidence supporting mistake and no change in circumstances. Court suggests father apply for appointment under s. 51.

D.M.P. v G.E.A., 2013 BCPC 117, Skilnick J., 22 May 2013

Application by mother for enforcement and variation of child support retroactive to 1997. Court observes FLA s. 152(1) allowing for retroactive claims and that case law on retroactive claims unaffected. Court provides excellent summary of *D.B.S. v S.R.G.* as leading authority. Court then analyzing standing of children aged 18, 20 and 21 as "children" within the meaning of s. 146, applying *Darlington v Darlington*, *Farden v Farden* and *McNulty v McNulty*, to determine whether retroactive order can be made.

T.F. v A.D., 2013 BCPC 205, G. Brown J., 24 May 2013

Application to determining parenting arrangements of child following interim order for sole custody to mother and intervention of MCFD. Court observes that as a result of the interim order, mother is "technically speaking" the child's only guardian. However, given extent of father's contact with child, court "makes" father a guardian under FLA s. 39(3)(c). In light of disagreements on parenting issues and father's instability, arrest on drug charges and bullying behaviour, all parental responsibilities under s. 41 allocated to mother.

S.G. v J.P., 2013 BCPC 126, Morgan J., 24 May 2013

Relocation case between guardians with equal parenting time. Court reviews FLA ss. 65 to 69 and finds mother's failure to provide notice of intention to relocate while FRA in force of no consequence. Court reviews evidence and concludes that mother's application to move made in good faith as not motivated by a desire to restrict father's parenting time or "any other inappropriate reasons," and that mother's proposed arrangements are reasonable, but mother not establishing that move is in child's best interests under s. 37 as a result of child's special needs and establishment of an effective education program at her current school.

C.L.L. v S.W.J., 2013 BCSC 917, Punnett J., 27 May 2013

Application for fine for non-disclosure under FLA s. 213 in context of child support application, based on failure to disclose tax information by date specified in order. Court not ordering penalty as respondent had provided an explanation and had complied with intent of order.

D.G. v A.M., 2013 BCPC 134, Burdett J., 3 June 2013

Father applying for "sole guardianship" of child in context of combined CFCSA and FLA case. On the facts, both parents guardians under FLA s. 39(1). Court not removing mother as guardian but ordering that child remain in care of father, that mother have supervised parenting time, and that father have "sole parental

responsibilities" under s. 41, save that mother have right to information about child's health and education under s. 41(1)(j).

L.G. v. R.G., 2013 BCSC 983, N. Brown J., 4 June 2013

Application to divide pension. Court applies FRA to divide pension as case commenced before FLA coming into force, but observes that "little substantive difference lies between those provisions of the *FRA* and the *FLA*" for dividing pensions and that "the two acts differ chiefly in the standards they expect a judge to apply before they exercise discretion to order an unequal division of a family asset." In light of claim for reapportionment, court nonetheless determines that "significant unfairness" under FLA s. 95(1) "essentially is a caution against a departure from the default of equal division in an attempt to achieve 'perfect fairness'" and that "only when an equal division brings consequences sufficiently weighty to render an equal division unjust or unreasonable should a judge order depart from the default equal division." Court concludes that same decision would have resulted under FRA or FLA.

G.B. v L.A.P., 2013 BCSC 1490, Watchuk J., 4 June 2013

Application to determine choice of child's kindergarten. Court determines that as matter concerns child's education, it is "an issue respecting guardianship" which will also affect the parenting arrangements for the child. Court holds that test is set out in FLA s. 37, and that court must consider "all of a child's needs and circumstances" in addition to the s. 37(2) factors. Court then analyzing issue under each of s. 37(2) factors.

Rashtian v Baragoush, 2013 BCSC 994, N. Smith J., 5 June 2013

Trial of property and debt issues and mother's claim for sole custody and father's claim for joint custody and children's primary residence. Claim sought orders in DA and FRA, counterclaim sought orders under FRA. Court relies on *Hansen v Matei-Hansen* to "deal with custody" under the DA, "supplemented as necessary by orders under the *FLA* on guardianship." Court orders that parties have joint custody, and as DA "does not deal with guardianship," and does not make order disturbing presumption under FLA s. 39(1) that parties are both guardians. Further to s. 211 assessment, court orders that all parental responsibilities be exercised by the parent with whom the children are living at the time, under s. 42(2) and appoints parenting coordinator under s. 15. Court observes that FLA allows for division of debts and that under FRA debts could only be recognized through reapportionment of assets.

M.J.S. v. A.D., 2013 BCPC 230, Saunders J., 6 June 2013

Application by paternal grandfather for leave to intervene under FRA s. 18, now FLA s. 204, and be added as a party under PCFR 20; application by mother to prohibit grandparents from making further applications under FLA s. 221. Earlier order

giving mother sole custody with supervised access to father and dismissing grandparents' application for access. Application to be added as intervenor dismissed as: personal interests of grandparents unaffected by outcome, and rights of grandparents not material or connected to issues between parents; grandparents cannot seek to vary earlier order in the guise of intervening; and, granting intervenor status would result in undue burden for mother. Application for prohibitory order under s. 221(1) allowed due to conduct of the grandparents over the previous three years, and, in particular, the conduct of the grandfather "who has interfered with the litigation … and the court process resulting in extended litigation and numerous frivolous applications to the court." Court further making order for payment of $2000 by grandparents under s. 221(2)(c)(ii) "because of the ongoing and relentless abuse of the court's process."

Van Kooten v More, 2013 BCSC 1076, Masuhara J., 19 June 2013

Trial between unmarried spouses concerning property, support and parenting issues. Court finds "some evidence" of family violence, but that incidents not related to the child nor as "dramatic" as alleged and concluding that incidents do not place the child at risk or interfere with parties ability deal with each other. Court imposes "equal parenting regime" on a modified version of Joyce model adapted for FLA:

> The guardians will exercise all parental responsibilities with respect to the child on the following terms:
>
> 1. in the event of the death of a guardian, the surviving guardian(s) will be the only guardian(s) of the child;
>
> 2. each guardian will have the obligation to advise the other guardian(s) of any matters of a significant nature affecting the child;
>
> 3. each guardian will have the obligation to discuss with the other any significant decisions that have to be made concerning the child, including significant decisions about the child's health (except emergency decisions), education, religious instruction and general welfare;
>
> 4. the guardians will have the obligation to discuss significant decisions with each other and the obligation to try to reach agreement on those decisions;
>
> 5. in the event that the guardians cannot reach agreement on a significant decision despite their best efforts, Mr. More will be entitled to make those decisions and the other guardian(s) will have the right to apply for directions on any decision the guardian(s) consider(s) contrary to the best interests of the child, under s. 49 of the *Family Law Act*;
>
> 6. each guardian will have the right to obtain information concerning the child directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third party care givers; and,
>
> 7. the guardians will maintain a common exchange journal which is to be exchanged when the child is transferred to the other guardians. Each guardian is to record on a daily basis while the child is in its care matters relating to the child including:

a) school - such as events, key dates, report cards, newsletters, outings, assignments, home reading, parent/teacher meetings and homework;

b) health - observations of the child, child's complaints, doctors' appointments, dental appointments, medications, injuries, and diet;

c) social - invitations, activities taken and family events;

d) extracurricular activities - registration, schedules, equipment, and events;

e) clothing;

f) key contact information for doctors, dentists, daycare, sitters, parents emergency contact numbers; and

g) any other matter relating to the care of the child.

M.A. v F.A., 2013 BCSC 1077, Bruce J., 19 June 2013

During application to vary child support, question arising as to whether incarcerated 18 year old qualifying as child of the marriage. Court reviews FLA s. 147(1), relieving parent of obligation to support a minor who has "voluntarily withdrawn," and DA s. 2(1) defining child of the marriage as minor who "has not withdrawn." Original order not stating source of statutory authority for child support, but court concluding that difference in language between DA and FLA would not lead to a different result. Court holds that when child is incarcerated, custodial parent not contributing to the support of the child and not required to contribute to support of the child, child has voluntarily withdrawn from the change of that parent and is not entitled to child support.

J.P. v J.B., 2013 BCPC 168, Merrick J., 19 June 2013

Relocation application between parents who are guardians. Court allows mother to relocate as move proposed in good faith and reasonable arrangements proposed, and father not establishing that move is not in child's best interests. Court concluding that FLA s. 70 prevents court from "fundamentally changing the parenting arrangements," and that s. 70 intended to "preserve existing arrangements to the extent that is reasonably possible.

Berry v Berry, 2013 BCSC 1095, M. MacNaughton, 21 June 2013

Application by father to prevent mother from changing the place of residence of the children, heard after mother had moved from Surrey to North Vancouver. Court holds that a move within the lower mainland "should not be considered a relocation" for DA purposes. Court further holds that tests in FLA ss. 46 and 65 are child-centred and focus "on children's relationships and the impact of a change in residence on those relationships," and that "to qualify as a relocation, the impact must be significant."

K.A.C. v. R.J.M., 2013 BCSC 1103, Cohen J., 24 June 2013

Application by father to change various aspects of separation agreement and for order that children be enrolled in a school closer his home in Cloverdale, brought after mother had moved herself and children from White Rock to Vancouver and enrolled children in Vancouver school. Court concludes enrollment of children in their best interests under FLA s. 37 and not a "flagrant breach or disregard" of access schedule in agreement, however mother should have applied to vary the schedule. Court notes s. 44(4) allowing the court to set aside an agreement it deems not in best interests of child.

Rush v Biggs, 2013 BCSC 1133, Johnston, J., 25 June 2013

Application by mother under Hague Convention for declaration that child wrongfully removed to Indiana and for order for return of child. Court observes that HC has "force of law in British Columbia" as a result of FLA s. 80.

Mular v Lawrence, 2013 BCSC 1158, Cohen J., 28 June 2013

Trial of claim for unequal division of family property under FLA s. 65, in proceeding between married spouses commenced under FRA. Respondent not consenting to proceeding being tried under FLA. Court holding that under FLA s. 252, matter governed by FRA ss. 65 and 66.

Young v Young, 2013 BCSC 1574, Barrow J., 3 July 2013

Application for cancellation of arrears of support owed under separation agreement. Court interprets application as seeking order under FLA s. 148(3) that court set aside potion of agreement addressing child support if it would make a different order. Given change in circumstances, court "varies" child and spousal support obligation on a without prejudice interim basis, without considering tests in s. 164. Court notes that FLA Reg. adopts the CSG with "some variations and modifications."

M.K.A. v A.F.W., 2013 BCSC 1415, M. Young, 5 July 2013

Father applying under FLA s. 69 to prevent mother from relocating with child. Parties' separation agreement giving father parenting time every Thursday evening to Saturday evening and sharing of holidays. Court concludes that father does not have substantially equal parenting time as has child for "approximately 36 percent of the time," and applying s. 69(4) to determine matter. Court finds that move is proposed in good faith as mother had tried to avoid the move and made significant efforts to support the relationship between the child and father; court finds that proposal for parenting time "are reasonable and workable, and very generous." As father failing to show that move is not in best interests of child, move allowed.

Pozzobon v Pozzobon, 2013 BCSC 1226, Grauer J., 10 July 2013

Application under DA to vary order on parenting arrangements. Although matter under DA, court hold factors at FLA s. 37(2) to provide "a useful basis for analyzing where the best interests" of the child lie.

M.C. v D.C., 2013 BCPC 212, Low J., 11 July 2013

Application by father for guardianship of children following 2002 order for joint guardianship and sole custody to mother, and 2007 order giving mother sole custody and sole guardianship. Court observing that father not a guardian pursuant to FLA s. 251. Father not complying with PCFR 18.1, arguing that requirements only apply to person seeking guardianship under s. 39(3). Court holds that PCFR 18.1 makes no distinction in status and is mandatory, and that person applying for guardianship must file PCFR Form 34 affidavit before application can be heard.

L.L.J. v. E.J., 2013 BCSC 1233, M. Keighley, 11 July 2013

Application for support by mother under DA; application to prevent mother and child from relocating by father under FLA, after delivery of mother's notice of intention to relocate. Applications brought subsequent to Provincial Court orders for parenting schedule and restraining parties from changing child's residence. Court holds that welfare of the child is the only concern on relocation applications and that FLA does not "suggest a new direction for the court to take on applications of this nature" and does not "suggest that the legislature has ventured a consideration of 'mobility rights'." Following *Hejzlar v Mitchell-Hejzlar*, court reviews all possible scenarios to consider mother's wish to relocated "in the round" and grants father's application.

Director v C.M. and C.W., 2013 BCPC 200, Rounthwaite J., 15 July 2013

Application by paternal grandmother for guardianship of children, brought in context of CFCSA continuing custody application, if father unsuccessful in having children returned to him. Court concludes children at risk from both parents. Court considers grandmother's application in light of s. 37(2) factors and concludes that it is not in children's interests to be moved from stable foster home to live with a person with whom the children do not have a relationship.

Reynolds v Huard, 2013 BCSC 1251, M. McCallum, 15 July 2013

Unmarried parties separating in 2003, proceeding commenced in 2008 seeking constructive trust interest in property; trial set for 2014 after several adjournments. Claimant now applying to amend pleadings to claim property relief under FLA. Given that claim under FRA Part 5 never advanced, claimant seeks to bring a new claim rather than amend an existing claim. New claim statute barred as a result of

FLA s. 198(2) requirement that claims by unmarried spouses be brought within two years of separation.

Re BC Birth Registration, 2013 BCSC 1262, Loo J., 16 July 2013

Application for adoption of child over objection of father. Parents separating in 2006 and signing separation agreement that mother have custody of child and father have reasonable access, but not specifically addressing guardianship. Court declining to consider whether or not father is a guardian under FLA. Matter decided on basis of father's status as natural parent; application dismissed.

H.D.F. v L.M.F., 2013 BCSC 1301, Holmes J., 16 July 2013

Application for assessment under FLA s. 211 and independent evaluation of allegations of inappropriate conduct by father. Court concluding that as a result of child's mental health issues, further assessment of allegations would be harmful to child but allowing s. 211 on terms suggested by counsel for child.

J.D.G. v J.J.V., 2013 BCSC 1274, Punnett J., 18 July 2013

Claimant failing to produce financial statement within time following service of claim as required by rules, failing to produce by Judicial Case Conference and failing to produce within period specified by order made at JCC. Application for contempt finding and fine pursuant to FLA s. 213 brought by respondent. Financial statement produced two days before hearing. Court reviewing law under FRA s. 92, comments on s 92 in 2010 white paper, text of FLA s. 213, explanatory materials on FLA published by government and Hansard transcript of Attorney General's remarks on FLA to conclude that the FLA is "intended to give the court more powers to make orders as to the conduct of parties" and that s. 213 "is to be used to secure proper disclosure in a timely and cost efficient way," and "therefore requires a robust application to accomplish that end." Court ordering that respondent have costs thrown away fixed at $1500 and that claimant pay penalty of $500 to the respondent.

D.Q.L. v W.D.H., 2013 BCSC 1291, Truscott J., 19 July 2013

Application by mother for divorce, orders for sole interim custody and guardianship, and child support. Court cites *Anson v Anson* for proposition that custody under the DA is "almost the equivalent of guardianship of the person." Because this meaning is akin to guardianship under the FLA and application is for interim orders, court declines to make order about custody and confirms that both parents will remain guardians; "all the necessary requirements for the children on an interim basis can be covered within the principles of guardianship set out in the *FLA*." Court then allocates some parental responsibilities to mother and requires both to share other parental responsibilities, with the mother having the right to decide in the event of impasse and the father having the right to apply under FLA ss. 45 or 49.

Van den Dungen v Van den Dungen, 2013 BCSC 1273, M. Bouck, 19 July 2013

Application for advance on family property in case including claims under FRA Part 5, citing both FRA and FLA. Court treats as an application for an interim advance under FRA.

De Jong v Gardner, 2013 BCSC 1303, Bowden J., 22 July 2013

Trial involving claims for divorce, parenting arrangements for child and order that mother return the child to BC, mother having taken child to Alberta in 2011. No orders made about parenting of child after father's failed interim application for return of child. Court concludes that FLA s. 46 is inapplicable, despite the absence of or an agreement or order on parenting arrangements, as mother had already moved child. Court approaches claim under DA, following reasoning in *Hansen v. Mantei-Hansen*, and applies *Gordon v Goertz* and the in-the-round approach required by *S.S.L. v J.W.W.* Court concludes child should return to BC.

D.J. and K.J. v C.K. and T.K., 2013 BCPC 197, Birnie J., 22 July 2013

Stepfather in relationship with mother ordered to pay child support to father under FRA; father seeking to vary order. Pretrial application to address effect of FLA s. 149(3), applicant arguing that respondent cannot apply to vary order as order cannot be made under FLA until the stepfather and mother have separated and FLA thus ineffective to vary order. Court cites *D.B.S. v S.R.G.* for proposition that once a child support order is made, the payor is under a continuing obligation to provide support in accordance with income, and that right to apply to vary is thus intrinsic to child support orders. Repeal of FRA did not extinguish any rights or vested interests acquired under the FRA.

Director and L.M.P., L.M.P. v K.P. et al., 2013 BCPC 206, Frame J., 23 July 2013

Father seeking guardianship of child in context of combined CFCSA and FLA proceeding. Father not a guardian as never resided with child, had not regularly cared for child and no agreement between parents that father be a guardian. Pretrial application to determine whether father must obtain criminal records check and nature of check required. Court observes that nothing in FLA s. 51 or in PCFR 18.1 requires production of criminal records check, merely text of Form 34. Court reviewing different species of records checks, their costs and their deficiencies. Court concluding that intent of FLA is that criminal records check must include a vulnerable sector search, however father unable to obtain this on his own, and legislation inadequate to compel father to obtain this record check or allow court to make order against police agency. Court concluding that only recourse is to ask, but not order, the father to attend the police and request fingerprint search.

N.P. v I.V., 2013 BCSC 1323, N. Brown J., 25 July 2013

Application seeking child support against stepfather and protection order against father. Court applying DA, distinguishing from FLA in that "the triggering of obligations flowing from a stepparent to a child in the breakdown of a formalized marriage is not subject to the temporal requirements arising in a non-marriage relationship," and relying on *Chartier v Chartier* to determine stepparent's liability. Court grants protection order on basis of "history of harassment and threats, not to mention breaches of previous probation orders." No contact and no go orders made in respect of the mother, children and stepfather, as well as order not to possess weapons.

L.J.R. v S.W.R., 2013 BCSC 1344, Betton J., 26 July 2013

First of two critical cases on relocation. Mother applying to move child from BC to Tennessee. Court concludes that FLA s. 69 analysis applies whether order for parenting arrangements or contact is interim or final. Court provides step-by-step approach to analysis of relocation applications. With respect to s. 69, court concludes that reasonableness of arrangements proposed depends on location at issue; reviews each of the good faith factors set out in s-s. (6) to determine whether factor is subjective, objective or both, and considers each factor in light of circumstances of case; and, analyses the best interests of the child by application of each of the s. 37(2) factors.

S.F.S. v S.A.S., 2013 BCSC 1350, Melnick J., 29 July 2013

Trial of claim for divorce and primary residence of children. Court applies *Hansen v Mantei-Hansen* to conclude that DA s. 16 applies, however also concluding that s. 16(8) factors are not inconsistent with the factors the court would have applied under the FLA.

Jensen v Jensen, 2013 BCSC 1373, M. Young, 31 July 2013

Application to extinguish arrears accumulating under 1997 order. Court observes that FLA s. 174 is "virtually the same" as FRA s. 96(2). Given contradictions between information from CRA and from trustee in bankruptcy, and unreliability of applicant's financial statement, court imputes income to respondent, recalculates support accordingly and fixes arrears. Court declining to reduce or cancel interest accumulating on the arrears under s. 174(3), holding that "the claimant has waited for years for this money and the respondent has made no effort to pay, so he should pay her interest on every outstanding monthly payment."

Sekhon v Sekhon, 2013 BCSC 1375, Dillon J., 31 July 2013

Trial of action including claim under FRA Part 5 commenced before FLA coming into force. Court applies FLA s. 252 to conclude that FRA applies to resolve case and that triggering event was s. 57 declaration at a Judicial Case conference.

Logan v Logan, 2013 BCSC 1390, Masuhara J., 2 August 2013

Trial of action including claim under FRA Part 5 commenced before FLA coming into force. Court applies FLA s. 252 to conclude that FRA applies to resolve case.

Hadjioannou v Hadjioannou, 2013 BCSC 1682, Fisher J., 6 August 2013

Application by father for order under FLA s. 69 prohibiting mother from relocating to Alberta with child, following trial concluding in January 2013 at which order for joint custody, joint guardianship and near-equal sharing of child's time made. Court observes that primary consideration has always been the best interests of the child, and that FLA s. 69 requires additional consideration of good faith and the proposal of reasonable arrangements. Court holds that best interests is assessed by considering s. 37(2) factors and that analysis of good faith requires review of each of the s. 69(6) factors and that these factors do not change the *Gordon v Goertz* principle that misconduct unrelated to parenting capacity must not be considered. Court applies each of s. 69(6) factors and s. 37(2) factors to allow application.

Bressette v Henderson, 2013 BCSC 1661, Griffin J., 9 August 2013

Parties in unmarried spousal relationship, separating in 2012. Claimant commencing action seeking orders in relation to jointly-owned property and respondent's property under law of unjust enrichment and trust. Claimant amending claim to plead under FLA; respondent objecting on basis that whole of relationship occurred before FLA came into effect. Court holds that FLA s. 252 does not address property rights of unmarried spouses, and observes that amendments were made within limitation period of s. 198(2). Court notes that a "decision on the transition provisions will have significant implications on the rights of common-law spouses who separated within two years of the *FLA* coming into force" and declines to decide the issue in the absence of full legal argument. However, court holding that an equal division of family property would be significantly unfair under s. 95 and that it would make the same order the FLA as under the common law.

McKenzie v Perestrelo, 2013 BCSC 1452, Savage J., 13 August 2013

Trial of claims between unmarried spouses involving parenting arrangements, support and property claims. Mother seeking "sole guardianship," father seeking "joint guardianship;" report prepared under FRA s. 15 recommending sole custody to mother and joint guardianship. Allegations of violence on part of father; ensuing criminal charges resulting in acquittal. Court notes that matters concerning children

are be determined considering only the best interests of the child under FLA s. 37, and orders that parties be "joint guardians;" court's consideration of s. 38 factors not articulated. Mother's claim to father's RRSPs dismissed as FLA inapplicable "due to the operation of s. 252," and court not finding father's contributions to be an unjust enrichment.

T.C. v S.C., 2013 BCPC 217, Dhillon J., 13 August 2013

Second of two critical cases on relocation. Mother applying to relocate with child from BC to Washington after marrying resident of that state. Parties separating in 2007, a few months after birth of child, and signing separation agreement under which mother having sole guardianship and father having unspecified access. Father's access later specified by order giving him equivalent of every other weekend and two evenings each week. Threshold issue arising as to father's status. Court concluding that under FLA ss. 251(2) and 39(2), parties making agreement under which father not a guardian, and therefore unable to object to relocation under s. 68. Court exercising power under s. 261(1) and PCFR 18.1(2) to make interim order appointing the father as a guardian because "such an order is in the best interests of the child and also in the interests of the administration of justice to permit a parent who has had a significant role in the life of a child to have relocation application considered on the basis of the parent having the status of a guardian of the child," and because "to deny standing to the father to argue for his parental rights is to fail to consider a just and reasonable approach in this family law dispute." Father required to file supporting materials within 60 days under PCFR 18.2(4). Turning to relocation analysis, court concludes parties do not have substantially equal parenting time. Court interprets good faith component of test under FLA s. 69(4) as requiring that mother's motives for moving are "not for improper reasons," following *Nunweiler v Nunweiler*, and is likely to enhance the child's quality of life or her own. Court interprets reasonable arrangements component as requiring the mother "to show how the father's relationship with the child can be preserved, not augmented or enhanced," and not requiring "anything other than a reasonable and workable arrangement." Court rejecting conclusions of s. 211 assessment with criticism as to author's approach, and analyzing best interests of child considering each of s. 37(2) factors in turn.

L.S.D. v K.K.D., 2013 BCSC 1462, Harvey J., 14 August 2013

Trial of claims including parenting arrangements, commencing when both children were living with mother and concluding after 17-year-old child had moved to live with father. Court observing that FLA specifically requires considerations of children's views, and declining to "interfere" with child's decision to live with his father. Court ordering "joint guardianship" of the children "based upon the Joyce model."

Schmidt v Sucke, 2013 BCSC 1489, Fisher J., 16 August 2013

Trial of property claims in action commenced prior to coming into force of FLA. Court noting provisions of FLA s. 252 and concluding that division of property must be determined under FRA. Respondent seeking order for equalization of CPP credits; in absence of evidence on issue or submissions on application of FLA s. 253, court declining to make order.

Director v A.B. and M.B., 2013 BCPC 224, Gouge J., 21 August 2013

Application by MCFD for continuing custody order, children having been in temporary custody of director since 2011, and seeking to move the children into care in Saskatchewan. Court concluding that under CFCSA s. 50(1), continuing custody order terminates parents' status as guardians, terminates their ability to exercise parental responsibilities under FLA s. 40(1) and, under s. 43(1), vests duty in director to exercise parental responsibilities in best interests of children. Court not finding means in FLA for director to delegate this function and adjourning application.

Chancellor v Chancellor, 2013 BCSC 1519, Barrow J., 21 August 2013

Applications including father's application for termination of restraining orders made in 2009 and 2011. Court ordering continuation of restraining orders, presumably as protection orders, considering: history of family violence, including criminal charges, under FLA s. 184(1)(a); mother's fear of father under s-s. (f); and the risk posed by a pending judgment under s-s. (g).

L.K. v M.M., 2013 BCPC 225, Mrozinski J., 27 August 2013

Application to determine where child will attend school, mother having moved, parties agreeing to treat issue as relocation application. Parties separating after child's birth. Interim order providing that parties have joint custody and joint guardianship, with father having unspecified access; subsequent order requiring week-on/-off sharing of parenting time. Parties agreeing at hearing that father "is a guardian pursuant to s. 39(3)(c) of the *FLA*." Court analyzing application under s. 69(5). Court reviews each of s. 69(6) factors, following approach taken in *L.J.R. v S.W.R.*, and notes that although none of the previous orders restricted mother from relocating, the move does preclude the father from exercising equal parenting time; court reviews each of s. 37(2) factors. Mother having moved before hearing, court finds that her move "while not necessarily made in bad faith cannot be entirely characterized as a good faith move" and that moving doing little to enhance quality of life of either child or mother, and mother therefore not discharging onus of proving that move is in the child's best interests.

Lee v. Starinovich, 2013 BCSC 1557, Humphries J., 27 August 2013

Trial of issues between unmarried spouses including claims for interest in property, child support and spousal support. Counsel agreeing that property claims governed by common law. Court applies *Kerr v Baranow* to find absence of unjust enrichment, and observing that property at issue would be excluded from division under FLA s. 85 as acquired prior to commencement of relationship. In determining claim for spousal support, court observes factors for spousal support set out at s. 161 to be "very similar" with those set out at DA s. 15.2(6), and finds that reasoning in *Bracklow v Bracklow* "is of some assistance." Court makes order at mid-range of SSAG and applies *Kerr* to determine claim for retroactive spousal support under FLA s. 170.

K.G. v T.M., 2013 BCPC 228, Mrozinski J., 28 August 2013

Application concerning parenting arrangements; father seeking schedule where mother would have child one day per week; mother seeking order for shared parenting time. Court reviews each of FLA s. 37(2) factors and concluding that child should spend an equal amount of time with each parent. Court applying s. 45(1)(d) to bar further applications until parenting after separation program taken or mediation attempted.

Kline v Hanna, 2013 BCSC 1567, Crawford J., 28 August 2013

Trial of property claims between married spouses in action commenced prior to coming into force of FLA. Court applies FLA s. 252 to conclude that FRA applies to resolve case.

S.B. v N.L., 2013 BCPC 233, Morgan J., 29 August 2013

Application to prevent mother from relocating with children, father not filing application until 29 days after deadline in FLA s. 68 and not recalling whether he received mother's notice. Court holds that "degree of proof of delivery of notice" informed by "potential repercussions of missing the s. 68 time limit." Court reviews ss. 66, 67, 68 and 69, and concludes that court's authority to permit or prohibit a relocation under s. 69(2) not fettered by passing of deadline set out in s. 68. However, to give "full effect" to the goal of s. 68, the court should generally recognize the 30-day limit. In those cases where it is "clear" that a complete analysis be performed under s. 69(3), the court should consider: the reasonableness of the explanation for not filing an objection; the length of delay in filing; and the degree of prejudice to the respondent in allowing the late filing, measured by the date of the proposed relocation and the planning already undertaken. In absence of proof of receipt of mother's notice, although court finding that notice was sent, court proceeding with full analysis under s. 69. Court reviews each of s. 69(4) and (6) factors and concluding that mother proposing to move in good faith and proposing

reasonable arrangements, and father failing to establish that move not in children's best interests.

Longo v Longo, 2013 BCSC 1578, M. Keighley, 29 August 2013

Applications by married spouses for a variety of orders including parenting arrangements, support and exclusive occupancy of family home under DA and FLA. Court finds that FLA s. 90(2) not contemplating departure from "historical framework of analysis" under FRA s. 124 requiring court to conclude that continued sharing is an impossibility and then determining whose occupancy is favoured by the balance of convenience. Court giving claimant exclusive occupancy of home, ordering payment of support at mid-range of SSAG and that parties be "joint guardians" of child.

L.R.A.C. v S.M.L.-C., 2013 BCSC 1622, Abrioux J., 30 August 2013

Review of parenting arrangements under DA s. 17 pursuant to trial order. Court notes best interests criteria set out in *S.B.C. v F.A.C.*, and decision in *Pozzobon v Pozzobon* applying FLA s. 37(2) factors to case brought under DA.

Gilmour v Herrick, 2013 BCSC 1591, Russell J., 30 August 2013.

Parties applying to vary interim order in advance of trial. Court observes that FLA s. 47 requires a change in circumstances, and relying on *Boychuk v Singleton* for proposition that required change must be a material change in circumstances, per *Gordon v Goertz*, and applying test in *Gordon* to conclude change not established that would justify varying order.

K.L.G. v D.J.T., 2013 BCSC 1684, N. Brown J., 11 September 2013

Trial of issues between unmarried spouses including parenting arrangements and mother's wish to relocate to Ontario with children. As a result of parties' consent, court requires parties to share all parental responsibilities under FLA s. 41, save that the mother has sole parental responsibility for day-to-day decision making under s-s. (a) and giving or refusing consent on behalf of the child under s-s. (h), and leaving right to make decisions respecting the child's residence under s-s. (b) for more detailed consideration. Court determines relocation claim under s. 46 in absence of order or agreement on parenting arrangements, framing issue in terms of whether mother "should be granted the right to decide where the children will reside." Court reviews guiding principles applicable to mobility applications set out in *Nunweiler v Nunweiler* against factors prescribed by s. 37 to determine which of the *Nunweiler* factors "no longer applies" under the FLA. Court then reviews each of s. 37(2) factors, and concludes that mother should have exclusive parental responsibility under s. 41(b) to determine the place of the child's residence.

Asselin v Roy, 2013 BCSC 1681, Harvey J., 11 September 2013

Parties cohabiting in 1987, signing cohabitation agreement in 1990 and separating in 2011. Trial concerning the division of property between unmarried spouses, parties electing to apply the FLA. Agreement providing that parties would only share property held in joint names; claimant seeking to have agreement set aside. Court finds parties to be spouses under FLA s. 3 and dividing property applying FLA Part 5, with the triggering event being the date of separation. Court holds that FLA intended "to create more certainty for litigants in the division of their assets," and that the "broad judicial discretion formerly available under the *FRA* has been replaced with a more formulaic approach to both the identification and division of family property." Respondent concedes agreement significantly unfair within meaning of s. 93 as to one property acquired after the execution of the agreement; claimant arguing that agreement unfairly entered into, not witnessed and signed without disclosure or legal advice. Court holds that s. 93 requires two-part test, the first assessing the formation of an agreement and the second assessing its effect; court concludes that agreement "procedurally unfair" under s. 93(3) and should be set aside. Court then proceeds to identify which property is family property and which is excluded, noting that "the court merely has to determine that such property existed on the date of separation and at least one spouse owned it or had a beneficial interest in it." Noting that onus lies on party claiming property is excluded property to prove the claim, court identifies family property, property proven to be excluded property and family debt. Court not finding equal division unfair and so orders, remarking it will be left "to others to formulate an intelligible definition of 'significantly unfair'." Court also emphasizing need for parties to provide detailed Scott schedules setting out value of property at separation, and presumably also at the commencement of the spousal relationship.

Ross v Ross, 2013 BCSC 1716, Verhoeven J., 18 September 2013

Summary trial of claims including division of property, and retroactive and prospective spousal support under DA, in case commenced prior to coming into force of FLA but after execution of interim agreement on spousal support. Property claims determined under FRA. Court reviews FLA s. 164 and concludes that "similar considerations" apply to court's assessment of interim agreement even though application brought under DA. Court holds that analysis in *Miglin v Miglin* and *Rick v Brandsema* can be applied to determine whether an agreement on spousal support should be varied retroactively. Court finding no reason to interfere with agreement as "there is no basis to find deliberate misrepresentation or bad faith, nor anything to indicate that there was oppression or that vulnerability played a part in the making of the agreement" and therefore concluding that agreement is not "substantially at variance" with the objectives of the DA. Prospective support ordered at mid-range of SSAG.

DRAFTING AFFIDAVITS

Legal Services Society
2013 Training Conference

John-Paul Boyd
Canadian Research Institute for Law and the Family

AFFIDAVITS

What's an affidavit and when are they used?

What's an affidavit?

Affidavits are narrative evidence in a written form ...

… given by an individual (a "deponent") …

… on the deponent's oath or solemn affirmation, …

… as if the deponent was a witness giving oral evidence ("testifying") in the witness box at trial.

Affidavits are a substitute for the testimony that would be given by a witness during an examination in chief.

Why are affidavits used?

- Deponent can't come to court to give evidence
- Deponent isn't subject to cross-examination on his or her evidence (at least not right away)
- More efficient way of presenting evidence to the court
- The rules require evidence to be given by affidavit in certain circumstances
- Enable the court to deal with certain kinds of application outside of court

When are affidavits used?

- Sometimes in provincial court hearings
- Interim applications in the supreme court
- Summary trials in the supreme court
- Desk order divorce applications and applications for consent or default orders in the supreme court
- Applications for appointment as guardian in the provincial court and the supreme court

What do affidavits do?

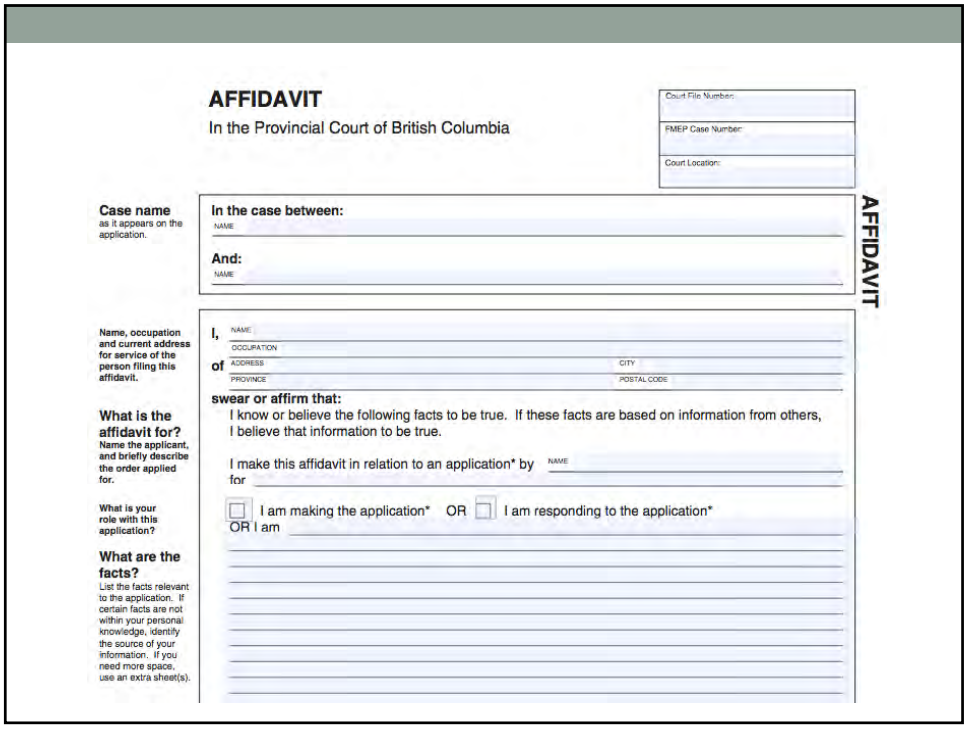
The ultimate purpose of all affidavits is to give the judge, who likely won't know anything about your client or the court proceeding, enough information to make a decision, and to do so as quickly as possible, as painlessly as possible.

FORMAL REQUIREMENTS

Format and content requirements of the rules of court, and a few tips to make affidavits easier to read and use.

Ordinary forms and ordinary rules

- Provincial court:
  - affidavits are generally in Form 17
  - PCFR 13 governs
- Supreme court:
  - affidavits are generally in Form F30
  - SCFR 10-4 governs



AFFIDAVIT

In the Provincial Court of British Columbia

Court File Number:
FMEP Case Number:
Court Location:

AFFIDAVIT

Case name
as it appears on the application.

In the case between:
NAME

And:
NAME

Name, occupation and current address for service of the person filing this affidavit.

I, NAME
OCCUPATION
of ADDRESS CITY
PROVINCE POSTAL CODE

What is the affidavit for?
Name the applicant, and briefly describe the order applied for.

swear or affirm that:
I know or believe the following facts to be true. If these facts are based on information from others, I believe that information to be true.

I make this affidavit in relation to an application* by NAME
for

What is your role with this application?

☐ I am making the application* OR ☐ I am responding to the application*
OR I am

What are the facts?
List the facts relevant to the application. If certain facts are not within your personal knowledge, identify the source of your information. If you need more space, use an extra sheet(s).

Form F30
(Rule 10-4(2) and (7))

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

I, _____ , _____ , of _____ in the City of Vancouver, in the Province of British Columbia, SWEAR (OR AFFIRM) THAT:

1. I am the _____ in the proceeding herein and as such have personal knowledge of the facts and matters hereinafter deposed to save and except where the same are stated to be based upon information or belief and where so stated I verily believe the same to be true.

Special forms for special rules

- Special affidavits, usually fill-in-the-blanks, are required in both courts for:
  - Financial statements
  - Proof of personal service
  - Proof of service by mail, fax and email
  - Applications for appointment as a guardian
- Other special affidavits are required in the supreme court for:
  - Desk order divorce applications
  - Attainment of age of majority
  - Applications for indigent status

Formatting requirements

- Each paragraph must be numbered
- Each page must be numbered, including each page of each exhibit
- Each exhibit must be identified by sequential letters and be marked with a certificate, to be signed by the person taking the deponent's oath or affirmation

This is Exhibit " *D* " referred to in the affidavit of *Homer J. Simpson* , sworn (or affirmed) before me on *1 April 2013* .

Formatting requirements

- The deponent must sign the affidavit in the presence of the person taking the deponent's oath or affirmation, who also signs the affidavit

SWORN (OR AFFIRMED) BEFORE ME at *Vancouver*, British Columbia, this *1st* day of *April*, *2010*.

Anne Attorney
A Commissioner for taking Affidavits for the Province of British Columbia

Homer Simpson
HOMER J. SIMPSON

Formatting requirements

- The person taking the deponent's oath or affirmation must provide his or her name and address below his or her signature
- If the deponent cannot read, the person taking the deponent's oath or affirmation must sign a certificate indicating that he or she read the affidavit to the deponent and the deponent appeared to understand the affidavit
- If the deponent is not fluent in English, an interpreter must read the affidavit to the deponent and sign a certificate indicating that the affidavit was interpreted to the deponent and that the deponent appeared to understand the affidavit

Content requirements

- Must state the court registry and the court file number
- Must identify the number of the affidavit in the series of affidavits made by the deponent
- Must state deponent's name, occupation and address
- Must state deponent's role in the court proceeding
- Must be written in the first person (I, me, myself, mine)
- Any corrections to the text must:
  - Be made at the time the affidavit is being executed
  - Be initialed by the deponent and the person taking the deponent's oath or affirmation

Helpful tips

- The client should write the affidavit using a computer or typewriter whenever possible
- Avoid novelty fonts!
- Indent quoted text that is more than two or three lines long
- Use headings and subheadings where helpful
- Put the first reference to an exhibit in bold, to make it easy to find

  Attached to this my Affidavit as **EXHIBIT "B"** is a true copy of my invoice for the pickup truck, dated 1 April 2006.

- Use at least one-and-a-half line spacing, and don't crowd the text of the affidavit

NO. E041234
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JANE EUSTACE DOE

PLAINTIFF

AND:

JOHN AEMILIUS DOE

DEFENDANT

AFFIDAVIT

I, **JOHN AEMILIUS DOE**, construction contractor, of 123 King Street in the City of Vancouver, in the Province of British Columbia, make oath and say as follows:

1. I am the Defendant in the proceeding herein and as such have personal knowledge of the facts and matters hereinafter deposed to save and except where the same are stated to be based upon information or belief and where so stated I verily believe the same to be true.

2. I make this my Affidavit in reply to the Plaintiff's first Affidavit, sworn on 1 January 2005 (the "Plaintiff's Affidavit"). I deny the truth of the facts alleged in the Plaintiff's Affidavit, save and except where I have no knowledge of the truth of a fact alleged or admit the truth of a fact stated, and so expressly state.

3. I admit the truth of the facts stated at paragraphs 6, 7, 8, 9, 10 and 22 of the Plaintiff's Affidavit.

J.A. DOE, #1
12 JANUARY 2005
NO. E041234
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JANE EUSTACE DOE

PLAINTIFF

AND:

JOHN AEMILIUS DOE

DEFENDANT

AFFIDAVIT

I, JOHN AEMILIUS DOE, construction contractor, of 123 King Street in the City of Vancouver, in the Province of British Columbia, make oath and say as follows:

1. I am the Defendant in the proceeding herein and as such have personal knowledge of the facts and matters hereinafter deposed to save and except where the same are stated to be based upon information or belief and where so stated I verily believe the same to be true.
2. I make this my Affidavit in reply to the Plaintiff's first Affidavit, sworn on 1 January 2005 (the "Plaintiff's Affidavit"). I deny the truth of the facts alleged in the Plaintiff's Affidavit, save and except where I have no knowledge of the truth of a fact alleged or admit the truth of a fact stated, and so expressly state.
3. I admit the truth of the facts stated at paragraphs 6, 7, 8, 9, 10 and 22 of the Plaintiff's Affidavit.
4. I have no knowledge of the truth of the facts alleged at paragraphs 4, 11 and 15 of the Plaintiff's Affidavit.
5. With respect to paragraph 5 of the Plaintiff's Affidavit, I make nowhere near $80,000 per year from Doe-A-Deer. While it is true that my gross earnings from my work as a construction contractor appear quite significant, the expenses associated with this work means that my actual net earnings are only a fraction of my gross. Out of my company's gross income, I must pay for building supplies, subcontractors' fees, tools, repairs and so forth. In 2002, for example, my gross was $148,425.95 but I netted only $38,285.53. In 2003, I grossed $259,171.42 but only netted $40,540.18. I expect to net about $40,000.00 this year as well.
6. With respect to paragraphs 12 and 13 of the Plaintiff's Affidavit, while it is certainly true that my relationship with the Plaintiff has deteriorated, it has largely deteriorated because of the her on-going affair with Salvatore Ferragamo, formerly my best friend, and her constant demands for money from me. Every time I speak to the Plaintiff, she invariably asks me for money for something or other, and she always drops some mention about Salvatore, like where they've been, what they've done or about what a great guy he is. As a result, I have limited by communication with the Plaintiff to email, in the hope of minimizing the conflict between us.
7. In further respect to paragraph 13, it is true that I made that comment when I was buckling Jack into his carseat, but I was only being sarcastic. What the Plaintiff does not mention is that I did in fact return Jack that night at 6:00pm as we had agreed.
8. With respect to paragraph 14 of the Plaintiff's Affidavit, I do in fact have family in Washington, Alberta and Hungary. However, I haven't seen my cousins in Hungary in more than ten years, and I am estranged from my step-sister and her family in Washington. I was, I admit, very angry with the Plaintiff when I received her

What do affidavits do?

The ultimate purpose of all affidavits is to give the judge, who likely won't know anything about your client or the court proceeding, enough information to make a decision, and to do so as quickly as possible, as painlessly as possible.

EVIDENCE & EXHIBITS

What the deponent can say, what the deponent shouldn't say and what the deponent mustn't say.

Hearsay evidence

- Hearsay: saying what some else said to prove a fact
  - *"Raj told me that Bob crashed the car."*
- Hearsay is permitted at interim applications, but not at hearings where the outcome will be a final order
- Double hearsay and anonymous hearsay are never permitted
  - *"Raj told me that Bob said that he'd crashed the car."*
  - *"Raj told me that someone saw Bob crash the car."*
  - *"The police officer told me that Bob crashed the car."*

Opinion evidence

- Evidence in affidavits consists of statements about facts not about the deponent's opinion about something or someone
  - *"Bob is a terrible driver."*
  - *"Bob's optic neuropathy caused the crash."*
- Look for:
  - *"In my opinion…"*
  - *"I think that…"*
  - *"I believe that…"*
  - *"In my view…"*

Expert evidence

- Experts, on the other hand, can give opinion evidence; that's usually why they're involved in a court proceeding
- Expert evidence gives the court information about things beyond most people's experience

  "Optic neuropathy can impair a person's eyesight."

  "Bob's excessive speed caused the crash."
- Typical experts in family matters include mental health professionals, accountants, valuators, actuaries; most common experts are s. 211 assessors

Testimonial letters

- "Dear Judge" letters are hearsay and are not proof that the contents of the letters are true
- Testimonials are rarely helpful, partly because they are opinion evidence but mostly because they are partisan and biased

  "Chen is the best father in the whole world and could teach a fence post to be a good parent."
- If it's really important, get the person to write an affidavit of his or her own

Character assassination

- Rarely helpful, partly because they are opinion evidence but mostly because they are partisan and biased

  "Chen is incompetent and a loser, and I wouldn't trust him to parent a fence post."
- If it's really important, get the person to write an affidavit of his or her own, but be aware that such affidavits may cause more harm than good
- This approach to family law disputes should always be discouraged

The facts, ma'am, just the facts

- Evidence in affidavits consists of statements about facts and should be neutral and dispassionate, and avoid self-serving descriptions of the deponent's emotional state and reactions

  "I was shocked and appalled when I saw that Chen had left the butter knife on the table where Lucas could have grabbed it."

  "I was devastated when I learned of Chen's affair. I would never have believed he was capable of such a betrayal."
- Failure to observe this rule can result in awards of costs and special costs

Legal argument

- Evidence in affidavits consists of statements about facts and should not contain arguments about why the outcome should be as the deponent wishes or observations about the law

  "Because Harkamal and I lived together for less than two years, we are not spouses as defined by the Family Law Act."

  "I am advised by my advocate that I am entitled to a protection order because Harkamal's conduct toward me is family violence."

Exhibits

- Anything that can be reduced to paper can be used as an exhibit to an affidavit, however just because it can be reduced to paper doesn't mean it ought to be an exhibit
- Look for documents that support important statements and will bolster the judge's impression that the deponent is being truthful

  "Lydia is doing well at her new school."

  "I deposited the money from the sale of the pickup into the family bank account."

  not

  "I live in the west end."

  "My cat turns four next month."

Useful exhibits

- Income tax returns, T4 and T5 slips, paystubs, notices of assessment, ROE forms
- Bank, loan and credit card statements
- Report cards, educational assessments, teacher letters
- Medical, dental and psychiatric reports
- Receipts, invoices, bills and account statements
- IBCC records, driver's abstracts, transfer forms
- Photographs of damage, injuries
- Photographs of houses, bedrooms, schools, playgrounds and community amenities

Useless exhibits

- Testimonial letters
- Letters and emails authored by the deponent, except in the context of letters and emails from the other party
- Letters and emails from people other than the parties, their lawyers or experts
- Diary excerpts where the sole purpose of the diary is to record the misbehaviour and shortcomings of a party
- Photographs of happy, smiling children and families on holidays, trips and outings
- Anything that does not help to support a fact that is important to the application

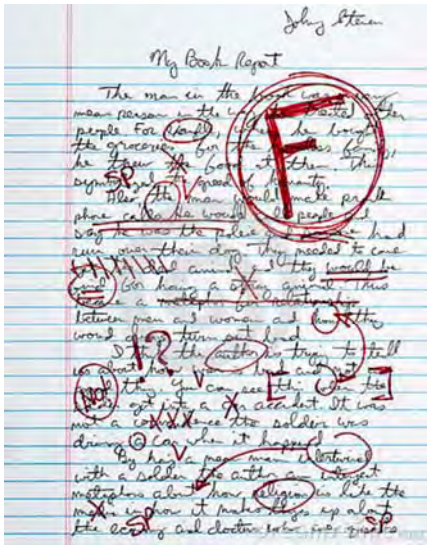
What do affidavits do?

The ultimate purpose of all affidavits is to give the judge, who likely won't know anything about your client or the court proceeding, enough information to make a decision, and do so as quickly as possible, as painlessly as possible.

> A SHORT BREAK

Please take a look at the handouts.

Fun with bad affidavits


John Steven

My Book Report

The man in the [illegible] was a mean person to the [illegible] people for [illegible] he bought the groceries for the [illegible] he threw the food at them. The [illegible] and mood to [illegible]. After the man would make [illegible] phone calls he would [illegible] people and say he was the police [illegible] had run over their dog. They needed to come [illegible] had animals and they would be fined. Or have a often arrest. This [illegible] a metaphor for relationships between men and women and [illegible] the word of [illegible] out loud. [illegible] the author was trying to tell us about how [illegible] had and what they can see this [illegible] got hit by a [illegible] accident. It was not a coincidence the soldier was dying [illegible] when it happened by having a poor man [illegible] with a soldier the author can [illegible] notes about how religion [illegible] the man grow it makes [illegible] up [illegible] the ecstasy and doctrine [illegible]

> BACK AT IT

The presentation continues.

STRUCTURE

How to organize an affidavit and tell the client's story.

Overview

1. State who is making the affidavit.
2. Describe the deponent's role in the court proceeding.
3. Provide a brief summary of the parties' relationship.
4. Provide a brief summary of the history of the court proceeding to date.
5. Describe the order that the deponent seeks or opposes.
6. State the facts that explain why the deponent seeks or opposes the order.

Who is making the affidavit

"I, Harkamal Gill, construction worker, of 123 Main Street in Vancouver, British Columbia…"

"I, Harkamal Gill, homemaker, of 123 Main Street in Vancouver, British Columbia…"

"I, Harkamal Gill, construction worker, of Vancouver, British Columbia…"

"I, Harkamal Gill, construction worker, with an address in the care of of 123 Commercial Drive in Vancouver, British Columbia…"

Relationship to the proceeding

"I am the claimant in this proceeding."

"I am this sister of the claimant in this proceeding."

"I am the claimant's landlord."

"I am the claimant's best friend."

Summary of the parties' relationship

- Age, employment circumstances, income of each party
- Date of cohabitation, date of marriage
- Children's names, birthdates, schools, grades, any special educational or health issues that are relevant
- Date of separation
- Living arrangements following separation

Summary of the court proceeding

- Attempts to resolve dispute
- Date litigation commenced, orders sought in claim, date of service on respondent
- Date of respondent's reply and counterclaim, claimant's orders agreed to and opposed, orders sought in counterclaim
- Date of judicial case conference
- Summary of any important orders made to date, whether orders were made by consent

Orders sought or opposed

- Applicant provides a brief statement of the orders sought in the application
- Respondent provides a brief statement of the orders sought that are agreed to and the orders sought that are opposed

Why orders are sought or opposed

- Applicant provides concise statement of the events that lead to the making of the application
- Respondent provides his or her version of the events leading to the application
- Respondent addresses the applicant's version of those events if necessary

This is the narrative – story-telling – portion of the affidavit. It should state the facts that motivated the application and those facts should explain the person's position on the application and why that position is reasonable. This is also where the bulk of your time should be spent.

Recap

- If an affidavit is especially long, wrap it up by restating the orders sought and the client's position on the orders sought

WRITING TIPS

A few important points about language, style and content.

Be brief and to the point

- Be as concise as the circumstances allow.
- Avoid irrelevant facts and irrelevant allegations about someone's conduct, especially historical conduct.
- Never speculate about someone's state of mind or motivations.
- Avoid long, run-on sentences.
- Chop large paragraphs up into a number of shorter paragraphs.
- Use lists and headings where the lists and headings will be helpful.

Remember, it's the client's affidavit

- The person who is making the affidavit is the client, not the advocate; the advocate can guide and suggest, but ultimately it's the client's affidavit.
- The client should be told that he or she may be cross-examined on his or her affidavit, and as a result it is very important that the affidavit be accurate and truthful; the client must be prepared to stand by the statements made in his or her affidavit!
- Check in with the client frequently: "Is this right, have I got this the way you want it?"
- The affidavit should use the client's language and reflect the client's level of literacy and fluency.

The judge won't know your client

- The judge is unlikely to know your client or the history of the court proceeding.
- Provide the minimum amount of information necessary for the judge to get a sense of the parties' backgrounds and current circumstances.
- Don't be ambiguous or skirt the issues.
- A stranger should be able to read the affidavit and understand what has gone on, what is going on and why the client is taking his or her position on the application
- If you have any doubt about this, *give the affidavit to a stranger* and find out!

Know which facts are important

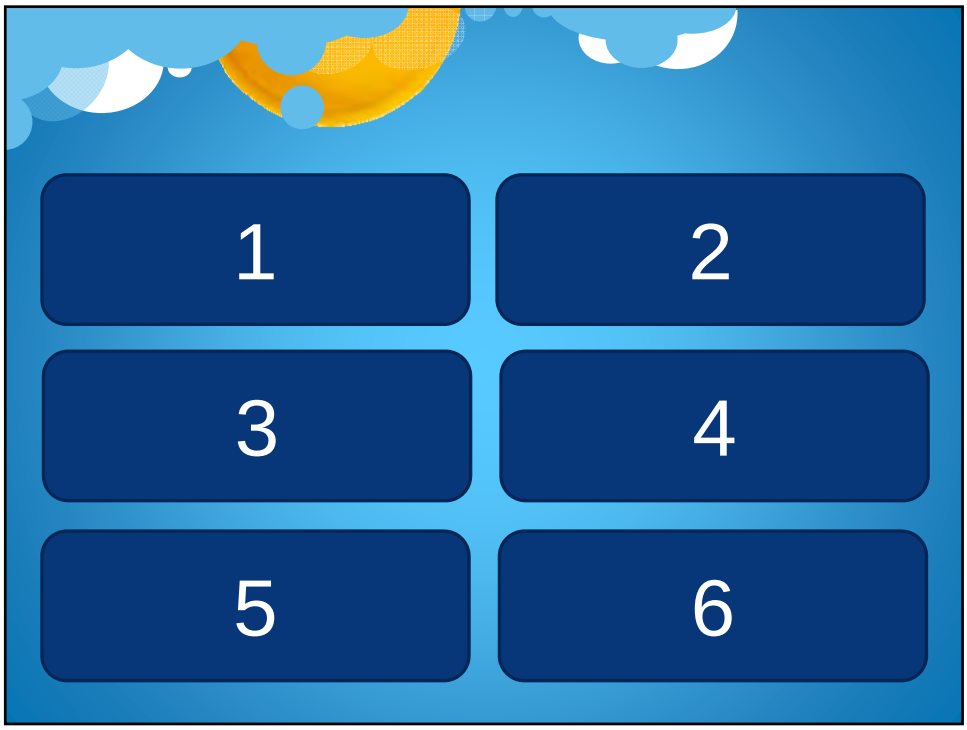
- The affidavit should provide, without argument, the facts that support the client's position on the application; this means asking yourself what the judge would need to know to make the order that the client wants.
- It is almost always helpful to look at the rules of court and the legislation to figure out any legal test that applies to the application; this will help the client figure out which facts need to be included in the affidavit.
- When looking up a rule, look at an annotated version of the rules; the cases referred to often help to point out important facts that must be in the client's affidavit.

> A SHORT BREAK

Come on down! You're the next contestant on…




#1 • Child support!
What does the court need to know?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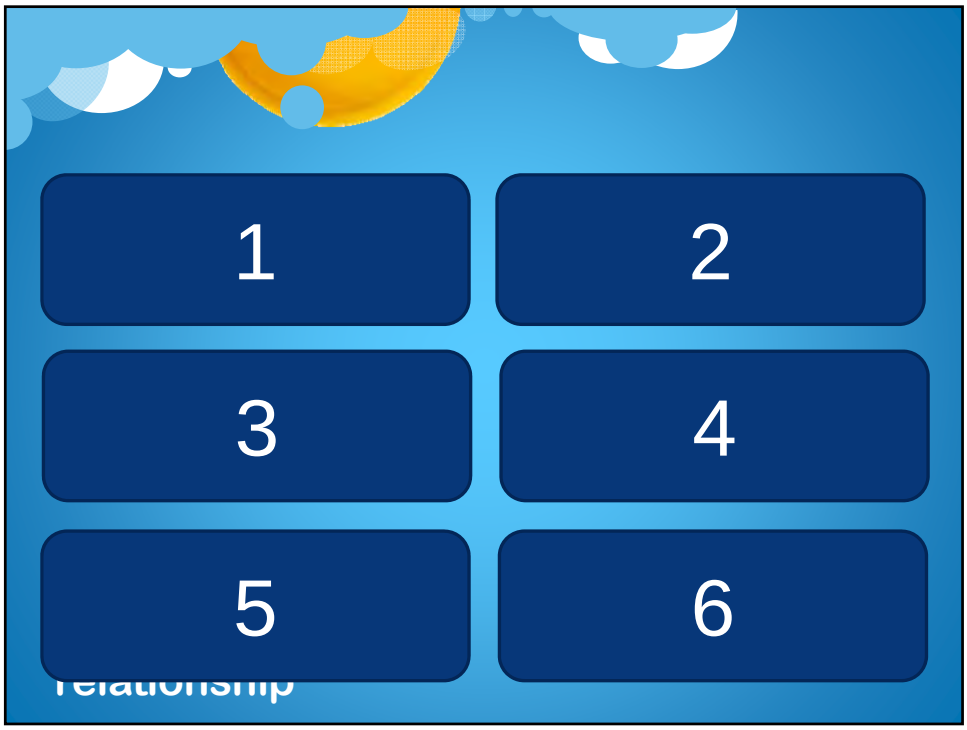
#2.1 • Special expenses!
What's so special about them anyhow?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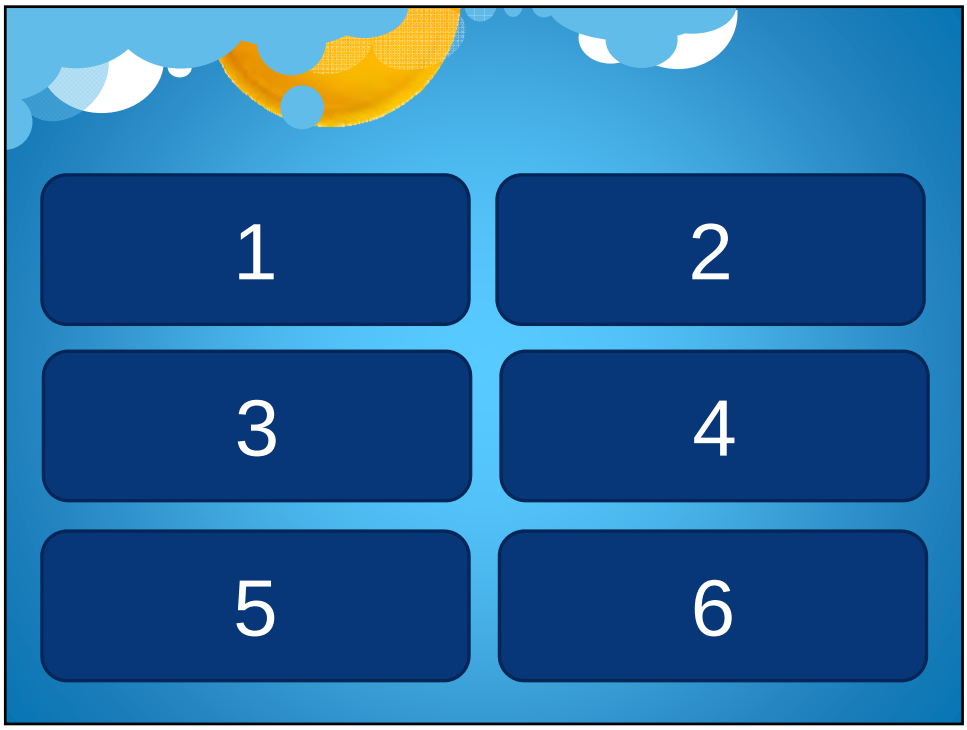
#2.2 • Special expenses!
Alright, and how do they get paid for?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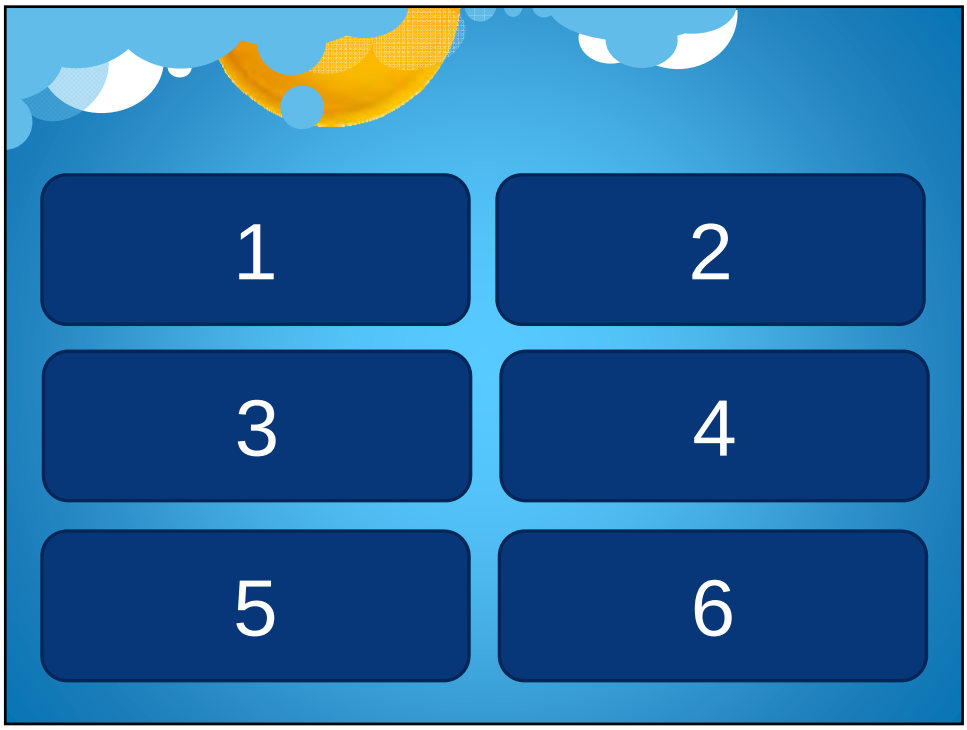
#3 • Imputing income!
Show me the money!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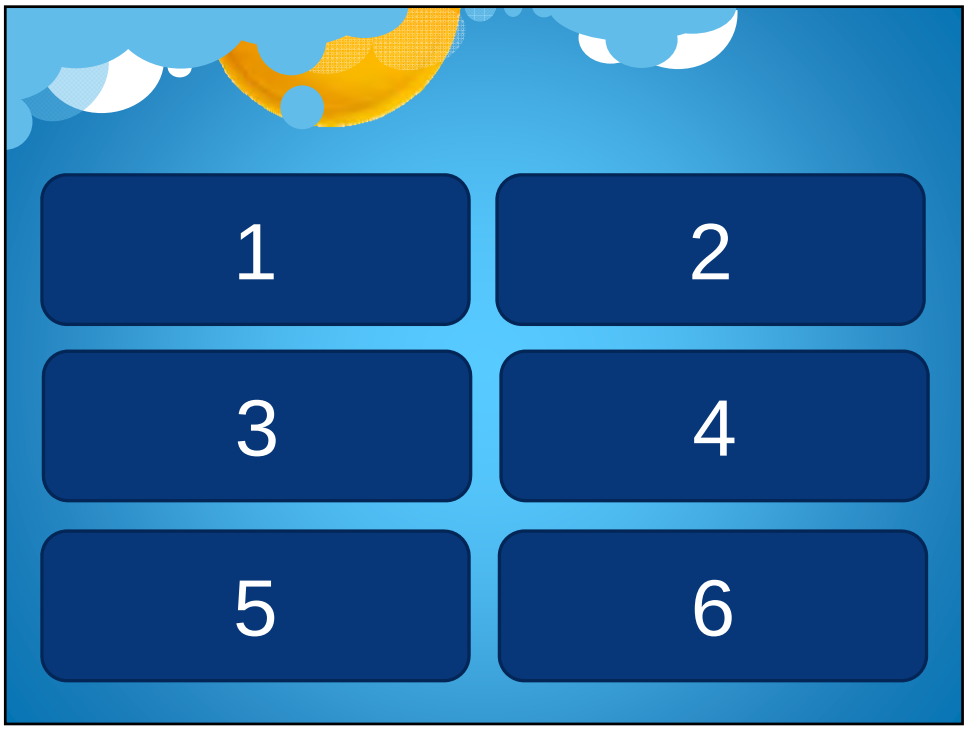
#4 • Spousal Support!
What does the court need to know?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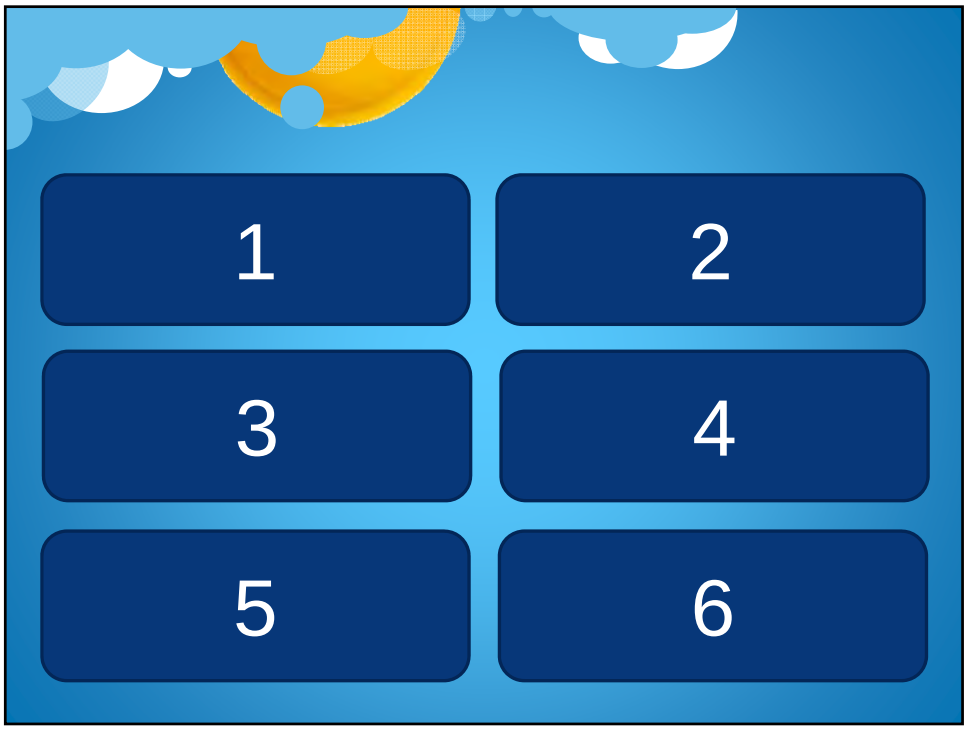
#5.1 • Let's get Divorced!
What does the court need to have?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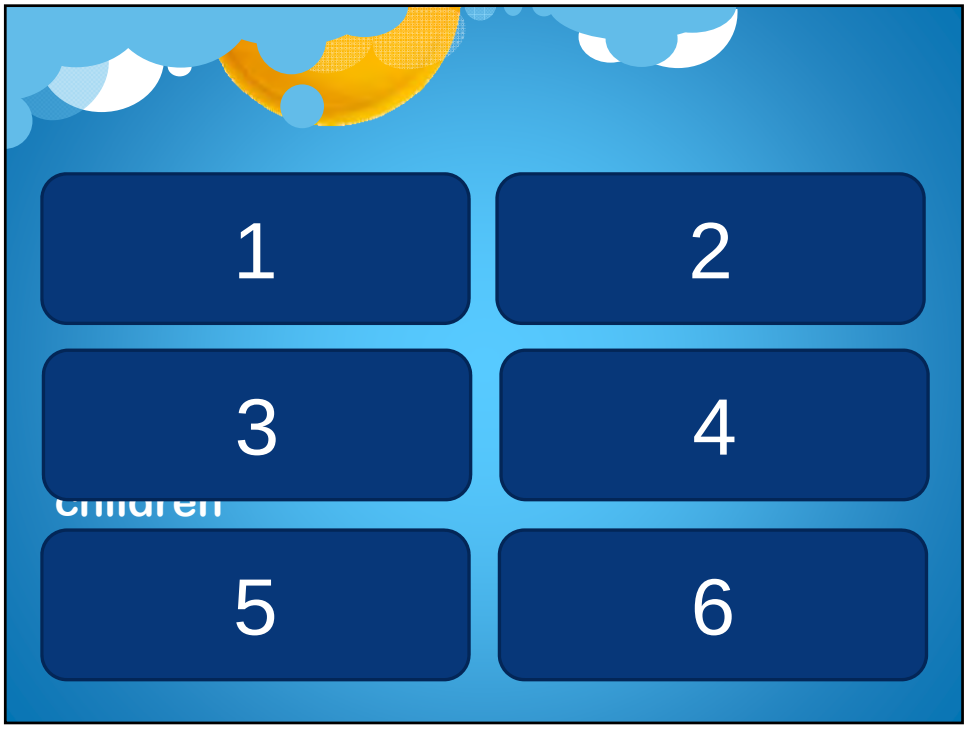
#5.2 • Let's get Divorced!
What does the court need to know?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> BACK AT IT

The presentation continues.

SUMMARY

A short checklist for affidavit drafting.

Before you start

- Identify the orders sought, those that are consented to and those that are objected to.
- Look at the applicable rules of court and legislation to identify any legal tests that must be met and any facts that need to be presented.
- Review the evidence available from the client with the client and determine whether it will be helpful to get affidavits from other people.

When drafting

- Summarize the orders sought and the client's position on those orders.
- Identify the parties and provide a brief summary of their relationship and important events in the litigation to date.
- Explain the circumstances provoking the application quickly and efficiently, and as neutrally as possible.
- Check in with the client frequently.
- Where the affidavit is particularly long, consider wrapping up by restating the orders sought and the client's position.

After the first draft

- Ensure that all exhibits are available, and that the exhibits which will be used are relevant and will reproduce clearly.
- Ensure that all pages are numbered, including each page of the exhibits.
- Review the affidavit to make sure that the facts are not misrepresented and bear in mind the possibility of the client's cross-examination on the affidavit.
- Review the affidavit to check for improper hearsay, opinion and inflammatory language.
- Ask the client to make sure that the statements in the affidavit are consistent with the statements made in his or her other affidavits.

Final review

- Review the affidavit with the client and encourage the client's comments, concerns and corrections; revise the affidavit as necessary.
- *Check your spelling*; revise the affidavit as necessary.
- Ensure any required certificates have been added to the end of the affidavit.
- Send the client out to get the affidavit notarized, make sure that all exhibits are attached and marked and tell the client to bring photo identification.

DRAFTING AFFIDAVITS

Legal Services Society
2013 Training Conference

John-Paul Boyd
403.216.0341
jpboyd@ucalgary.ca

Preparing Affidavits

John-Paul Boyd
August 2013

An affidavit is a person's evidence, reduced to a written form.[1] Just like oral evidence given at trial, the person making the affidavit, the "deponent," swears or affirms that what he or she is saying is true.[2] Affidavits are primarily used when making interim applications in the Supreme Court under Rules 10-3(4) and 10-6(2) of the Supreme Court Family Rules, but are also used in:

- hearings in the Provincial Court, under Rule 12(3) of the Provincial Court Family Rules;[3]
- summary trials in the Supreme Court, under SCFR 11-3(5); and,
- desk order applications in the Supreme Court, including divorce applictions, under SCFR 10-10(2).

Affidavits are a substitute for the deponent's oral evidence, given from the witness box during an examination in chief. From the lawyer's point of view, presenting this evidence in written form allows a degree of control rarely possible during oral examination. From the client's perspective, however, affidavits can be a difficult, daunting and unpleasant writing exercise, particularly when the issues and factual background are complex.

I. FORMAL REQUIREMENTS

A. The Rules of Court

Affidavits used in the Provincial Court must generally be in Form 17; the rules about content, of which there are hardly any at all, and the use of affidavits are found in PCFR 13. Special forms of affidavit are required for:

---

[1] "Evidence" is testimony (oral evidence), documents or physical objects that tend to establish a fact. For example, the evidence that establishes the amount of a payor's income might include the payor's testimony, the testimony of or a letter from the payor's employer, the payor's paystub or income tax return, and the payor's finanacial statement.

[2] "Swearing" involves making an oath on one's faith in a god that the evidence given is true. In the middle ages, the risk of burning in a lake of fire for all eternity was thought to be a reasonable guarantee of the deponent's honesty. Atheists, agnostics and those whose religious persuasions prohibit them from giving oaths may simply "affirm" (promise) that the evidence they are giving is true.

[3] PCFR 13(3) says that affidavits may not be used unless a judge has given permission, however this rule is generally only enforced at trials. Affidavits are commonly used at the hearing of motions without seeking permission; in fact, most judges prefer that evidence be given by affidavit at such hearings.

- financial statements (Form 4);
- proof of personal service and service by mail, fax or email (Forms 5 and 13); and,
- applications for appointment as the guardian of a child, under s. 51 of the *Family Law Act* and PCFR 18.1 (Form 34).

Affidavits used in the Supreme Court must generally be in Form F30; the rules about the content of affidavits are found in SCFR 10-4. Special forms of affidavits are required for:

- financial statements (Form F8);
- proof of personal service and service by mail, fax or email (Forms F15 and F16);
- desk order divorce applications (Forms F37 and F38);
- proof of attainment of the age of majority (Form F84);
- applications for indigent status (Form F86); and,
- applications for appointment as the guardian of a child, under s. 51 of the *Family Law Act* and SCFR 15-2.1 (Form F101).

SCFR 10-4 sets out specific formal and formatting requirements that all affidavits used in the Supreme Court must follow:

- the affidavit must be in the first person and show the name, address and occupation of the deponent, and his or her role in the court proceeding (SCFR 10-4(2)(a),(b));
- the affidavit must be identified, at the upper right-hand corner of the title page, by the name of the deponent, the sequential number of the affidavit made by the deponent, and the date on which the affidavit was made, usually

  This is the **3rd** affidavit
  of **Homer J. Simpson** in this case,
  and was made on **1 April 2013**

  (SCFR 10-4(3));
- the text of the affidavit must be set out in consecutively numbered paragraphs (SCFR 10-4(2)(c));

- the pages of any exhibits attached to the affidavit must be numbered sequentially, beginning on the first page of the first exhibit and ending on the last page of the last exhibit (SCFR 10-4(10));[4]

- each exhibit must be marked with a certificate to be signed by the person taking the deponent's oath or affirmation, usually

> This is Exhibit " D " referred to in the affidavit of Homer J. Simpson, sworn (or affirmed) before me on 1 April 2013 .

(SCFR 10-4(8));[5]

- any alterations to the type-written text must be initialled by the deponent and the person taking the deponent's oath or affirmation at the time the affidavit is sworn or affirmed (SCFR 10-4(11));

- the affidavit must be signed by the deponent, and the person taking the deponent's oath or affirmation must sign a statement confirming that the affidavit was sworn or affirmed in his or her presence, usually

> **SWORN (OR AFFIRMED) BEFORE ME** at Vancouver , British Columbia, this 1st day of April , 2010 .)
>
> Anne Attorney — Homer Simpson
>
> A Commissioner for taking Affidavits for the Province of British Columbia — HOMER J. SIMPSON

(SCFR 10-4(4), (5));

- if the deponent is unable to read, the person taking the deponent's oath or affirmation must certify, after everyone's signatures, that the affidavit was read to the deponent and that he or she appeared to understand it, usually

[4] Although not required by the rules, it is very helpful to ensure that the pages of the text of the affidavit are also numbered sequentially.

[5] The exhibits themselves are usually identified by sequential letters, both in the text of the affidavit and in the certificate on the exhibit.

Certificate

I, **Anne Attorney**, lawyer, of 123 Main Street in Vancouver, British Columbia, certify that the above affidavit was read to the deponent, Homer J. Simpson, in my presence and that the deponent seemed to understand it.

Date: 1 April 2013 Anne Attorney

Anne Attorney

(SCFR 10-4(6));

- if the deponent does not understand English, a competent interpreter must interpret the affidavit to the deponent and the interpreter must sign an endorsement, after everyone's signatures, that he or she has interpreted the document to the deponent, usually

Endorsement of Interpreter

I, **Herb Powell**, translator, of 123 Commerical Drive in Vancouver, British Columbia, certify that:

1. I have a knowledge of the English and Spanish languages and I am competent to interpret from one to the other.

2. I am advised by the person swearing or affirming the affidavit and believe that the person swearing or affirming the affidavit understands the Spanish language.

3. Before the affidavit on which this endorsement appears was made by the person swearing or affirming the affidavit I correctly interpreted it for the person swearing or affirming the affidavit from the English language into the Spanish language and the person swearing or affirming the affidavit appeared to fully understand the contents.

Date: 1 April 2013 Herb Powell

Herb Powell

(SCFR 10-4(7)); and,

- the person taking the deponent's oath or affirmation must provide his or her full name below the person's signature (Practice Direction, 1 July 2010).[6]

[6] Under the old rule on this subject, the person taking the deponent's oath or affirmation was also required to provide his or her address (Practice Direction, 22 November 2004). This is a sensible practice that should be continued, regardless of what the new rule says.

Finally, while there is no rule to this effect, it is good practice to ensure that at least one or two lines of the text of the affidavit are on the page where everyone signs to avoid any concerns that the page wasn't signed by itself.

Although PCFR 13 says almost nothing about the formal requirements of affidavits prepared for use in the Provincial Court, it is good practice to follow the requirements of the Supreme Court rules to the extent possible. Those rules were created for a reason, and they do help to ensure that affidavits are easy to use in court.

B. Practical Considerations

The fundamental purpose of all affidavits is to give the judge – a complete stranger who knows nothing about the case or your client – a lot of factual information as briefly as possible. Affidavits should be formatted to facilitate and expedite the judge's job of digesting what can be a very large volume of information. Here are some tips:

- affidavits should be typed or done up on a computer wherever possible, unless your handwriting is extraordinarily clear and legible;

- never use novelty fonts, pick a font that is boring but widely used and easy to read, like Times New Roman, Garamond, Cambria or Arial;[7]

- the text portion of the affidavit should be double or one-and-a-half line spaced, with an extra line between paragraphs;

- when quoting more than two or three lines of text from another document, like a letter or an email, add the quote as an indented subparagraph;

- highlight references to exhibits by putting the first reference to the exhibit in capital letters and bold type, like this

  > Attached to this my Affidavit as **EXHIBIT "B"** is a true copy of my invoice for the pickup truck, dated 1 April 2006.

  and omit any special formatting in subsequent references to the same exhibit

  > The pickup truck cost me $12,000 to drive off the lot, as can be seen from the invoice attached as Exhibit "B", not $9,000.

  and,

- headings may be used, where appropriate, to signal new topics or changes in subject matter.

[7] The text of this paper is set in Cambria.

In short, anything that can be done to ease the judge's task of reading and absorbing the contents of an affidavit should be done.[8]

II. CONTENT

There are no formal rules about what must be said in an affidavit and how it must be said, apart from the usual rules of evidence. Bear in mind, however, that the chief goal of an affidavit is to present the facts which militate in favour or against an application in a seemingly objective and dispassionate nature. At a minimum, an affidavit should set out the facts on which the application is advanced or opposed in a concise, logical and factually accurate manner.

A. Admissibility of Information and Documents

The facts set out in the affidavit must also be admissible under the evidence acts,[9] the rules of court and the common law rules governing evidence. While the court will not expect the client to be aware of these complex and sometimes confusing rules, nor is this paper capable of summarizing them, there are a few things the court will not excuse.

1. Hearsay

Hearsay is repeating what someone else has said as proof of a fact, for example saying "Yoko told me that she saw Ted at the park with a frisbee and a squirrel" to prove that Ted was in the park with a frisbee and a squirrel. Hearsay is permitted on interim applications but not at hearings where the result will be a final order, usually at summary trials brought pursuant to SCFR 11-3 or in desk order divorce applications under SCFR 10-10.

2. Double Hearsay

Double hearsay is repeating as a fact what someone else said to someone else: "Yoko told me that Ted said he was at the park with a frisbee and a squirrel." Double hearsay is *never* permitted.

3. Anonymous Hearsay

Anonymous hearsay is repeating as a fact what someone said to the deponent without stating who that person was: "I learned that Ted had been in the park with a frisbee and a squirrel," "someone who I cannot name told me that she had seen Ted in the park with a frisbee and a squirrel" or "the police officer told me that Ted was in the park with a frisbee and a squirrel."

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[8] You might, for example, bear in mind that some judges have the dimished eyesight that generally comes with age. Use of a larger font size, say 13 or 14 points, is often appreciated.

[9] The provincial *Evidence Act* applies to court proceedings in the Provincial Court and to court proceedings brought under the *Family Law Act*. The *Canada Evidence Act* applies to proceedings brought under the federal *Divorce Act*.

Because the person on the other side has no ability to cross-examine or evaluate the credibility of an unidentified witness, anonymous hearsay is never permitted.

4. Opinion Evidence and Expert Evidence

Opinion evidence is an inference drawn from a set of facts or circumstances that usually expresses a point of view: "I think Ted is an irresponsble father" or "I think Ted is a narcissist and may be a kleptomaniac." Expert evidence is a kind of opinion evidence that includes statements about facts that are beyond most people's knowledge: "Ted's kleptomania is caused by high levels of lead in his well water" or "Ted's results on the personality inventory indicate that he is a narcissist."

In general, only experts – doctors, psychologists, psychiatrists, accountants, engineers, mathematicians, physicists, lawyers and so forth – may give opinion evidence. While the court will generally allow but ignore common types of opinion evidence that won't have much influence on the outcome of a trial or application ("I think Ted is an irresponsible father"), it will not allow opinion evidence about things that require expert knowledge ("Ted's kleptomania is caused by high levels of lead in his well water").

Opinion evidence is usually easy to find by looking for sentences that begin with phrases such as:

- "I believe that…";
- "I think that…";
- "In my opinion…"; or,
- "In my view…".

Other kinds of opinion evidence are harder to spot because the opinion is stated as a fact: "drinking water with high levels of lead causes kleptomania" or "Ted is an irresponsible father because he insisted that the children be vaccinated and vaccination causes autism." The trick here is to look for statements that would be outside the ordinary person's understanding and seem to require special knowledge or expertise.

5. Testimonials

Many people involved in family law proceedings believe that the path to success is paved with letters confirming their prowess in the parenting arts and superior relationship with their children. This sort of evidence is usually presented as "to whom it may concern" or "dear judge" letters attached as exhibits to an affidavit.

As a matter of law, testimonial letters like these are hearsay. The best that can be said about exhibits like this is that they may establish that the author of the letter wrote the

letter, but they are not proof that the statements made in that letter are true. In general, the court frowns on evidence like this; it simply isn't helpful. This sort of evidence is even worse where the author is obviously partisan and praises the deponent to the heavens while mercilessly dumping on the other party.

If a third party has valuable information that the court should know about, that person should be asked to prepare an affidavit of his or her own, rather than write a letter that may ultimately prove to be pointless. The court will always give more weight to the affidavits of third parties than it will to the letters of third parties.

6. Attacks on Character and Personality

The opposite approach to gathering testimonial references is to simply lash out against the opposing party by attacking his or her character and personality, whether in the form of statements in an affidavit or letters attached to the affidavit as exhibits. This approach will backfire more often than not, since such attacks usually consist of inadmissible opinion and hearsay, and inevitably tarnish the court's opinion of the deponent more than that of the other party.

7. Histrionic Language

Affidavits are supposed to set out the facts, and these facts should be relevant to the application before the court and be set out in as neutral and dispassionate a manner as possible. In a 1993 case called *Creber v. Franklin*, Mr. Justice Spencer said that affidavits should state only facts and should not be "larded with adjectives" about the conduct of others. "Self-serving protestations of surprise, shock, disgust or other emotions" must also be avoided.

While some description of the deponent's emotional state is permissible, overly florid language is generally unacceptable: "I felt shocked and horrified when I saw that little Chen had been left helpless and alone. I was disgusted and appalled that anyone could do this to a three year old; it was inhumane and incredibly careless." In *Van Es v. Adams*, a 1997 case, Master Patterson summarily assessed special costs against a party who incorporated "double hearsay, emotional reactions, and unsubstantiated sources of information" into an affidavit, thereby causing the opposing party additional time and expense to traverse "the various innuendo, embellishments and inflammatory assertions" found in the affidavit.

8. Argument

Affidavits may not contain legal argument ("according to the case of *Simpson v. Flanders*, a contingent interest in a trust is not family property within the meaning of s. 85 of the *Family Law Act* if the beneficiary did not contribute to the trust property"), even where the argument is phrased as hearsay that would normally be acceptable ("I am advised by my advocate that because the respondent and I separated more than two years ago we are no longer spouses").

9. Exhibits

Anything that can be reduced to paper can be attached to an affidavit as an exhibit. This does not mean, however, that it *should* be attached to an affidavit or that it will be admissible if attached to an affidavit. In general, only those documents which actually serve to improve the likelihood that the client's evidence is true should be used as an exhibit, for example:

- "Lydia is doing well at her new school" – report card from old school, report card from new school, attendance records, assessments from tutors and counsellors;

- "I deposited my share of the house sale proceeds into our joint account" – vendors' statement of adjustements, trust cheque from conveyancer, bank statement from joint account, deposit slip or teller's receipt; and,

- "I have a blue Ford F150 pickup truck" – insurance documents, vehicle transfer form, photograph, lease or financing agreement.

As has already been mentioned, letters attached to an affidavit are proof only that the author of the letter wrote the letter. They are not proof of the facts stated in the letter because the contents of the letter are hearsay. On the other hand, business records, providing they are properly dated and identified, will usually be admissible for the proof of their contents. This is an exception to the general rule against hearsay. Typically, business records appropriate to a family law proceeding will include:

- personal income tax returns, notices of assessment and notices of reassessment;

- corporate income tax returns and financial statements;

- bank, credit card, loan and investment statements;

- school report cards and educational assessments;

- medical, dental and psychiatric reports, estimates and quotes;

- receipts, invoices, bills and account statements; and,

- ICBC receipts, drivers' abstracts, forms and statements.

Photographs can also be attached to an affidavit, providing that the date of the photograph and the name of the photographer is provided. However, because photographs are admissible and everyone sees to have a digital camera these days, deponents often feel moved to supply picutres of the happy family and smiling children engaged in various enriching, healthy activities. This is not always helpful, as parents never seem to attach photographs of children who have just been spanked, scolded or stubbed their toes.

B. The Introductory Paragraphs

The first paragraph of all affidavits provides the deponent's name, occupation, address and a statement that the information in the affidavit is being given on oath or affirmation:

> I, **Doug MacKenzie**, carpenter, of 123 Main Street in Penticton, British Columbia make oath and say as follows:

If the client does not wish to reveal his or her street address, just the name of the city or town and province can be given, or an address in the care of a business or another person can be provided.

The next paragraph is a part of the client's sworn statement and begins the numbered paragraphs that make up the text portion of the affidavit. This paragraph confirms the relationship of the deponent to the court proceeding and confirms that the statements made in the affidavit are true:[10]

> 1. I am the claimant in the proceeding herein and as such have personal knowledge of the facts and matters hereinafter deposed to, save and except where the same are stated to be based upon information or belief, and where so stated I verily believe the same to be true.

Where the deponent is a friend or relative, this paragraph would read as follows:

> 1. I am the sister of the claimant in the proceeding herein and as such have personal knowledge of the facts and matters hereinafter deposed to, save and except where the same are stated to be based upon information or belief, and where so stated I verily believe the same to be true.

Where the affidavit is being used for a summary trial or a desk order application for a final order, this paragraph must be changed to remove reference to knowledge on information and belief as hearsay evidence is not permitted at summary trials:

> 1. I am the claimant in the proceeding herein and as such have personal knowledge of the facts and matters hereinafter deposed to.

Apart from these two set paragraphs which begin all affidavits and the phrase that identifies an exhibit to an affidavit, there is no other set language that must be used in an affidavit.

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[10] The essence of this statement is included in the pre-printed part of the Provincial Court form and states: "I know or believe the following facts to be true. If these facts are based on information from others, I believe that information to be true."

C. Structure

An affidavit should be organized to present the information in a logical, orderly manner so that the judge can readily understand:

- who is making the affidavit;
- the role of the deponent in the court proceeding;
- the history of the parties' relationship;
- the history of the court proceeding so far;
- the nature of the order the client seeks or opposes; and,
- why the client seeks or opposes that order.

In general, this sort of full recounting of information is only required for the client's first affidavit or to bring the court up to speed when there have been many affidavits filed and many applications heard in the course of a court proceeding. Subsequent affidavits will usually be limited in scope to addressing new applications and replying to affidavits.

1. Initial Affidavits and Applicants' Affidavits

The first affidavit filed in an action is inevitably prepared by the party who is first moved to apply for an interim order, and usually provides the full recounting described above. Subsequent affidavits, including those for applications made later in the course of a court proceeding, need not go into the same amount of historical detail although they will describe the applications being brought and the circumstances motivating those applications.

Initial affidavits I draft typically look something like this:[11]

1. I am the claimant in the proceeding herein and as such have personal knowledge of the facts and matters hereinafter deposed to save and except where the same are stated to be based upon information or belief and where so stated I verily believe the same to be true.

Application

2. In my application, by Notice of Application dated 1 April 2006, I seek a declaration that the respondent and I are guardians of our child, Joshua Aaron Epstein, born on 1 April 2008, and orders that:
   a) Joshua primarily live with me;

[11] This is an example of only one way that affidavits like this might be prepared. The ways that affidavits can be structured are virtually limitless, subject only to common sense.

b) the respondent have parenting time with Joshua every other weekend from Friday at 4:00pm to the following Sunday at 4:00pm; and,
c) the respondent not take Joshua outside of British Columbia.

Background

3. I am 32 years old and am presently employed as a plumber by Ace in the Hole Bathroom Repair. I earn about $42,500.00 per year.

4. The respondent is 33 years old and is a florist and works for Violets Are Blue in Kitsilano. He earns about $34,000.00 per year.

5. The respondent and I met and started dating in the summer of 2002. We started to live together in October 2004 and married on 1 April 2005.

6. Joshua was born on 1 April 2006.

7. The respondent and I separated on 1 April 2012, when he moved out to live with his parents. Joshua and I remained living in the family home.

8. I started this court proceeding on 23 September 2012, when I filed my Notice of Family Claim.

9. On 23 October 2012, the respondent filed his Response to Family Claim and Counterclaim.

10. On 23 January 2013, a Judicial Case Conference was heard in this matter before Master Smith. We agreed that the respondent would pay child support to me for Joshua in the amount of $317.00 per month.

11. Apart from Master Smith's order about child support, no other orders have been pronounced thus far in this proceeding.

Circumstances of Application

12. On 1 March 2013, the respondent came to my home, uninvited, and began to pack up our belongings.

… and so on.

The first part, "application," summarizes the application that the court will be considering.

The second part, "background," explains who the parties are, the history of their relationship and the important parts of any litigation to date.

The third and most important part, "circumstances of application," states the facts that motivated the application and which support the order sought. In particular, this part

would set out the facts relevant to any legal test the applicant might have to meet in order to succeed in the application.[12]

2. Respondents' Affidavits

It is often helpful to begin respondents' affidavits with a supplemental paragraph beneath the first paragraph that explains the purpose for which the affidavit is being prepared, usually to reply to an application and the affidavits prepared by the applicant in support of that application:[13]

> I make this my affidavit in reply to the first affidavit of the claimant, sworn in this matter on 1 April 2013.

Following these two introductory paragraphs, the standard identifying paragraph and the paragraph explaining the purpose of the affidavit, the structure of respondents' affidavits may mirror that of the applicant even though they are usually prepared for contrary purposes.

In the "application" part, a respondent would state his or her position on the application, and summarize any orders sought in any cross-application.

In the second part, "background," a respondent would usually say very little, except to summarize any important facts omitted by the applicant and correct any errors or misstatements made by the applicant. In general, repetition of facts accurately presented by the applicant and bickering about minor points of difference should be avoided.[14]

In reply to the part describing the circumstances of the application, a respondent would typically:

- state any important facts omitted by the applicant;
- correct any errors, omissions or misstatements made by the applicant;
- state his or her perception[15] of the events leading to the application and rebut any important statements of fact made by the applicant; and,

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[12] In the example just given, the applicant would have to prove that it is in the child's best interests to live with her and have the particular parenting schedule proposed, and that there is a good reason to restrict the respondent's ability to travel or relocate with the child.

[13] This statement is included in the pre-printed part of the Provincial Court form and states: "I make this affidavit in relation to an application by _____ for _____ ."

[14] My caution against repeating facts is not an inviolable rule. There are circumstances when it is appropriate and even advisable to present the respondent's own summary of the background facts, such as when the applicant's summary is so partisan that the respondent should simply approach the facts afresh to avoid allowing the applicant to establish how the circumstances of the application are framed.

[15] It is important to remember that people inevitably perceive events differently from one another and that memories are corrupted with the passage of time and the emotions that are attached to them. Absent an

- state the facts which tend to show that any legal tests required by the application have not been met.

Specific statements of fact can be replied to by referencing the paragraph in the applicant's affidavit in which the claim is made and providing an explanation, usually the respondent's version of events or additional facts which give a larger context to the applicant's statements:

> 44. With respect to paragraph 15 of the claimant's affidavit, I was late to pick Joshua up because I was having car trouble. My car stalled and I could not find a taxi to take me to the daycare on time. A tow truck came about thirty minutes after the stall and fixed my car. I make every effort to be on time or early when I pick Joshua up from daycare.

Respondents must be wary of the temptation to reply to absolutely every comment or point raised by the applicant. This will confuse the facts underlying the application and frustrate the judge, particularly when the statement being replied to is not particularly relevant to the application at hand. In general, blanket denials and acknowledgements can be neatly contained in the second paragraph:[16]

> 2. I make this my affidavit in reply to the first affidavit of the claimant, sworn in this matter on 1 April 2013. I deny the truth of the allegations of fact made in that affidavit except where I have no knowledge of the truth of a fact alleged or admit the truth a fact stated and so expressly state.

To complement a blanket denial, you may wish to also have the respondent acknowledge the statements that are true:

> 3. I admit the truth of the facts stated at paragraphs 5, 6, 7, 13, 24, 25 and 31 of the claimant's affidavit.

The same approach can be applied to those statements of which the respondent has no knowledge, such as the feelings, motives and reactions of others or events not occuring in the respondent's presence.

> 4. I have no knowledge of the truth of the facts alleged at paragraphs 4, 8, 9 and 26 of the claimant's affidavit.

Where the affidavit that is being replied to contains statements that are irrelevant, the client should be encouraged to refrain from addressing those statements. This can be very difficult to accomplish, as irrelevant statements are often hurtful or scandalous and the

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accurate video recording that includes audio and sufficient context, it can be very difficult to pin down the "true" facts of an event.

[16] Some judges have made negative comments about this approach. To be clear, a blanket denial should not be used to challenge the truth of important facts. Applications are not a did-not-did-too game of verbal volleyball; where the deponent challenges the truth of a fact that is essential to the application, "did not" *must* be accompanied by an explanation of some sort.

client may feel compelled to address those claims, in the fear that the court will accept the truth of those statements and think poorly of the client; the client should be reassured that the court generally pays little attention to spurious and offensive irrelevancies. If necessary, a further blanket denial may be added to the introductory paragraphs:

> 5. I will not reply to the allegations of fact made at paragraphs 11, 30, 31, 32 and 40 of the claimant's affidavit as they are untrue and not relevant to the applications before the court.

The court will usually appreciate any effort the client can make to confine him- or herself to relevant facts and avoid the exchange of insults by affidavit.

3. Additional Affidavits

Affidavits prepared by either party subsequent to their first affidavits do not need to go into the same detail as the initial affidavit. If statements made in an earlier affidavit are useful, those statements do not need to be incorporated into a new affidavit, the affidavit can be included in the materials filed in support or in opposition to an application.[17]

Affidavits prepared after the applicant's affidavit and the respondent's reply affidavit have been exchanged usually serve to:

- rebut statements made in an affidavit;
- provide the court with new information about events happening since the previous affidavit was made; or.
- correct a misstatement in a previous affidavit made by the deponent.

Affidavits written to address contested statements of fact may deal with those statements in the manner suggested for respondent's affidavits above. Affidavits that introduce new evidence or correct previous evidence should be as brief as the circumstances permit, and should explain their purpose briefly in the introduction to the affidavit:

> 2. I make this my affidavit to relate certain events occurring since the execution of my first affidavit on 1 April 2013.

or

> 2. Since I made my first affidavit on 1 April 2013, I have learned that my true income in 2011 was in fact $32,680.00. Attached to this my Affidavit as **EXHIBIT "A"** is a true copy of my T4 slip for 2011. The statement I made about my income at paragraph 22 of my first affidavit is incorrect.

[17] Both the Supreme Court Notice of Application and the Application Response allow the deponent to specify the affidavits he or she will be relying on. Inevitably one fresh affidavit will be required for the purposes of the new application, but old affidavits containing relevant information can and should be relied upon.

D. Language

The language used in the affidavit should be that of the client and reflect his or her language skills, manner of speaking and level of literacy. While most clients are unlikely to use words and phrases like "heretofore" and "the effect of the triggering event is to crystallize each spouse's interest in all family property as tennants in common," and such stuffy language should certainly be avoided, technical language is acceptable in the introductory paragraphs of an affidavit, when introducing affidavits and when dealing with other technical issues. Remember that a cross-examination on an affidavit is always a possibility; the client must be able to explain and defend the statements made in his or her affidavit.

Apart from ensuring that the language of the affidavit is appropriate to the client, the following general principles should be observed:

1. Affidavits are written in the first person. It is the deponent who is giving the evidence, not "the claimant," "the applicant" or "Mrs. Chen" and the appropriate pronouns to use are "me," "myself" and "I."

2. Affidavits should be as brief as the circumstances will allow. Avoid run-on sentences and feel free to chop up a large and ungainly paragraph into two or more paragraphs, or a number of subparagraphs.

3. Affidavits should not contain legal argument.

4. When introducing an exhibit, the deponent should confirm that the exhibit is a "true copy" of the original or otherwise affirm the accuracy of the exhibit.

5. Affidavits should not contain irrelevant statements of fact, particularly where the allegations are frivolous, provocative or scandalous.

6. There is no need to begin every paragraph with the word "that." Affidavits written in this manner are extremely old fashioned, hard to read and irritating to those who must read them.

7. Foul language may be used where someone is being quoted directly, without the necessity of tidying the language up with spaces or symbols: "she told me to f-ck off." There's no need to be prudish.

1. Client Comprehension

The affidavit is the *client's* sworn evidence, not that of the advocate. The client must not only agree that the evidence being recorded in the affidavit is factually accurate, he or she must also understand the evidence being given. Apart from the usual issues that the advocate should be alert to – having a first language other than English, being visually

impaired or having poor language skills – be aware that some clients may be functionally illiterate and will go to great lengths to conceal that fact.

Where there is any doubt as to the client's comprehension the affidavit should be slowly read to the client, whether by the advocate or an interpreter, and the client should be encouraged to give comment and feedback, and suggest revisions.[18] Check in with the client frequently: "is this right?" or "have I got this the way you want it?" At a minimum, the client should be reminded that the document is a sworn statement as if made under oath or affirmation in the witness box and the potentional of future cross-examination on the contents of the affidavit should be discussed.

2. The Role of the Advocate

Most clients in family law matters are unfamiliar with court proceedings and rely heavily on lawyers and advocates for guidance. As a result, clients will often sign, without question, any document put before them. There is a high ethical duty on the advocate when helping draft an affidavit, to ensure that the final product properly reflects the client's own evidence rather than words put into his or her mouth by the advocate.

E. Execution

Affidavits are usually notarized by lawyers and notaries public. Most lawyers and notaries will charge for this service. Court registry staff may also take affidavits. While execution at the Provincial Court is free, the Supreme Court will charge a fee of about $35.00. The client should be advised to bring a piece of government-issued photographic identification regardless of who is taking the affidavit. The lawyer, notary or court clerk must be satisfied that the person executing the affidavit is in fact the deponent.

III. A CHECKLIST

Before drafting:

- ❑ Identify the orders sought, consented to and opposed.
- ❑ Attempt to identify any applicable legal tests and the facts or circumstances that must be established to meet the tests.
- ❑ Review the evidence available from the client and discuss the need for affidavits from additional witnesses.

While drafting:

- ❑ Summarize the orders sought or the client's position on the orders sought.

[18] Remember that special statements must be added to the affidavit when it is read to a client who cannot read or is translated to someone who is not fluent in English. These statements are reproduced above.

- ❑ Identify the parties and provide a brief summary of the parties' relationship and the important events in the course of the proceedings to date.

- ❑ Explain the circumstances provoking the application expeditiously and efficiently, without relying on self-serving expressions of emotion or opinion.

- ❑ In the case of lengthy affidavits, conclude by restating the orders sought or the client's position on the orders sought.

Drafting double-check:

- ❑ Ensure that all exhibits are relevant and necessary to the application.[19] Ensure that all exhibits will clearly reproduce.

- ❑ Ensure that all pages are numbered, including each page of all exhibits.

- ❑ Ensure that the facts motivating the application are not misrepresented or presented in such a way as to manipulate the truth, bearing in mind the possibility of the deponent's cross-examination on the affidavit.

- ❑ Ensure that the statements made and documents used as exhibits are properly admissible.

- ❑ Try to ensure that the statements made in the affidavit are not inconsistent with the deponent's previous evidence.

After drafting:

- ❑ Review the affidavit with the deponent,[20] and encourage the deponent's questions, comments and corrections. Revise the affidavit as necessary, and review any changes with the deponent.

- ❑ Ensure that any required certificates or endorsements are included after the space for the deponent's signature.

- ❑ Send the client out to get the affidavit executed. Make sure that all exhibits are attached and marked, and that the client has government-issued photo identification.

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[19] Where an affidavit uses a great many exhibits and you anticipate frequent reference to those exhibits in chambers, consider separating the exhibits by alphabetized tabs in all copies of the affidavit, including the copy given to opposing counsel. This will greatly speed the hearing of the application.

[20] This is also an excellent opportunity to use the client as a second set of eyes to check the affidavit for spelling, grammar and syntax errors.

IV. APPENDICES

A. Example of a bad applicant's affidavit; *not to be used as a precedent*.

B. Example of a bad respondent's affidavit; *not to be used as a precedent*.

C. Example of an affidavit of surpassing brilliance.[21]

[21] This affidavit should likewise not be used as a precedent, not because it is anything other than a stellar example of drafting excellence, but because no two affidavits are ever alike. Apart from the mandatory two introductory paragraphs, each affidavit is an unique reflection of the background facts and the particular circumstances of the client and his or her family.

Appendix A

[redacted]
Vancouver Registry

[redacted]
Sworn March 24, 2004

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

[redacted]

PLAINTIFF

AND:

[redacted]

DEFENDANT

AFFIDAVIT

I, [redacted], of [redacted], in the City of Vancouver in the Province of BC, **MAKE OATH AND SAY AS FOLLOWS:**

1) I am the Plaintiff in this action and, as such, have personal knowledge of the matters of fact hereinafter deposed to, save and except where the same are stated to be based upon information and belief and, where so stated, I verily believe the same to be true.

2) I am swearing this affidavit in response to the Section 15 update of December 24, 2003 Section 15 update by [redacted]. The update, requested by the Defendant in this matter was intended to evaluate how our children [redacted] and [redacted] are doing under the present parenting schedule.

3) I was initially opposed the Dr. [redacted] update on the grounds that the original section 15 and based on subjective opinion that contradicted objective evidence. It was my belief that Dr. [redacted] was acting as an advocate and apologist for the Defendant and that she indicated that she simply dismissed much of what I had to say.

4) During the cross-examination of Dr. [redacted] on the original the original Section 15, she would not admit to her misrepresentations. She claimed I told her I had a serious depression problem, which I did not. She then changed her testimony and said that [redacted], physiologist had said that I had serious depression problems, which statement was also untrue. Then she changed her mind once more and testified that it was her interpretation of what Mr. [redacted] had told her. This tendency to couch her rationalizing as evidence against me and in support of he predetermined position continues in the update.

5) The Defendant brought an application before the court to have Dr. [redacted] do an update. In chambers, it was clear to my counsel that the Judge was going to explicitly adhere to Paragraph 136 of the Reasons for Judgment of [redacted]. My council, Mr. [redacted] recommended we consent to the order, to avoid costly court costs. I reluctantly agreed. I hoped Dr. [redacted] would have reconsidered her mistakes and rectified those misrepresentations in her updated report.

6) Upon receiving the report, my concerns were realized. Dr. [redacted] has produced a report with findings that are the opposite from that of the many affidavits of friends and neighbours who are all parents and collectively have spent, literally and cumulatively, 1000's of hours with E[redacted] and D[redacted], as opposed to her couple of hours.

7) Dr. [redacted] findings are contradict what the children's teachers report.

8) Dr. [redacted] did not interview the children's schoolteachers. These professionals spend five days a week with out children. Originally Dr. [redacted] did ask me for the teachers phone numbers so she could talk to them. After I sent Dr. [redacted] the children's Christmas report cards, she decided not speak to the teachers.

9) D[redacted]s Christmas & Spring Report Cards were glowing. E[redacted]'s were very good and improving. Attached as **Exhibit "A"** to this my affidavit is are copies of the children's most recent report cards.

10) Dr. K[redacted] would not review video of the children and I, made by friends of mine. She told me these tapes were not helpful, since it was clear I would not be showing videos me abusing the children. This argument may make sense in a philosophy course on logic, but in the present context exposes her predisposed view of me as potentially falsifying the videos for the purposes of misleading the court.

11) Dr. [redacted] has severely restricted the data she examined, thereby controlling and directing the outcome. Dr. [redacted] used the subjective interpretation of her own observations, and the Defendant's complaints as the basis for her report. She did not interview me to obtain my version of each of the Defendants complaints, other than to ask me about phone calls. Therefore, her "report" was made without having the benefit of both sides of the story. It can be argued that she did not want to have to deal with evidence that so clearly and unambiguously contradicts the allegations of the Defendant.

12) The only other information beside her own observations that she seriously considered was that of [redacted] play therapist, whom she personally recommended provide therapy to our children in the first place. I will address Ms. [redacted] comments later in this affidavit.

13) Many of the issues raised by the Defendant in the section 15 update and commented on by [redacted] were addressed in my September 4, 2004 affidavit.

14) Someone has made our children aware of the purpose of the [redacted] interviews. Everything I have read and been taught about children of divorced parents is that children should be protected from the rigors of litigation as much as possible. I am

very concerned that E[redacted] and D[redacted] have been put directly into the position of choosing between their parents.

15) Dr. [redacted] reports that the children are aware that I desire a week on week off residency schedule. Dr. [redacted] fails to mention that the children are also aware that the Plaintiff does not want them to spend more than a few days away from her.

16) Dr. [redacted] conclusions about D[redacted] are contrary to D[redacted]'s teacher's experience. D[redacted]'s teachers have nothing but positive things to say about her. . D[redacted] spends 6 hours a day in school 5 days a week. Suggesting that a 6-year-old child could hide these type of problems from a teacher with many years of experience is less than credulous. She has very dedicated teachers who would have noticed if something was wrong with her, particularly of the severity concluded in the Section 15 update.

17) Dr. [redacted] concludes that E[redacted]'s fooling around in class is an indication of psychological problems. I spoke with his teacher about her comments made in his report card. Teacher comment was that this was an area to improve, but definitely not something to become worried about. She told me that most of the boys in her class can improve in this area. I have spent more than a few days in E[redacted]'s classroom helping out on projects or going on field trips. The boys in general need frequent reminders to settle down. E[redacted] is simply typical for a boy his age in that area.

18) E[redacted]'s behavior is not extraordinary. These types of comments about improving and not fooling around were part of my elementary report cards as well. My boyhood elementary school experiences were very similar to E[redacted]'s.

19) I have addressed the missing a play therapy appointments in my September 4th affidavit. The Defendant implies that I somehow do this on purpose, which is certainly not the case. Dr. [redacted] seems to only attach importance to my "failings" and fails to note that that Defendant forgets and makes mistakes as well. We all do.

She does not remind me any more than I remind her, and it certainly does not occur routinely. For instance, on March 12, 2003 the Defendant forgot to take D[redacted]e to swimming lessons. I note that no particular importance is attached to that such as was attached to my "lapse". This has been typical of the manner in which Dr. [redacted] has approached this matter.

20) The Defendants expresses concern with E[redacted]'s choice of friends. These are the same boys the Defendant asked me to send E[redacted] on an overnight sleepover Birthday party with. Attached as **Exhibit "B"** to this my affidavit is a copy of the Defendant's February 10, 2004 email to me on this matter.

21) I was never notified by the Defendant of E[redacted] getting into trouble about throwing ice at a window. As the school did not notify me, so it must have been a fairly minor issue. Unfortunately, this is another issue that I find out about only in legal proceedings, not through the Defendant's communications.

22) Under cross examination during the trial, Dr. M[redacted] explained how these petty complaints should not be considered by the Section 15 assessor in her report, yet she spends an inordinate amount of the report detailing all of the minor and petty complaints that the Defendant makes.

23) Dr. [redacted] does not supply an analysis of her observations that lead to her conclusions. Dr. [redacted] spoke to me repeatedly about the science of her work and that was her reason for refusing to review my video's and other information that I provided. Her report does not contain any analysis that leads one to her conclusions. This kind of analysis is the basis of any technical or professional report.

24) The Section 15 update presents me as an "Angry Man", a man in denial. It suggests that E[redacted]and D[redacted] are "very fearful" of their father. It states that my ongoing problems and anger are responsible for a wide variety of problems that afflict our

children. Dr. [redacted] completes this character assassination, without any substantive evidence or supporting analysis. Had she spent some time properly reviewing the materials that I provided, she would have seen that this was not the case and that her interpretations were incorrect.

25) Dr. [redacted] uses language that turns a positive into a negative. When I describe Etienne and how I see him, Dr. [redacted] ends the paragraph with "but he hasn't had any sleepovers yet". Dr. [redacted] asked me the question of how I saw E[redacted] directly. It was not something I volunteered. However, it is strange that she would choose to tie questions about E[redacted] and getting along with friends and teachers, then throwing in a comment about not having sleepovers yet. It seems to me that Dr. [redacted] is trying to discount what I observed and stated in my answer to her questions by tossing in some unrelated comment that was made some time later.

26) At the time of the Section 15 interview, E[redacted] had had several successful sleepovers with friends without his parents.

27) Some significant comments I made to [redacted] were left out of the report.

28) I told Dr. [redacted] E[redacted] had recently started a new daycare. No mention in the report of my statements about how well E[redacted] adjusted to the new daycare or that [redacted] who runs the daycare, was commented that she was surprised how quickly he settled in to his new surroundings.

29) Dr. [redacted] questioned me about E[redacted] not currently being registered in any structured sporting activities at the time of the interview. However I did tell [redacted] that she should read the September 4th 2003 affidavits for background information and accuracy of events.

30) When Dr. [redacted] asked me why the Defendant was interfering and undoing planned physical activities that were in my realm of responsibility, I told her "[redacted] does

what [redacted] wants" and suggested as the expert perhaps she could shed some light on why she does this.

31) When we discussed Cubs and Sparks. I talked at length about the general differences about boys and girls in the Sparks vs. Cubs. The physicality of the boys and their need for frequent activity and how this is associated with the boys' shorter attention span in the classroom, and hence the comments from teachers about too much fooling around. Dr. [redacted] elected not to include this relevant part of the conversation.

32) Similarly, when discussing E[redacted] and D[redacted]'s friends, Dr. [redacted] leaves out positive comments I made. What I actually told Dr. [redacted] is that both children frequently have friends over or they go to friends houses. I told her that there is often a house with several kids playing with both E[redacted] and D[redacted]

33) I don't know what Dr. [redacted] is trying to get at with this strange comment about going to Cubs and Sparks on Mother's Day on Wednesday, In fact, the children go to Cubs and Sparks on Wednesday night when they residue with me. The comment has no relevance.

34) Dr. [redacted] frequently uses parenthesis to emphasis something I've said. She does not do this with the Defendant.

35) Dr. [redacted] has a very strange way of saying that I told her that I am not in any serious relationships. *"Mr. [redacted] stated he is involved, and has been involved, with no relationships".*

36) With respect to our conversation about D[redacted] jumping out of windows. Dr. [redacted] responded to my statement about not knowing about it until I read it in the the affidavit with doubt. She asked me twice if the Defendant had not notified me about these concerns. She appeared very concerned. She also asked me why I thought Defendant would not tell me about this. I told Dr. [redacted] she was the expert, maybe

she knows. I didn't have any reason as to why the Defendant would not tell me something that significant.

37) With respect to any other concerns – I referred Dr. [redacted] to the affidavits for a list of concerns and so she could both see sides of the story. That we use email primarily and phone is only used for emergencies.

38) Dr. [redacted] asked me about emails and if the children had access to them. I told her I used my laptop for email between the Defendant and I. That our children did not have access to this computer. They only use the desktop computer at home. That I only read my email at night or in the morning and that I do not turn it on in the middle of the day when the kids are with me.

39) Dr. [redacted] asked me about nightmares. I responded that they have a nightmare every six months or so. I wake up as they get up and come to my room. Dr. [redacted] fails to ask the Defendanat this same question, or make any comment about it. Nor do I see urination problems with D[redacted].

40) Dr. [redacted] does not mention that I told her that Defendant refused to reimburse my lost parenting time. That she insisted on sticking to the court order stipulating "not more than 4 days" without mother unless agreed upon. It ignores the fact that the children and I had been able to go on vacations of more than 4 days for three years. It ignored the fact that the children's paternal grandparents have a 50th wedding anniversary this summer and with the current situation we will not be able to visit them in Toronto.

41) Dr. [redacted] was the one who suggested extended time during the summer holidays of two weeks or more at a time in the summer.

42) Dr. [redacted] does not mention that I told her that the Defendant flip flopped on summer daycare issues and registered the children in a different program against my

input. Dr. [redacted] was quite surprised stating " But there's a court order and that's your decision to make". Dr. [redacted] asked me why the Defendant would act in this way. I responded with that is the way the Defendant conducts herself and Dr. [redacted] was the expert and that perhaps she could explain it to me.

43) I further told Dr. [redacted] the following facts and statements, but she failed to note them in her reports:

A) The children refer to Dad's house as home when with Dad. And Mom's house is home when with Mom.

B) More than ½ the children's friends and classmates have parents that live in separate homes. That both children have commented that this is normal. In E[redacted]'s words, "not a big deal". I told Dr. [redacted] living in two homes is the only life D[redacted] knows since she was only two when we separated.

C) I drop the kids off at school typically around 8:30 and pick them at 4 and that I only work 6 hours a day when the kids are with me. I frequently take time off work to attend and help out at school activities and field trips.

D) I told her the children have many friends in the neighbourhood. There are some 20+ kids in the same block under 12. A football sized green space in the backyard with trees. That we live a 5-minute walk from the school. Dr. [redacted] choses to ignore these positives.

44) With respect to the interview with myself and D[redacted], I would suggest that playing with my hair, holding hands, and giggling, are not signs of a fearful child.

45) Dr. [redacted] uses "wacked" for emphasis. Actually it was E[redacted] who hit me playfully with the paper roll, not D[redacted]. She does not mention that I correctly redirected E[redacted].

46) In contrast, when the children misbehaved in the in the original section 15, Dr. [redacted] praises the Defendant for successful conflict resolution. She does not accord me the same consideration.

47) With respect to her interviews with the children, Dr. [redacted] does not tell us what the children say, but presents only her interpretation of what the children say. Given the problems with her "interpretations" of my statements and those of [redacted], there is some question about her ability to "interpret" the children.

48) Interviews with children were mostly conducted at the Defendants house. Only 15 minutes were spent with D[redacted] at my house & 10 minutes for E[redacted] This is a noticeable discrepancy.

49) This issue is relevant because after nearly 5 years of litigation our children have learned that their mother wants them not to spend as much time with their father and wants to make all of the decisions in their lives. Essentially, she wishes to minimize their involvement with me. I simply desire equality in parenting.

50) I believe that as a result the children tend to answer these types of questions in the way the parent whom they reside at any one time wants.

51) Dr. [redacted] has alleged – "Both children expressed concern about how their statements may be used against them by Mr. [redacted]". However, she fails to provide any information as to what statements or in what manner she does not explicitly describe what the children allegedly say, or whether the idea for this statement could have been suggested to them by their mother.

52) This insinuation is very worrisome. It is a similar situation to the play therapist recommended by Dr. [redacted] who will not say what the problems are that the children allegedly have, but presents an interpretation of them without specifically identifying them.

53) I believe that it is the duty of the therapists and psychologists to fully and completely report a problem rather than make vague and unsubstantiated statements, allegations and then offer interpretations. It does not permit enough information to challenge or examine those conclusions. It would be analogous to a judge only hearing one side of an argument and then, in the Reasons for Judgment vaguely referring to the "evidence" without ever giving any indication of what that evidence might be.

54) Dr. [redacted]'s report suggests than the children are fearful and are in some sort danger if I find out what they are saying. Not only is this preposterous, she does not substantiate her claims with any facts. The statement is simply tossed out without any validation. This makes it difficult to respond to or, indeed, to defend against.

55) Someone told our children about judges and the purpose of the interview Children should not be part of this dispute. Keeping children away from litigation is a core principle of custody disputes.

56) Giving children the power to go back and forth between parents is a recipe for disaster. Children should not be making certain kinds of decisions. They don't decide their bed times. They don't decide whether or not they feel like going to school, brushing their teeth, eating healthy foods or anything like that, so why would they be allowed to make more important and far reaching decisions.

57) Both children have spent one on one time with both parents on many occasions. I am very much in favour of it and have told the Defendant just that. The most recent occurrence was Sunday March 21, 2004 when Delphine spent the day with her Mother at her request.

58) The section 15 update report places a great deal of emphasis on the phone call issue. There is a great amount of evidence available that shows that phone calls are made reach night and frequently at other times.

59) I have made at least three requests for the Defendants own cell phone records. This would be substantive evidence of nightly phone calls. As at he swearing of this affidavit, the Defendant has chosen to ignore these requests.

60) The Defendant's cell phone records will clear up much of the controversy surrounding the telephone issue and provide a very good picture of the number and frequency of the calls made over the last year. This list is not exhaustive since some calls would go to her home phone and the Defendant has made calls to the children from other phone numbers.

61) In my September 4th, 2003 affidavit I have also addressed the phone call issue. Several Affidavits were supplied by other's attesting to my diligence in ensuring that the children telephone their mother. I included a tape transcript of a typical situation when the Defendant cannot immediately contact the children, and leaves 7 voice mails in a period of 45 minutes. In this case we had gone next door to the neighbour's for supper. When we returned home we promptly called the Defendant.

62) Dr. [redacted] reports that the children have said that sometimes the (home) phone does not work. This is true. As my emails , attached hereto as **Exhibit "C"** , show, a storm in October 2003 disabled my home phone line. Due to the service backlog, it took approximately a month to repair the phone line. During that time we used my cell phone to phone the Defendant and visa versa. Attached as **Exhibit "D"** to this my affidavit are copies of my cell phone bill for that period.

63) This evidence shows a clear pattern of nightly calls to and from the Defendant when the children reside with me. It further shows that the children call their mother at

other times of the day and that the Defendant calls the children at different times of the day, sometimes 5 or more calls will go back and forth.

64) Nevertheless, and in the face of such evidence, Dr. [redacted] reports that the children have said that they have trouble phoning their mother. Dr. [redacted] accepts these statements at face value, without any question, when the evidence shows the contrary to be true.

65) What Dr. [redacted] reports is either an "interpretation" that the children are telling her about not being able to call their mother, or the children feel obligated to answer in this way, since evidence shows that calls are made nightly and more.

66) I sent the following letter to [redacted] in August of 2001, before the Trial–

"Dear Ms. [redacted],

I have completed some research on the subject of Play Therapy. As you have been treating E[redacted] and D[redacted] I have several concerns that I would like to address. Experts agree that play is crucial to a child's growth and development. Make-believe ,imagination and fantasies are important components of play.Play Therapy, when used as therapy, has a role for children in need of treatment. My concern is that you not make references and draw incorrect conclusions about the child's reality based on play. The child's play is placed in context of hearsay evidence provided fiom one party in a custody dispute.

For example if you hear from one parent in a custody dispute that the other is violent, then your interpretation of the child's play has to push you towards what you have been told is the background and you wouldn't know to consider another hypothesis. The child's play is then used to assist the case of one party

against the other.

Perhaps an example is useful to convey my concern.

A child's mother, who is attempting to gain sole custody, accuses a father of being an aggressive violent abuser. During a play therapy session, the child is observed smashing some toy soldiers. The child has recently watched a TV show with soldiers in it and is using his imagination. Nevertheless, the therapist then uses this event to fit the context of the hearsay evidence as described by one party .If the father is then confronted with this accusation, he is likely to respond defensively, perhaps even appearing aggressive to the therapist; adding more fuel to the fire. My second concern is that once this type of evaluation is made, a report is then created and presented. Even though the report is based on fitting observations into the context of hearsay evidence using faulty logic, and based on false assumptions about the child, it carries the weight of an entrusted professional. The report may be accompanied by a curriculum vita expounding the expertise of the writer, giving the report additional credibility, when in fact the whole tragedy is based on a subjective representation of child's play fantasy.

Play Therapy used to "evaluate" the child's reality is an improper use of the procedure. What the child needs is "play therapy" not "play assessment".
I have been and always will be willing to assist in my children's counseling if:

1. *It is necessary.*
2. *if the purpose is therapy.*

I need you to confirm in writing that you will not be preparing an evaluation or affidavit before I meet with you."

67) The concerns outlined in my letter have unfortunately come true. Ms. [redacted], the play therapist, has had a play therapy session with the Defendant and the children together where they all discussed "Father being angry and yelling at the children".

68) First it is inappropriate for someone engaged in therapy to be having discussions about the other parent with the children present when the therapist knows there is a custody dispute going on. The children will be strongly influenced by that parent.

69) Second it is inappropriate to take this play therapy session with the mother present as fact. It is not an environment free from either influence or bias.

70) If the play therapist had any suspicions she should have contacted me to get the other side of the story . Like the psychologist who recommended her, Ms. [redacted] declined to find out the other side of the story.

71) Ms. [redacted]'s interview in the Section 15 update portrays me as a menacing man that I say is completely untrue. Dr. [redacted] repeats three times in her report that I threatened Ms. [redacted], which is untrue.

72) Strangely enough, on June 17, 2003 the play therapist wrote a pleasant letter wherein she characterizes my relationship with E[redacted] and D[redacted] by "It is obvious they have a deep attachment to you" Ms. [redacted] has also made many positive comments such as "you guys are having way to much fun" when he heard the laughter and observed the children and I playing in the waiting room.

73) Ms. [redacted] claims that our children are normal, but that they also have significant problems. I would, therefore, conclude that the problems themselves are normal and consequently not extreme, as they have been characterized.

74) In light of all this, I find the alleged comments of the play therapist in the Section 15 update and Ms. [redacted] confusing and, in fact, in opposition to each other.

75) Dr. [redacted]'s report accuses me of threatening [redacted] Either Ms. [redacted] has misrepresented the situation to [redacted] or [redacted] is "embellishing" or "interpreting". I did not "threaten to go after Ms. [redacted]'s License" as the [redacted] Report claims.

76) I did write to the play therapist's licensing body about policy on disclosure of children's information files to parents, and copied [redacted] on that correspondence, which was a matter of courtesy, but I never threatened her.

77) Similarly, Dr. [redacted]'s report comments about me being "insistent" on terminating therapy are incorrect. I questioned the play therapist about how long the children would be in therapy. The play therapist's response in her letter of June 17, 2003 was that she would be conclude her work at the end of the summer 2003 and would be natural transition to the beginning of the school year. Therapy concluded in late December 2003, four months after the play therapist had said she would be finished.

78) During our my initial interview in January 2003 with [redacted] she told me that:

A) Her general belief that children in are not ready for week on-week off residency regimes before the ages of 7 or 8.
B) She had seen the E[redacted] & D[redacted] twice the year before the trial and once recently before my visit in January 2003.
C) That E[redacted] was not showing any signs of aggressive behavior and both children seemed more settled than last year.
D) That E[redacted] was sad that his parents were living apart, but she acknowledged that all children of divorced parents exhibit this sadness to some degree.

79) A significant part of my evidence during trial was the report of Dr. [redacted] MD, Clinical Professor of Child Psychiatry, Columbia University College of Physicians and Surgeons. Dr. G[redacted]'s report forewarned many of the issues facing this court today in his report of August 20, 2001. The G[redacted] report was not addressed in Reasons for Judgment of [redacted]. I attach a copy of the G[redacted] report as **Exhibit "E"** to this my affidavit.

80) Dr. G[redacted] has written a number of books on play therapy, has worked with play therapy for over 30 years and has lectured on play therapy in many countries around the world. Dr. G[redacted] recommended that the play therapist identify, *"what are the symptoms that she is planning to treat and are they outside of the normal anxieties that children can be expected at time of separation".*

81) I repeatedly asked this question of Ms. [redacted]. After 10 months of play therapy, I still do not have an answer to that question from the play therapist. Certainly the picture presented in the Section 15 update is significantly different than the one presented in Ms. [redacted]'s letters to me. There is a noticeable discrepancy between Dr. [redacted] and Ms. [redacted].

82) Dr. G[redacted] explains why the stonewalling of information to the father will ruin any therapy of E[redacted] and D[redacted].

83) On the subject of efficacy of child therapy during litigation (page 5 of his report) Dr. G[redacted] had this to say-

"*Those problems that result from the litigation are not likely to be helped by any kind of therapy, whether it be play therapy or any other kind of therapy.* As *long as the parents are litigating for custody, that long will the child have symptoms in this category, symptoms that are not likely to be helped by play therapy or any other kind of treatment. I often say that treatment of such symptoms is like throwing pebbles at a tank. It's a waste of the parents' time and money. I personally will not*

accept as a patient any child whose symptoms are in this category. I state to the parents: "When the litigation is over and things settle down, then bring the child back to me and we'll see then whether treatment is necessary for residual symptoms that resulted from the litigation."

84) Dr G[redacted] wrote on the subject of therapy and litigation, on page 6 of his report:

"Skilled therapists recognize that when a parent brings a child to therapy at a time when a lawsuit is ensuing, that the parent may have a hidden agenda, namely to use that therapist in the course of litigation. Competent therapists do not allow themselves to be so duped and protect themselves from such exploitation by insisting upon a signed contract preventing such manipulation and exploitation."

85) On the matter of confidentiality, at page 7 of his report, Dr. G[redacted] states:

"By the way, with regard to the word "confidential," if the therapist takes the position that what the children say to her is confidential from the parents, then that is a serious flaw. Although it is a common error, it is still an error. When working with children ages 4 and 6 (I'm not talking about teenagers here), everything must be above board or else the therapy will be compromised. Children in that age range do not have the ability to make judicious decisions regarding what should be and should not be disclosed to their parents. There is nothing that goes on in their lives that should not be disclosed to the parents and if the therapist is naive enough to think that "respecting" children's wishes in this regard serves the best interests of their therapy, that therapist is not doing what is really in the children's best interests. Accordingly, it would be important for the father to know what Ms. [redacted]'s position is on the confidentiality issue and exactly how she utilizes the principle. It is important for the reader to appreciate that I am making a sharp differentiation here between the therapist disclosing to the parent what the children say, and the therapist disclosing to the lawyers and court

what the children say. For proper therapy to be conducted, it is crucial that the therapist have the freedom to disclose in the former category and not in the latter category."

86) G[redacted] states that that play therapy should not be compellable in court, and this should be decided before therapy begins. He further explains that any disclosures to the court will destroy the therapy and gives his reasons for this fact.

87) On page 10 of his report Dr. G[redacted] he further explains –

" First it needs to be established that these children need therapy. If they do need therapy, then I would agree that it should be completely separated from the court and that both parents sign a contract with the therapist that there should be no information transmitted to lawyers or anyone else. "The lawyers must agree as well that they not take steps to void that contract and bring information to the court above the protest of either parent."

88) I believe this was the intention of the court in the July 2002 reasons for Judgment. Unfortunately, the Defendant and her Lawyer inappropriately obtained the file and information about play therapy and managed to make it part of the court record.

89) In my letters to [redacted] I write about access to the children's files. My purpose in gaining access to these files was simply to find out what was happening to E[redacted] and D[redacted], mostly because there was no information forthcoming from Ms. [redacted]. I never intended it for litigation.

90) With the resumption of litigation, the Defendant has started to grill the children about planned activities. For instance when the children share our plans with their mother on the phone, I can hear the children responding to her questions. For instance they tell her that yes, they really want to go skiing and that Daddy is not forcing them to do it. E[redacted] is told to look after D[redacted], as if there was something to worry about.

This is created solely by the Defendant. I believe that this position of the Defendant, transmitted to Dr. [redacted] and accepted by her at face value, is the origin of the "fear" allegations.

91) Recently the Children has been feeling the effects of approaching litigation. It affected E[redacted] more during the trial when he was 6 years old. D[redacted] now 6 seems to be affected worse than E[redacted] this time around. This has happened before with resumption of litigation. Just as before, I believe it will go away again, just as Dr. G[redacted] correctly predicted. Fortunatly, it has not affected their schoolwork.

92) Dr. [redacted] does not address these issues and contradictions in her report-

A) If mother is too busy, how will more time with mother help?
B) E[redacted] is relatively well adjusted and a polite boy - yet very angry?
C) Father is "not as nurturing" vs. "not nurturing" a significant difference. This to be expected with mothers vs. fathers. This is what Dr. E[redacted] wrote about the complementary roles of mothers and fathers and why both were essential.

93) Dr. [redacted] presents this update as vindication for the Court not following her earlier recommendations in the original Section 15. It is more of a defence for the author's earlier position than an objective re-evaluation as required.

94) There is no evidence provided to show that E[redacted] was angry and tense. The only evidence is that he is a normal boy with all the usual tendencies that boys have.

95) Dr. [redacted] presents no evidence that suggests that E[redacted] only wants to please me and rather than to actually spend more time with me. [redacted] cannot accept that's what E[redacted] wants. Most children want fairness. Curiously on this point, Dr. [redacted] does not refer back to the original Section 15 were E[redacted] says he wants to spend more time with his dad (when E[redacted] was only 5). Dr. [redacted] has once

again conveniently ignored and/or omitted whatever does not fit in with her own personal theories.

96) The Defendant extols E[redacted] to care for his sister when with Dad. An eight-year-old boy should not have this burden. Dr [redacted] presents this as a positive. She ignores the Defendant's implication that there is something to worry about when the children are with their father.

97) All children afraid of negative evaluation to some degree. Dr. [redacted] did not ask me or report that she asked E[redacted] if I praise him (and D[redacted]) for a job well done. Positive evaluation. Something I do on a regular basis – [redacted] maximizes the negative and avoids the positive. She presents this negative evaluation statement as fact without satisfying it. There is no basis for this statement or evidence that I negatively evaluate E[redacted] (or D[redacted]).

98) Suspiciously, Dr. [redacted]'s conclusions that I am an angry man are very similar to that noted by the play therapy in session with mother and children. Yet the only evidence she presents is the alleged testimony of the children. Dr. [redacted] provides no analysis or basis for these conclusions. On one hand she suggests that the children's statements, such as wanting to spend time with me, are not reliable, but takes any negative statement at face value without providing any proper analysis. I believe this calls her report into considerable question.

99) There is no evidence in the report that D[redacted] is moody. This statement directly contricts the teachers reports. This comment appears to come directly from the interview of the Defendant without reasoning or analysis. It is also contrary to the collateral evidence presented in affidavits. Once again, Dr. [redacted] ignores the evidence and simply accepts the Defendant's word at face value.

100) The description of D[redacted] "holding her breath" similarly comes from the Defendant's description , although it was not part of the section 15 update.

101) The issue of telephone access is addressed above.

102) The evidence from my previous affidavits (which I presented to Dr. [redacted] and asked her to read) contain many examples of the Defendant not being flexible with altering parenting schedules. Attached as **Exhibit "F"** to this my affidavit are copies of various communications between the Defendant and myself.

103) Dr. [redacted] originally recommended Ms. [redacted] conduct play therapy for the children. In turn, the [redacted] update was suggested by [redacted]. Now [redacted] suggested ongoing therapy by Ms. [redacted]. I believe if the court lets this continue there will be another recommended update in a year from now with more play therapy recommended as a result of a whole new series of alleged problems with the children caused by something that I do or do not do.

104) Play therapy has not helped the children. It has just caused problems and led to further litigation. More play therapy by Ms. [redacted] will, on the basis of historical evidence, induce more litigation.

105) Even though the Section 15 update presents me in a negative light, Dr. [redacted] she still recommends that I spend 40% of the time parenting our children based on an unworkable schedule.

106) Her alternative suggestions will drop me below the 40% residency point. Further to the damage that will be done to our children, I will be obligated at that point to pay the Defendant the full table amount of child support. I will not be able to meet my creditor obligations. I will go bankrupt, be forced to move out of the catchments area to find less expensive accommodations. I don't believe that this is in the best interests of our children.

107) In short Dr. [redacted] has produced a report without analysis or support for her claims or recommendations, based almost entirely on her one sided and subjective observations, and those of the play therapist [redacted].

SWORN BEFORE ME at the City of Vancouver, in the Province of British Columbia, this day of)



Mr. [redacted]



A Commissioner for taking Affidavits within British Columbia.

Appendix B

[redacted] #2
sworn: March 15, 2006

No. [redacted]
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

[redacted]

PLAINTIFF

AND:

[redacted]

DEFENDANT

AFFIDAVIT

I, [redacted], of [redacted], Sechelt, British Columbia, **MAKE OATH AND SAY AS FOLLOWS:**

1. **THAT** I am the Plaintiff in the within proceeding and as such have personal knowledge of the matters hereinafter deposed to, save and except where the same are stated to be upon information and belief, and where so stated, I verily believe them to be true.

2. I have read the Affidavits of the Defendant, [redacted], all sworn February 13, 2006 and I make this Affidavit in reply.

Affidavit of the Defendant

3. **Re: paragraph 5:** My degree is an Arts degree specializing in Geography.

4. **Re: paragraph 7**: The Defendant and I continued to live in the house together because he would not leave even though he was seeing someone else. He was hardly ever there and would come home at 1:00 am on most nights. The children and I frequently saw his orange car parked at the local strip club (The Pen) on our way to swimming lessons in Gibsons, British Columbia.

5. **Re: paragraph 8**: I removed the Defendant's items from the house after he was using the rental trailer for a party spot with various other women and had been spending periodic nights there already.

6. **Re: paragraph 9**: I thought the Defendant and I could find a way to have a reasonable agreement between us and still be friends, for the children's sake. Time after time, we would meet and I would type out the agreement and he would say, "that offer is not on the table anymore". I agreed to the settlement we worked out with the mediator, [redacted], only to be met once again with "that agreement is not on the table anymore". When the house across the street came up for rent at $700.00 per month, I thought I might be able to handle it. I was having a tough time finding a job on the Sunshine Coast.

7. Over and over, whenever I agreed to what we had worked out when it came time to actually sign the agreement, the Defendant would not. When we last appeared in Court, I would have settled, but then the Defendant put a stipulation on the agreement to once again foil its completion. The Defendant insisted I sign something saying that I would never leave the Sunshine Coast.

8. I have travelled extensively all over the world and know that there are plenty of other great places to live. I cannot subscribe to this type of thinking.

9. **Re: paragraph 10**: I have never stood in the way of the Defendant's relationship with the children. Quite to the contrary, I have encouraged it. Getting the Defendant to take the children at all was a chore. Eventually, he did and the children used to go over every Wednesday evening for dinner. Sometimes he would only invite R[redacted] and not L[redacted]. This was very hurtful for L[redacted]

10. Since the children and I moved, the Defendant has not asked to see the children and they have not asked to see the Defendant at any time during the week. The Defendant never telephones the children and they do not telephone him. I have forced the relationship between the Defendant and the children because I thought it would be best for the children.

11. **Re: paragraph 11**: For the Defendant to claim that I have restricted his visitation is untrue. L[redacted] requested that we move from the farm and I agreed. The children and I took a vote and all was in favour. The dilapidated state of the house (ie. furnace would not pass inspection and electrical was very dangerous), made the move easier. The children and I currently live in a little A frame on the beach and the children love it. There is a duck pond across the street and we ride our bikes along a small gravel road to get the mail.

12. **Re: paragraph 12**: I want the children to have a steady routine. As well, I do not want to deal with the Defendant and his hot temper or his rude girlfriend everyday. I want the children to settle down and relax and enjoy their childhood. When I am working, it is important to me to know exactly where the children are at all times.

13. **Re: paragraph 13**: Again, when I am working, I need to know where the children are and they are usually at home doing their homework. I would never let my children wonder off. I am a very protective mother because on [redacted] Road, in previous years, there has been a stabbing incident and a murder investigation where the murdered man's watch and wallet were found in the ditch. I keep a very careful eye on the children. I always have and I always will.

14. **Re: paragraph 14**: I monitored the children to make sure I knew where they were, not to make sure they were not with the Defendant. Anytime when the Defendant called to made arrangements regarding the children, I agreed. Often, if the children were outside, they would simply disappear. After looking for them and calling them repeatedly, I would find them at the Defendant's place. Then I would have to knock on the door and deal with his extremely rude girlfriend or his belligerent attitude. That is not something I enjoy doing.

15. **Re: paragraph 15**: [redacted] has been a long time friend of both the Defendant and myself. Her daughter, [redacted], is R[redacted]'s age and is currently not in school, I believe, due to some personality conflict with other students. Ms. [redacted] indicated to me that she would be grateful if R[redacted] came over after school because it is hard for her to keep [redacted] connected with friends when she is not in school. Ms. [redacted] would refuse payment for caring for R[redacted] when I offered it. She was just grateful for the companionship for her daughter. When Ms. [redacted] was working, I helped her with childcare extensively for years. We

have always had a mutual understanding that we would help each other in this regard.

16. When the Defendant and I last appeared in Court, it was the first time I had heard of the proposed child care arrangements. I was in shock. The Defendant has never been involved in the school at any level. In fact, he has told me, point blank, that he will not support the children going to university. He does not think it is necessary. I even offered to take less of a payment if he would contribute to the children's RESP in which there is $1,000.00. The Defendant refused. He is now telling the children that a university education is not necessary. He is of the mind that all the children ever need is the farm. In my view, this is a very small thinking and places extreme limits on the abilities and aspirations of the children.

17. **Re: paragraph 16:** The children only have one grandmother that is interested in them. The Defendant's mother lives in [redacted], British Columbia and has never seen our children. They call her "the grandma we've never seen". My mother adores the children and misses them terribly. She used to live on the Sunshine Coast, but remarried and moved to [redacted], Alberta. I really did not think the Defendant would mind the children going to see my mother. My boyfriend paid for their trip as he felt sorry for them. I was working and had not earned any vacation time and could not provide a summer holiday for the children. They were formally accompanied by Westjet representatives, signed in and signed out by authorized people with ID (myself and my mother). There were probably 10 other kids there doing the exact same thing on the same flight.

18. **Re: paragraph 19:** When I went on the cruise, given to me and to the Defendant by my father, the Defendant did not want to go. I came home to a shocking situation. The house was a complete mess. There was the odour of cat faeces as soon as I walked in the door, the kitchen floor was very stinky as a large portion of it looked like someone spilled apple juice and did not clean it up, the laundry was piled at least 3 feet high and each child's rooms was in complete and utter mess with the entire floor covered in dirty laundry and garbage. I dropped my luggage and went looking for the cat pooh. That is not the way anyone wants to come home to. It was a real eye opener.

19. **Re: paragraph 20:** The Defendant was up and out of the house early in the morning to go over to the camper he had set up in the driveway to make coffee.

As far as I was concerned, I was not about to send the children over there looking for a ride to school. I happily took them to school.

20. **Re: paragraph 21**: I was dating a gentleman, [redacted], who suddenly had a ruptured aorta. He was medivacked out of Sechelt by helicopter. All of his family was in the East, in [redacted]. He had one brother who is mentally challenged and incapable of making life and death decisions. Decisions like the blood flow stopped to his legs, whether we have to cut them off. I had to make decisions regarding Mr. [redacted]'s health, including whether the plug would be pulled while Mr. [redacted] was in a coma. Fortunately, Mr. [redacted] recovered. I ended up working with [redacted] as he is a P. Eng, at [redacted], my past employer.

21. I was grateful that the Defendant was able to look after the children during this dire emergency. I would do the same for him. The Defendant's father was also generous and gave me a cheque for $500.00 because he knew I did not have any money. I will always be grateful for this show of kindness and I would reciprocate to either of them in a heartbeat.

22. **Re: paragraph 22**: After mediation, even though it was still difficult for me emotionally to leave the farm and become a single mother with no source of income, when the house across the street came available, I thought it would be perfect for all concerned. The rent was cheap and it was on 5 acres.

23. Yes, I did say, "you must still love me", because I could not figure out why the Defendant would not let me go and still won't. I truly do not understand.

24. As for saying I would harass [redacted], I did not do that. What I said was I was going to stop being so nice and start logging some trees on the property for money.

25. In addition, I certainly did not appreciate the notes [redacted] used to leave in my vehicle during the night when I lived on [redacted] Road. I have sent copies of those notes to my lawyer as well as downloads from Divorce Magazine.

26. With respect to the Defendant contacting the police, I verily believe that he thinks he is building a record against me. Last time he told them that "my wife is trying to make me hit her". The Defendant has hit me in the past. There were no witnesses and I did not report it to the police. As the Defendant has remarked, that was "my mistake".

27. **Re: paragraph 24**: As for L[redacted] advising me about living with their dad half the time, the first I heard of this was from the Defendant's lawyer when the Defendant and I were last in Court.

28. **Re: paragraph 25**: During our visits to Vancouver, I take the children to do many interesting and educational things that are not available on the Sunshine Coast. We go to the Planetarium, skiing, Science World, etc. and also spend a lot of time with my aunt, uncle and cousins.

29. A couple of times, I have asked that the Defendant keep the children on the Sunday night and one of the times was when I had an early morning appointment with my Allergist which I had to wait months to get. Most recently was because I started a new job. I thought it appropriate that I should be there on time on my first day. I have accommodated the Defendant in the past so he could go racing in his car and take his girlfriend away for the weekend. I did not think that the Defendant would mind reciprocating. If it is going to be a problem, I will adhere rigidly to our schedule with no flexibility. The Defendant has asked me various times to have the children for special occasions and that is no problem. He recently wanted to have L[redacted] come over from Vancouver, where we were celebrating Christmas with my family on Christmas Day. We made a special trip to drive L[redacted] to the ferry (a 3 hour endeavour) to accommodate his request.

30. In addition, the children seldom complete homework assignments while at their father's place. I always get stuck with dealing with the last minute completion of assignments on Sunday night or even getting up early Monday morning to complete them.

31. **Re: paragraph 27**: Throughout the 15 year marriage between the Defendant and myself, the Defendant religiously worked for his father until 4:00 pm every week day. He would not get off work at 2:30 pm to pick up R[redacted] at the bus station.

32. **Re: paragraph 30**: The house is unsafe. It is just a matter of time before there is a fire. The furnace guy would not even clean the system because it was in such a bad state of repair. He issued a "do not burn" order which has been completely ignored by the Defendant.

33. The furnace must be properly repaired and inspected. I would not agree to the children spending any more time there until this is rectified. My whole family is

also terrified of something happening to the children and myself in this regard. My cousin, an electrician, inspected the electrical and came up with something like 28 violations of the electrical code. He installed a smoke detector above the electrical panel downstairs.

34. **Re: paragraph 31**: I do not know to which letter the Defendant is referring to in this paragraph.

35. **Re: paragraph 34**: If and only if I move to Vancouver, I would be looking to a continued and fruitful relationship between the children and their father. I have always maintained this relationship and encouraged it. I have been the primary caregiver of the children to the point where it has often been very hard, emotionally and financially, for me. The children and I are very close. They asked to move off the farm.

36. **Re: paragraph 35**: I added up a box of mud and grease cover receipts every year. It was my understanding that the Defendant and his father had a partnership and the balance of the wages were being declared and written off by whoever prepared the tax returns for the partnership. It was not me as I am not a tax accountant by any means.

37. **Re: paragraph 36**: I noticed that farm expenses have increased to over $18,000.00 per year. I do not know what the money was spent on. There are no visible improvements (ie. buildings, etc.). The Defendant did not have pigs or turkeys last year so the feed bill could not have been too high. As regards to egg laying chickens, a general rule of thumb is that you double your money after expenses.

38. **Re: paragraph 42**: There was no job offer at Mental Health. Addiction services and Mental Health merged and Mental Health already had a receptionist. As they were merging into that office, there simply was no job available.

39. **Re: paragraph 43**: The absence of trailer rental had been since March 1, 2004. The Defendant still paid me $1,000.00 per month until he moved in with [redacted] and her [redacted] baby, in June 2004.

40. The Defendant upped the payments from $448.00 to $600.00 a couple of days before we were to appear in Court.

41. **Re: paragraph 46**: The race car that the Defendant drive around uses a lot of fuel and requires a lot of specialty parts, mag wheels, paint jobs, etc. and is generally expensive to maintain. When the Defendant and I married, I did not mind it was his hobby, but when I see how he is treating the children and me financially, I consider it as unfair.

42. **Re: paragraph 49**: Finally, the Defendant has a water cooler. Since he has this, the children are not coming home sick. They have had many Mondays off school because they were sick to their stomach and diarrhoea.

43. **Re: paragraph 52**: I have also had extensive car repair bills and have to make a lot of payments on my credit card bills.

44. Various pieces of jewellery (including a diamond ring) went mysteriously missing while the Defendant was living in the house.

Affidavit of [redacted]

45. **Re: paragraph 8**: This paragraph is pure fabrication.

46. **Re: paragraph 9**: I always knew the whereabouts of my children. I keep an eye on them wherever they are.

47. On the farm, there is always the threat of bears, cougars, coyotes and the cows, including the bull, are always getting out.

48. To say that R[redacted] was hopping to see her father without me noticing is not true. The children often saw him outside.

49. If R[redacted] looked stricken, it was probably the tattoo covered body of [redacted] that scared her, along with the multiple piercings and dyed bright red hair that stands straight up.

50. **Re: paragraph 13**: I did the best I could to add the receipts.

51. Revenue Canada did review my taxes and paid me an extra $1,000.00.

52. **Re: paragraph 14**: It was my understanding the Defendant and his father formed a partnership to avoid Worker's Compensation Board regulations

Affidavit of [redacted]

53. **Re:paragraph 8:** As far as I know, there has been no change in the amount of time [redacted] spends with the grandchildren. I have always encouraged the children to go there for dinner, for special occasions, etc. and swimming in the summer time.

54. **Re: paragraph 10:** Surface water at best is unreliable. I drank the water for many years myself. I note [redacted] has a water cooler for drinking. It was only when the children were becoming sick I started investigating because I could not figure out why. Now that the Defendant has a water cooler, the children are coming home fine.

55. There could be a problem with run-off from chickens or something or animals using the stream. According to Public Health there are so many variables.

56. **Re: paragraph 11:** [redacted] and [redacted] have attempted to help us resolve our differences. I was so emotionally distraught about the Defendant leaving and my financial situation, I could not see how I could survive. But every time I did agree, I was met with "that offer is not on the table anymore".

Affidavit of [redacted]

57. **Re: paragraph 5:** As stated, I agreed to the solution of [redacted], the mediator, but was told "that offer is no longer on the table".

58. **Re: paragraph 6:** I have never been asked if the children could spend the weekend with [redacted] and [redacted]. [redacted] once asked me on a Sunday evening if she could take the children to Harry Potter, which would bring them home about 10:00 pm. I thought it was too late for a school night. They wouldn't be in be in bed until 10:30 pm or 11:00 pm.

59. **Re: paragraph 7:** If the children are suffering stress, it is because the Defendant has not adhered to the things he should have learned in the "Parenting after Divorce" workshop he insisted I attend

60. **Re: paragraph 8:** That is pure fabrication. Since our separation, Arthur has been over many times for coffee and I have never or will never stand in the way of his association with the children.

61. **Re: paragraph 15:** I doubt R[redacted] had tears in her eyes. R[redacted] is a very loving and affectionate person in general.

Affidavit of [redacted]

62. **Re: paragraph 6:** On many occasions, I have had to let out a bellow that would travel 10 acres or so when the children wander into the cow field. If I were to see the bull coming toward them or L[redacted] picking on his sister, I would yell from the house. It does not surprise me that [redacted], being a close neighbour would hear this.

63. [redacted] was named the Godfather of L[redacted] at birth. Unfortunately, we have not seen [redacted], except driving in his truck, for at least 5 years.

Affidavit of [redacted]

64. **Re: paragraph 5:** As previously noted, dealing with the Defendant everyday is stressful. Every time he is near, he starts picking on me and putting me down.

65. The Defendant has been emotionally, verbally and physically abusive toward me in the past and I do not wish to be around this type of behaviour any longer.

66. **Re: paragraph 8:** I note [redacted] is on a well, not creek water.

67. L[redacted] has had two documented bacteria from creekwater. That fact cannot be disputed.

68. Over the past 3 years life has been extremely difficult for my children, L[redacted] and R[redacted] and myself. We have been dealing with extreme emotional and financial stress and hardships.

69. A few days after the organization I had been working for on and off for 13 years wound down due to government cut backs, the Defendant decided he wanted a divorce.

70. He told me and the kids to get out and he would give us $1,000.00 a month. However, I had no where to go and knew we could not live on a thousand a month.

71. I was absolutely devastated and was really suffering emotionally. The Defendant would not leave the house. He said his lawyer had advised him to stay. I slept in the living room because I had no money and no where to house the children.

The Defendant went out every night and was seen with other women by myself and others. On the way to swimming lessons with the kids we would see his car parked at the strip bar every time.

72. L[redacted] took the break up very hard and dropped out of every activity, karate, violin, baseball, soccer and his marks dropped severely. He began to get into fights at school. All my talking to him wasn't enough. I took him for professional counselling and this was very helpful. The counsellor helped me too.

73. I tried repeatedly to settle the matter without using lawyers because I so badly wanted to provide a house for the children. After living on a 20 acre farm surrounded by another 230 acres owned by their grandfather, it was like living in a park. I thought they at least deserved a back yard, and still do. However, every time the Defendant and I would meet and I would type up our agreement, when it came time for signing he would say "Sorry, that offer is not on the table any more." We went to mediation; I still did not see how I could leave as I could not find a job. I went to career counselling and had my resume re-done at the unemployment agency in town and went on several interviews but could not land a job.

74. At the same time the Defendant moved into our rental trailer with a young girl and her [redacted] baby. He would often carry the child around the yard, which I found particularly painful because he had been completely ignoring his own children. When I insisted he take the children for a weekend he left them in the house alone, even though R[redacted] had just gotten over the stomach flu. He spent the night in the trailer with his girlfriend. When I confronted him with the wrongness of the situation, he told me I was paranoid. He reduced his payment to me down to $600.00 per month.

75. The Defendant's father offered to buy me a house but it was on a busy road frequented by logging trucks and the driveway was slanted towards the road. At that time R[redacted] was still shaky on her bike. I had been working with a woman for many years who's daughter, R[redacted]'s age, had been killed by a logging truck. I thought it best not to put our children in that situation.

76. The Defendant and his family thought I was being greedy, but I wasn't, I just couldn't make the finances and other important aspects work in my head. Without a job I knew we could not survive.

77. Soon after the Defendant began to cut down my monthly payments. At one point he was paying me $448.00 per month. A few days before we went to our JCC, he upped it to $600.00. I had to beg for money to feed the children in front of his friends and then he would laugh at me. His girlfriend would also laugh at me and leave notes in my car at night. The children and I could do nothing for entertainment. I went seriously into debt. I have borrowed money from the Royal Bank, MBNA, my Mother and my boyfriend and I owe my lawyer a lot of money. All of these total about $35,000.00.

78. A lot of this debt was incurred by expenses of the children going back to school and also some extensive car repairs. I have been doing my very best to not let the children feel the pinch. I have taken a job in Vancouver with a good company and am looking at moving into Vancouver at the end of the school year. The place the children and I are currently renting is unavailable after the end of June. I am working as the assistant co-ordinator for field operations for [redacted]. I work from home and I attend the office in Vancouver several days a week. I am paid $20.00 per hour, and I have full benefits including dental. R[redacted] needs braces and I have been told by her orthodontist that her treatment has to start right away.

79. There is a lack of educational and recreational activities for the children on the Sunshine Coast. I want them to grow up to be well rounded and wholesome people with lots of opportunities for personal development. While in Vancouver the children and I go to the wave pools, Planetarium, Science World, walks at the beach (Crescent, White Rock, Kitsilano), go to occasional plays, go fishing, boating, do crafts, go skiing (1x) and visit with family.

80. With only 8 courses to go, I am looking at finishing my undergraduate degree, which I would like to do in Vancouver. The educational opportunities go only to the 200 level courses on the Sunshine Coast. I need all 300 or better level to complete my degree.

81. I did find a decent job on the Sunshine Coast through the unemployment centre then they ran into financial difficulties and most everyone was laid off. When a job comes available on the Sunshine Coast that pays more than minimum wage sometimes over 1,000 people apply for it. Often there are required qualifications like [redacted] or some necessary credential associated with it, which I don't have.

82. Regarding moving to Vancouver I would like to say that the children and I have discussed what we like to see in a neighbourhood like nicely kept houses, parks, kids, friendly people (with small dogs-R[redacted]). The children have requested smaller schools. I also like the idea of smaller schools. I always ensure the children are happy, safe, well taken care of and remain close to them. In addition, I have family in [redacted], including an aunt, uncle, and two cousins who love the children and look forward to spending more time with them. They are fully supportive of the children and myself, in every way.

83. I think the Defendant should be paying his share of the debt incurred for feeding, clothing and educating the children. In addition, he has sold multiple head of cattle, a race car and a truck. He is working on a van repair which will total $3,000.00 when complete (his budget). His shop is fully equipped with all air tools and body shop tools. He works 6 hours a day on his fathers farm and the rest of the time on ours. He spends a great deal of time working on his hobby race car.

84. When I read that the Defendant had been getting $2,000 per month throughout our whole marriage I was surprised. I knew he had his own private bank account which I did not have access to.

85. Of great concern to me is the safety of the farm house where the Defendant and his girlfriend are living (with her child). When I went to have the chimney cleaned, [redacted] service would not clean it and issued a "Do Not Burn" order. When I tried to use electric heat, the breakers kept blowing and both a house inspector and an electrician told me to get out due to fire hazard. A smoke detector was installed above the electrical panel with a warning to have the electrical re-done or leave. I did ask the Defendant to make the necessary repairs and bring the house up to code. He was unqualified to do the repairs and did not offer to bring in qualified people to do so. He did offer to tear some ivy off the side of the house and disconnect power to the laundry room as a solution, which was not acceptable.

86. As far as I know the house remains in the same condition and the Defendant is burning in the wood furnace. I had sent him, through his lawyer, a copy of the Do Not Burn Order. He makes light of if but it is very scary stuff. Combined with the electrical problems of the house I am very uncomfortable about them spending time there. I do not want to say they cannot see their father but I am very

concerned for their safety. I would like to see proper inspections done to ensure the house is safe.

87. The children and I had a family meeting and L[redacted] asked if we could move. We did so. Since then the children have both improved at school and are noticeable more relaxed and cheerful and not fighting nearly as much.

88. I encourage the children to have a good relationship with their father. I believe it is good for them.

89. I have always been the primary caregiver since birth. It was I who rose in the night repeatedly to care for the children's every need. I breast fed L[redacted] for 9 months (he got a bad cold and stopped) and R[redacted] for 20 months. I have been forever fully involved in the children's activities and I arranged for the children to get together with other toddlers and friends. In kindergarten they took violin lessons (parent participation-which I did), played T-Ball on teams and soccer on weekends. Later they continued violin lessons, played hardball (I was scorekeeper), took Karate (I took it too), horseback riding lessons and went fishing (I'm the line untangler). I love to have a good time with the children and watch them light up when they experience something new and enjoy learning. The Defendant was preoccupied with working on the farm and on his car.

90. To that end I have always been very involved in the children's school life, hosting field trips to the farm, driving for every other field trip I can, volunteering in the canteens (at L[redacted]'s high school as well), preparing and submitting grant applications for the school which get the school $3,500 extra every year for equipment and free field trips, ie: free skating trip for entire school. As well, I always volunteer in the classroom whenever I can and help the children with their many and varied school experiments/projects. I have participated in the Parent Advisory Committee as the Emergency Preparedness Coordinator. I know all of their teachers and principal (not yet all in L[redacted]'s new high school) and attend a parent teacher interview with every report card. The Defendant, despite my urging, has never attended a parent teacher interview.

91. Homework is how we spend our week night evenings. There's not much time for anything else except dinner and a bath and the odd game of Chess or Monopoly.

92. The Defendant's situation is that he does not like going off the farm. He very seldom does. The farm life is one life, but recognizing that life has more to offer is

paramount in this day and age. The Defendant does not believe in university education for the children. I think it is important.

93. I have been extremely disappointed in the Defendant's lack of willingness to contribute for back to school expenses, which usually come to around $2,000.00 or more each year and always continue to mount up throughout the year with band instrument rentals, out of town basket ball games, metal shop expenses, ski trip costs and lunches, etc. L[redacted] is 5'9" and wears men's XL and size 13 shoes (that's last year). He once again needs new clothes as does R[redacted]. All their pants are too short. The Defendant does not give the children any money, buy them clothes or school supplies or pay for the dentist or anything else. It all rests on my shoulders.

94. At one time I had tried to save some money and purchased Canada Savings Bonds. I believe they totalled approximately $3,000.00. I have had to cash those in to support the children over the last 3 years. Years ago I had started an RESP for the children's education in which there is $1,000.00.

95. Last year I note that the Defendant's farm expenses had gone up to $18,000.00. He spent $6,800 on support payments for the children ($448.00 for 4 months, $600.00 for 8 months, $200.00 for back to school)

96. The Defendant is increasingly difficult to deal with over child care matters. I have been accommodating in every way possible. Over Christmas my friend took time away (3 hrs) on Christmas day to drive L[redacted] to the ferry because the Defendant wanted him to go to a family Christmas party. Yet when I ask him to take the children to the ferry on Spring Break he cannot find the time to do so.

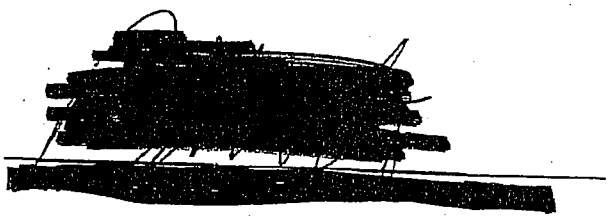
97. All of my dealings with the Defendant are difficult, compounded by financial hardships. It is difficult to communicate with the Defendant. When he gets mad, which is often, he yells at me uses derogatory language and wants to argue.

SWORN BEFORE ME at the City of Vancouver, in the Province of British Columbia, this 15th day of March, 2006.

[redacted]

A Commissioner for taking Affidavits within British Columbia.

[redacted]



Appendix C

Form 60 (Rule 51(2))

[redacted], #1
17 MARCH 2006

NO. [redacted]
NEW WESTMINSTER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

[redacted] **also known as** [redacted]

PETITIONER

AND:

[redacted]

RESPONDENT

AFFIDAVIT

I, [redacted], information technology systems manager, of [redacted] in the City of Edison, in the State of New Jersey, in the United States of America, make oath and say as follows:

1. I am the Petitioner in the proceeding herein and as such have personal knowledge of the facts and matters hereinafter deposed to.

Application at Bar

2. In my application, by Notice of Motion dated 3 March 2006, I seek the variation of the order of the Honourable [redacted], pronounced in this matter on 24 September 1998, to:
   a) vary my obligation to pay child support;
   b) vary my obligation to contribute to my children's special and/or extraordinary expenses retroactive to 1 September 2002;

c) require the Respondent to contribute her proportionate share of the children's special expenses retroactive to 1 September 2002; and,

d) cancel my arrears of child support accruing since 1 September 2002.

3. In the event that my arrears are cancelled or reduced, I also seek an order that any fines and other penalties levied against me under the *Family Maintenance Enforcement Act* be cancelled, and an order that the Director of the Family Maintenance Enforcement Program ("FMEP") withdraw the Notice of Attachment filed in certain proceedings in the Provincial Court, and any other Notices of Attachment of which I am unaware.

Background

4. I am 59 years old and am employed as an information technology systems manager by [redacted]. of Secaucus, New Jersey. My present income is $113,410.00 USD per year, or about $128,875 CAD using an exchange rate of $0.88 CAD to one American dollar. Attached to this my Affidavit as **EXHIBIT "A"** is a true copy of my 2004 tax return.

5. The Respondent is 48 years old, and lives with her parents in Richmond, British Columbia. I do not know whether she is working at present or what her income is. I am aware that she does not pay rent to her parents and that she received an inheritance of about $30,000.00 last year from her aunt.

6. The Petitioner and I were married on 25 September 1982. We separated on 16 October 1987.

7. There are two children of our marriage:

a) F[redacted], born on [redacted], and,

b) R[redacted], born on [redacted].

8. These proceedings commenced on 30 July 1998 when I filed my Petition for Divorce. Attached to this my Affidavit as **EXHIBIT "B"** is a true copy of my Petition.

9. The Respondent and I were divorced by the order of [redacted], pronounced on 24 September 1998 (the "Divorce Order") in this matter. Attached to this my Affidavit as **EXHIBIT "C"** is a true copy of Her Ladyship's order.

10. Among other things, the Divorce Order provides that the Respondent would have sole custody and sole guardianship of the children and that I would pay child support to the Respondent as follows:

    a) basic child support of $888.00 per month, payable in two equal installments; and,

    b) contribute to the children's special and/or extraordinary expenses by paying $712.00 per month, also payable in two equal installments,

    for a total support payment of $1,600.00 per month. The Divorce Order does not specify what the children's special expenses are.

Circumstances of Application

11. At present, F[redacted] is in her fourth year of the bachelor of science program at Boston University in Boston, Massachusetts. R[redacted] is in his third year of the bachelor of arts program at Kwantlen College in Vancouver, British Columbia.

12. F[redacted] left home and moved to Boston in September 2002. For the first two years, she lived on campus in a dormitory. Her tuition fees were about $16,000.00 USD per semester, including tuition fees. Her residence and meal plan fees were extra, at about $1,700.00 USD and $3,000.00 USD respectively per semester. Her textbooks cost about $500.00 USD per semester. Attached to this my Affidavit as **EXHIBIT "D"** is a true copy of F[redacted]'s student account printout from Boston University and a confirmation statement regarding F[redacted]'s enrolment in the 2006 spring semester.

13. In September 2004, F[redacted] moved off campus into a condominium I bought for her at [redacted] Attached to this my Affidavit as **EXHIBIT "E"** is a true copy of my mortgage documents showing the purchase price of the condominium as $179,000.00 USD and the mortgage balance to be, as at January 2006, $167,542.18 USD.

14. While F[redacted] was at school, I paid the cost of her tuition fees, student fees, textbooks and a monthly allowance of $200.00 USD. While she was living on-campus, I also paid for her residence and meal plan costs. After she moved into the condominium, I paid for:

a) the condominium mortgage and strata fees;

b) all of her utilities; and,

c) a $500.00 USD per semester off-campus meal plan,

in addition to her allowance and schooling costs.

15. Attached to this my Affidavit as:

a) **EXHIBIT "F"** is a true copy of some cheques I have written to Boston University with respect to F[redacted]'s school expenses;

b) **EXHIBIT "G"** is a true copy of the 2005 real estate tax bill for the condominium;

c) **EXHIBIT "H"** are true copies of typical bills for the condominium;

d) **EXHIBIT "I"** are copies of cheques written for condominium maintenance;

e) **EXHIBIT "J"** is a true copy of the Bank of America statements for the first bank account I share with F[redacted] which is used to pay for her expenses; and,

f) **EXHIBIT "K"** is a true copy of the Fleet Bank statements for the second bank account I share with Francine which is used to pay for her expenses.

16. R[redacted] continues to live with the Respondent, at her parents' home at [redacted] in Richmond.

17. I have paid for R[redacted]'s tuition fees and student fees while he has been studying at K[redacted] College, about $2,500 CDN per year. Attached to this my Affidavit as **EXHIBIT "L"** are true copies of my BMO MasterCard credit card statement showing the payments I have made for R[redacted]'s schooling between September 2003 and August 2005, totaling $6,771.65

18. I opened a Canadian Scholarship Trust for both children years ago which contributes $1,200.00 CDN to each of their tuition costs every year.

19. The Respondent has not contributed towards the costs of either F[redacted]'s schooling or R[redacted]'s schooling.

20. I have financed the children's schooling largely through debt. At present the debts I have relating to the children's schooling are as follows:

a) Discover Card credit card, about $6,600.00 USD owing;

b) CitiBank credit card, about $8,500.00 USD owing;

c) Chase credit card, about $2,700.00 USD owing;

d) an ACS student loan with about $72,727.00 USD owing;

e) an American Education Services student loan with about $4,250.00 USD owing; and,

f) the mortgage on the condominium.

Attached to this my Affidavit as **EXHIBIT "M"** are true copies of statements for my Discover, Citibank and Chase credit cards. Attached to this my Affidavit as **EXHIBIT "N"** are true copies of statements for my student loans.

21. Once F[redacted] left home, I spoke and wrote to the Respondent repeatedly to ask her to agree to reduce the amount of child support I pay to her, so that I would only be providing support for R[redacted]. She refused to discuss the issue with me. I spoke and wrote to her to ask whether she would withdraw the outdated order from FMEP. Again, she refused to discuss the issue with me. I have asked her to contribute to the cost of the

children's post-secondary schooling. She has refused to discuss the issue with me, and will tell the children to ask me for money for books and so forth rather than contribute to those costs herself. Attached to this my affidavit as **EXHIBIT "N1"** is a true copy of an email I sent to the Respondent this year on these subjects. I have not received a reply.

22. I started making only one of the two monthly child support payments I am required to make under the Divorce Order. Instead of paying $800.00 on the first of the month and another $800.00 on the fifteenth of the month, I made only the payment due in the middle of the month. I did this because I was supporting F[redacted] and paying all of her costs and living expenses and F[redacted] was no longer living with the Respondent.

23. Attached to this my Affidavit as **EXHIBIT "O"** is a true copy of my FMEP account statement. It shows that as of 7 December 2005, I owed arrears of child support in the amount of $10,453.22 plus fines levied by FMEP in the amount of $1,220.00. I expect that I owe another $2,400.00 in arrears as at the date of execution of this my Affidavit; I do not know whether I owe more fines.

24. In 2003, I asked FMEP whether I had to continue paying child support for F[redacted], given that she had started her studies in Boston the previous year. On 19 December 2003, FMEP advised me of its decision to continue collecting child support from me. Their decision appears to have been supported by the Respondent's claim that she supports F[redacted]. Attached to this my Affidavit as **EXHIBIT "P"** is FMEP's letter and the Respondent's completed Request for Information of Child's Circumstances, dated 15 December 2003.

25. FMEP reviewed F[redacted]'s eligibility in May 2004 and came to the same result. Attached to this my Affidavit as **EXHIBIT "Q"** is FMEP's letter to me dated 9 June 2004 and the Respondent's completed Request for Information of Child's Circumstances, dated 27 May 2004.

26. FMEP reviewed F[redacted]'s eligibility in August 2004 and came to the same result. Attached to this my Affidavit as **EXHIBIT "R"** is FMEP's letter to me dated 10 September 2004 and the Respondent's completed Request for Information of Child's Circumstances, dated 6 September 2004.

27. Following this last letter, I wrote again to FMEP and tried to supply them with more evidence of my support of F[redacted]. Attached to this my Affidavit as **EXHIBIT "S"** is my Enforcement of Child Support Review Form, dated 2 November 2004, and true copies of the documents I sent to FMEP.

28. In 2005, I asked FMEP whether I had to continue paying child support for R[redacted], given than he had started his studies at Kwantlen College the previous year. On 4 April 2005, FMEP advised me of its decision to continue collecting child support from me. Attached to this my Affidavit as **EXHIBIT "T"** is FMEP's letter to me and the Respondent's completed Request for Information of Child's Circumstances, dated 30 March 2005.

29. FMEP reviewed F[redacted]'s eligibility in September 2005 and concluded that she continued to be entitled to receive support from me. Attached to this my Affidavit as **EXHIBIT "U"** is FMEP's letter to me dated 27 September 2005 and the Respondent's completed Request for Information of Child's Circumstances, dated 5 September 2005.

30. I wrote again to FMEP on 14 October 2005 and tried to provide them with additional information about my support of F[redacted]. Attached to this my Affidavit as **EXHIBIT "V"** is a true copy of my letter to FMEP and the documents I attached to that letter.

31. FMEP came to the same conclusion as it had before. Attached to this my Affidavit as **EXHIBIT "W"** is FMEP's letter to me dated 8 November 2005 and the Respondent's completed Request for Information of Child's Circumstances, dated 7 November 2005.

32. In December 2005, I received a Notice of Attachment from FMEP indicating that they had attached any funds due to me from the Canadian Government. Attached to this my Affidavit as **EXHIBIT "Y"** is a true copy of this notice, filed in action number [redacted] of the Vancouver Provincial Court, and FMEP's cover letter dated 7 December 2005.

33. I asked FMEP to remove the Notice of Attachment but they refused. Attached to this my Affidavit as **EXHIBIT "Z"** is a true copy of my Request for Review Form and with an annotation indicating FMEP's rejection of my request.

Conclusion

34. I realize that I should have gone to court and applied to change the Divorce Order but as I was living in New Jersey, on the other side of the continent, I mistakenly thought I could handle the matter through the FMEP. In any event, FMEP has kept track of my arrears under the Divorce Order and imposed penalty fees on my that I can ill afford to pay.

35. At present, the monthly payments I make associated with the children and their schooling expenses are as follows:

Child support for R[redacted]	$800.00
R[redacted]'s tuition and supplies	$237.00
R[redacted]'s internet connection	$40.00
F[redacted]'s tuition	$2,875.00
F[redacted]'s books, supplies, school trips	$113.00
F[redacted]'s meal plan	$144.00
F[redacted]'s allowance	$230.00
F[redacted]'s cell phone bill	$58.00
Maintenance and utilities for the condominium	$222.00
F[redacted]'s groceries	$58.00
F[redacted]'s subway pass	$46.00
Total	**$4,823.00 CAD**

I have not included the mortgage I pay for the condominium in this figure, as I will retain ownership after [redacted] graduates, and will likely have to sell it to pay down my loans and credit cards.

36. Given the money I pay for both children, I ask this Honourable Court for an order that:

a) the Divorce Order be varied to fix my present obligation to pay child support to the Respondent to the amount for one child at my present income, $944.00 per month;

b) the Divorce Order be varied to cancel my obligation to contribute to my children's special and/or extraordinary expenses retroactive to 1 September 2002;

c) the Divorce Order be varied to require the Respondent to contribute her proportionate share of the children's special expenses retroactive to 1 September 2002;

d) the Divorce Order be varied to cancel my arrears of child support accruing since 1 September 2002;

e) all fines and other penalties levied against me by FMEP be canceled; and,

f) the Director of the FMEP be required withdraw the Notice of Attachment filed in certain proceedings in Provincial Court action number [redacted], and any other Notices of Attachment of which I am unaware.

SWORN BEFORE me at the City of Edison in the State of New Jersey, in the United States of America this 17th day of March, 2006.

[redacted]

A Commissioner for taking Affidavits for the State of New Jersey.

[redacted]

[redacted]
Notary Public of New Jersey
My Commission Expires Nov. 19, 2006

TAB 5: Housing

- **Residential Tenancy Branch Update (Day 1)**
  - Powerpoint

Orange sheet

- **Co-ops (Day 2)**
  - Not for Profit Housing Cooperatives

  Separating sheet

  - Membership Termination: How can an advocate help?

Orange sheet

- **The Writing on the Wall: Strategies when a tenancy is likely to end (Day 3)**
  - Readings

  Separating sheet

  - Exercises

  Separating sheet

  - Precedents

Residential Tenancy Branch

Cheryl May, Executive Director
Residential Tenancy Branch
Office of Housing and Construction Standards



Agenda



- Overview of the RTB
- Public Education
- Policy
- Service Delivery
- On the Horizon

2

Overview of the Residential Tenancy Branch (RTB)

RTB Offices & Personnel

Offices:

- Victoria, Burnaby and two outreach offices in downtown Vancouver
- Partnered with Service BC in over 60 other BC communities

Approximately 90 staff consisting of:

- Information Officers (IOs),
- Arbitrators
- Leaders, Policy Analysts and others



4

2012 / 2013 Statistics

- 600,000 estimated tenancies in BC
- Over a million website visits each year
- 170,000 telephone calls
- More than 55,000 in-person contacts
- Over 12,000 Emails



(2012-2013)

5

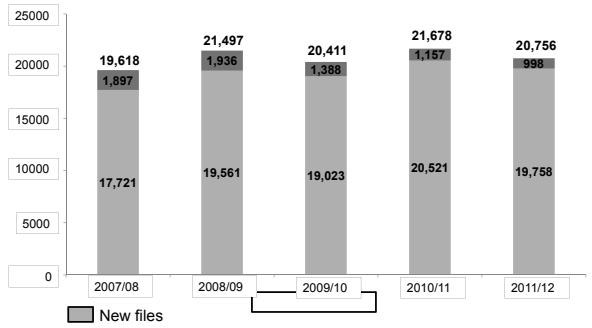
2012 / 2013 Statistics

- 22,000 applications for dispute resolution (mail, fax, in-person, on-line)
- 19,000 Dispute Resolution Hearings

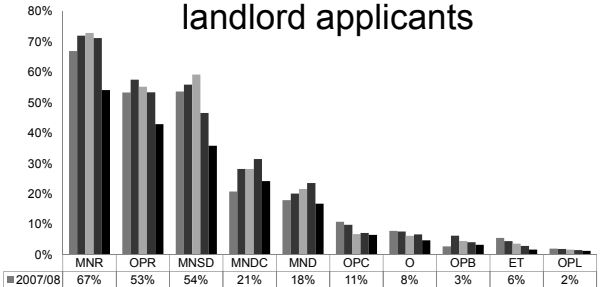
(2012-2013)

6

Number of dispute applications



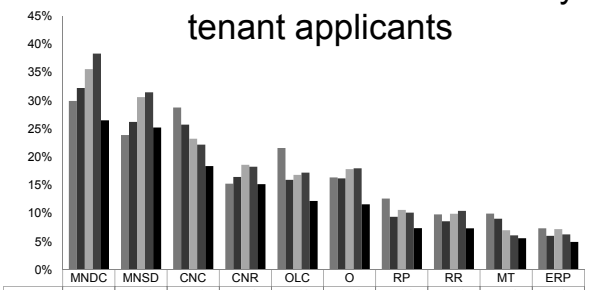
Most common codes selected by landlord applicants



	MNR	OPR	MNSD	MNDC	MND	OPC	O	OPB	ET	OPL
2007/08	67%	53%	54%	21%	18%	11%	8%	3%	6%	2%
2008/09	72%	57%	56%	28%	20%	10%	8%	6%	4%	2%
2009/10	73%	55%	59%	28%	22%	7%	6%	5%	4%	2%
2010/11	71%	53%	47%	31%	24%	7%	7%	4%	3%	2%
2011/12	54%	43%	36%	24%	17%	7%	5%	3%	2%	1%

MNR	OPR	MNSD	MNDC	MND	OPC	O	OPB	ET	OPL
Monetary Order – Rent or Utilities	Order or Possession –Rent or Utilities	Monetary Order – Security/Pet Deposit	Monetary Order – Damage or Compensation	Monetary Order – Damage	Order of Possession – Cause	Other	Order of Possession – Breach of Agreement	Early End to Tenancy	Order of Possession – Landlord Use

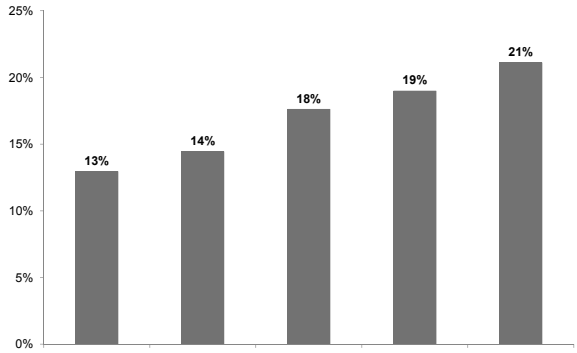
Most common codes selected by tenant applicants



	MNDC	MNSD	CNC	CNR	OLC	O	RP	RR	MT	ERP
2007/08	30%	24%	29%	15%	22%	16%	13%	10%	10%	7%
2008/09	32%	26%	26%	16%	16%	16%	9%	9%	9%	6%
2009/10	36%	31%	23%	19%	17%	18%	11%	10%	7%	7%
2010/11	38%	31%	22%	18%	17%	18%	10%	10%	6%	6%
2011/12	27%	25%	18%	15%	12%	12%	7%	7%	6%	5%

MNDC	MNSD	CNC	CNR	OLC	O	RP	RR	MT	ERP
Monetary Order – Damage or Compensation	Monetary Order – Security/Pet Deposit	Cancel a Notice to End Tenancy	Cancel a Notice to End Tenancy -Unpaid Rent	Order for Landlord to Comply with Act	Other	Repairs To the Unit	Reduction or Rent – Repairs, Services	More Time to Apply – Cancel Notice to End	Emergency Repairs

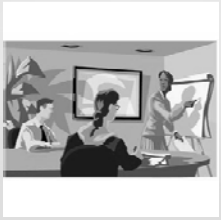
Cross applications





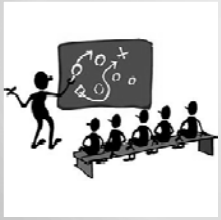


Presentations



13

Public Education Team

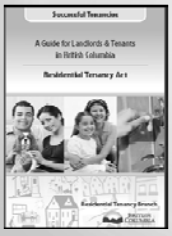


Created and delivered targeted presentations for :

- Non-commercial landlords
- First time renters
- Residents of SROs

Print Materials





- Guides for Landlords and Tenants
- *What Every Landlord and Tenant Needs to Know*

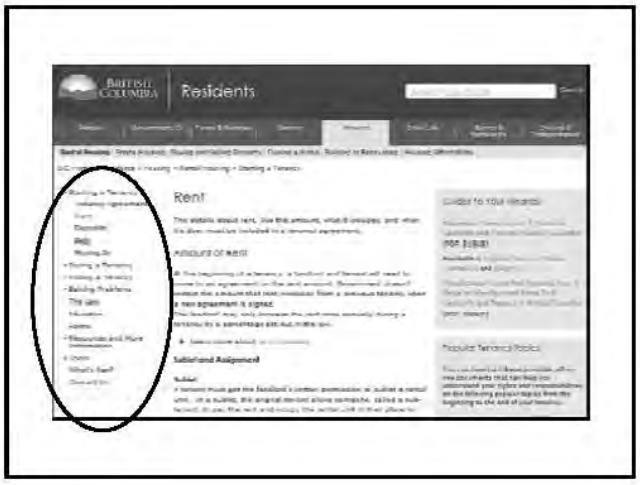
Website

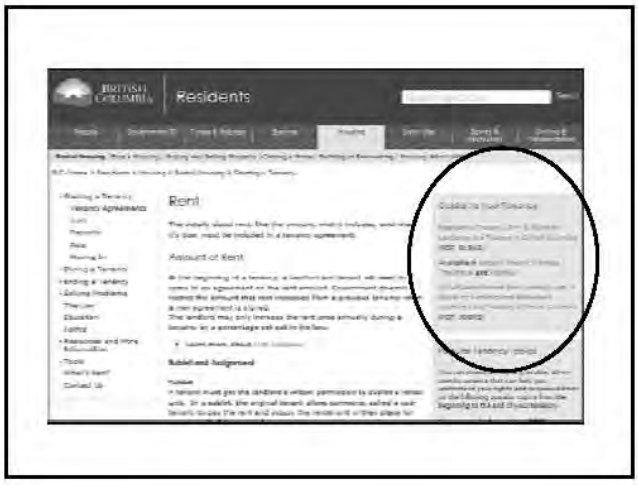




- *Acts*, Regulations, Rules and Policy Guidelines
- Guides, fact sheets, flowcharts and forms
- On-line Application
- Dispute resolution decisions

16


Residents
Rent
Amount of Rent
Subletand Assignment


Residents
Rent
Amount of Rent
Subletand Assignment


Residents
Rent
Amount of Rent



BRITISH COLUMBIA

Policy



BRITISH COLUMBIA

Policy Guideline 26

Advocates, Agents and Assistants

- Addresses the role of advocates, agents and assistants in dispute resolution proceedings



22

BRITISH COLUMBIA

Policy Guideline 27

JURISDICTION

- RTB does not have the authority to decide matters involving Indian lands
- MHPTA and the RTA are wholly inapplicable to tenancy agreements on Indian Lands where the Landlord is an Indian or Indian Band

23

BRITISH COLUMBIA

Rules of Procedure

Purpose of the Rules

- Rules of Procedure give participants in a dispute resolution hearing a common understanding of what is required and what will happen.



24

BRITISH COLUMBIA

Digital Evidence



- Can only be photos, video or audio recordings
- Must be accompanied by a printed description of what is on the digital device
- All parties must be able to gain access to the files on the device

25

REVISIONS ON THE HORIZON

➢**POLICY GUIDELINE 19**

•Assignment and Sublet



BRITISH COLUMBIA

SERVICE DELIVERY



CONTACT CENTRE



29

BRITISH COLUMBIA

Single Point of Contact for Walk-in Clients

- Clients can complete an application and receive hearing package at same visit
- Turn around time 20-25 minutes
- Clients have the option to come back for hearing packages



30

BRITISH COLUMBIA

Improvements To Burnaby Reception Area

- Increased number of information booths by 50%
- Improved signs
- New numbering system directing clients to the next available Information Officer

31



ON THE HORIZON



CURRENT TRENDS

- Administrative tribunal transformation



34

On the horizon

- Web enhancements and improvements to the online application
- Continued commitment to improve in-person services and over-the-phone contact with information services staff



35

Thank you

36

NOT FOR PROFIT
HOUSING CO-OPERATIVES

I. Introduction

Co-operatives have been on the BC legal landscape for many decades. Co-operatives are incorporated for purposes as varied as one can imagine and are involved in such familiar industries as agricultural or housing or as unfamiliar as shellfish gathering and campground management. This paper will provide some in depth comment on not for profit co-ops using the business model of not for profit housing co-operative.

A. Why Go Co-operative?

There are numerous reasons why a body of people might want to form a co-operative as opposed to a traditional corporation. While there is no empirical evidence, the predominant reason to go co-operative is more likely than not to be philosophical. The following general characteristics may be found with a group that goes co-operative:

1. **Common social goals**.

   There is usually a common social goal to any group that decides to go the co-operative route. Generally speaking, those who join in co-operatives are going to be from the same community. They are going to want to find the best way to deliver the service product that they have chosen to supply and in such a way to maximize the benefit to their members and their community at large.

2. **Membership**

   The structure of co-operatives allows them to choose whom they may admit to membership. Generally speaking, and unless we are talking about a closely held corporation, that type of membership selection is not available to corporations where shares go on to the open market. Generally speaking, the co-op's aims, goals and services provided will be plain and obvious to anyone interested in joining. Those who are not interested in the co-operative system are unlikely to apply for membership. The co-operative is also able, subject to human rights concerns, which I shall set out below, to weed out member applicants who do not meet co-op membership criteria.

3. **Members have a Stake in the Operation**

   Once accepted into membership, the member is usually currently required to pay for a share (this is the requirement in British Columbia although it is not a requirement in some other provincial jurisdictions). Although the share in a not for profit co-op will not earn any equity, the member is nevertheless making an expression of ownership in the co-operative.

4. Democratic Principles

Co-operatives operate on democratic principles. The *Co-operative Association Act* provides for various matters that must be voted on by the members either by ordinary or special resolutions. The *Co-op Act* also contains familiar corporate provisions allowing disgruntled minority shareholders to make demands on directors to call meetings on specific topics.

II. The Not For Profit Housing Co-operative

A. What is a Housing Co-operative

Housing Co-operatives are multi-unit residential buildings or townhouse complexes incorporated pursuant to the *Co-operative Association Act*, S.B.C. 1999 c.28. The *Residential Tenancy Act* has no application (RTA s. 3(2)(b)). The *Co-op Act* is, for the most part, a stand-alone piece of legislation. There are marked similarities between the *Co-op Act*, the *Company Act* and *Society Act*. The *Co-op Act* includes sections dealing with such critical matters as directors' duties, standard of care, disclosure, conflict of interest, auditors, corporate records, and other familiar corporate matters.

There are two types of Housing Co-operatives:

(1) Equity Housing Co-operative

There are few Equity Housing Co-operatives in the Province. The main difference between these housing co-operatives and not for profit housing-co-operatives is, of course, that members who purchase shares in equity housing co-operatives are entitled to make a profit on the sale of their co-op shares if the market so dictates. Members are usually also free to mortgage their interest in the co-op in order to finance their purchase of the share in the equity co-op.

(2) Not-for-Profit Housing Co-operatives

These are by far the more numerous type of co-op in the Province. These housing co-operatives are often subsidized by Canada Mortgage and Housing Corporation ("CMHC"), BC Housing, or both. Potential members may apply for membership in the housing co-operative. The Membership application is typically reviewed by a director appointed membership committee and finance committee. If the member's application is acceptable, the member is invited to join the co-op by purchasing a share from the co-op and receiving an occupancy agreement. The share purchase is usually a nominal amount, not approximating the actual value of the housing unit assigned. Share purchases in not-for-profit housing co-operatives can be anywhere from $500 to $5,000. The individual co-op has the ability to set the share price.

Housing Cooperatives who have operating agreements with CMHC receive a subsidy pool each year. This is based on the co-op's budgetary requirements from the previous

year. The subsidy pool is administered by the co-op under obligations set out in operating agreements between the co-op and CMHC. Co-ops with operating agreements with BC Housing also receive subsidies in the form of rent supplements delivered monthly to the co-op.

Members of the co-op who are of modest means may apply to the Board of Directors (or such other committee as directed) for subsidy. Subsidy is generally granted on the basis of the member's income. For instance, a member's monthly housing charge for the unit they occupy could be $1,000. The member might only make $800 per month. According to some housing charge calculations in place with CMHC, the member would be required to pay 25% of the member's income or $200 per month. The balance of the housing charge, that being $800, would come from the co-op subsidy pool. The co-op uses the money collected from the member and from the subsidy pool to pay the member's housing charge.

Even those members of the co-op who have an income over the threshold that would allow subsidy enjoy some benefits. Generally speaking, the cost of similar rental accommodation in and around any particular housing co-operative would be 5% to 20% higher.

As in most cases, you never get something for nothing. In order to enjoy the low housing charges and subsidy, members are required to participate in the daily affairs of the housing co-operative. In many cases, participation in the affairs of the co-op is simply implied. Those who join housing co-operatives often have a sense of community and an ingrained desire to assist and advance the co-op community in which they choose to live. However, more and more often, we are seeing housing co-operatives implementing mandatory participation policies as the ideals and principles that gave birth to the co-op housing movement in the early l970's begin to wain.

Subsidies provided by the Government will soon be a thing of the past. Almost every co-op in the province will see the end of their Operating Agreement with either CMHC or BC Housing over the next 10 years. Subsidy money received from those agencies will end when the Operating Agreements terminate. Well over half the co-ops in the province will no longer have operating agreements by the end of 2015.

It is unknown how co-ops will deal with housing subsidy going forward. Due to the nature of co-ops' Memorandum of Association, non-profit housing co-ops are not permitted to create a subsidy pool and then provide it to the members of modest means to offset their rents as members are not permitted to participate in, or gain any benefit from, the income of the housing co-op. Co-ops may simply require a reduced housing charge from certain households in economic need.

It seems likely that subsidized housing charges or reduced housing charges will be eliminated slowly by attrition as Operating Agreements come to an end. It is unlikely that members paying the maximum housing charge are going to want to subsidize somebody else's housing charge. What will likely happen is that Co-op's will implement a broad based reduction of housing charges that all members can enjoy. Members who

have relied on housing subsidy will be forced out of their accommodation due to lack of affordability.

B. How is a Not-for-Profit Housing Co-operative Set Up To Operate

As set above, a housing co-op is set up to run much like a company. To put in the simplest fashion, a non-profit housing co-operative is akin to rental accommodation with the added benefit of limited ownership interest and community participation.

The important legal documents constituting a housing co-operative are:

1. Certificate of Incorporation

2. Memorandum of Association

The Memorandum often includes provisions setting out the non-profit status of the housing co-operative. It also contains provisions providing for distribution of the co-op's assets if the co-op is ever wound up or dissolved. Assets of a wound-up co-op usually go to some other charitable organization or non-profit organization whose goals are the provision of affordable housing or some other philanthropic aim.

3. Rules

The Rules of the housing co-operative are somewhat similar to what one would find in the articles of a company. The Rules of the co-op contain provisions dealing with membership, termination of membership, issuance of shares, general meetings, directors and the business of the directors, financial matters, serving of notices and dissolution provisions.

4. Occupancy Agreements

The typical Occupancy Agreement looks something like the Rental Agreement or Lease and are usually attached to the Rules as a schedule. The Occupancy Agreement contains the duties of the co-op and the duties of the member with regard to the member's use and occupancy of the unit assigned to the member within the housing co-operative. The matters included within the occupancy agreement are the member's promise to pay monthly housing charges as they become due, the member's promise to provide financial information to justify subsidy requirements, alterations to the property, the member's covenant to obey the rules and policies of the co-op as if they were terms of the occupancy agreement and the co-op's right to terminate the occupancy agreement under certain conditions. There should be no overlap between the matters set out in the rules and the occupancy agreement, but the documents should be reviewed to ensure that there are no contradictory provisions.

As above, the Occupancy Agreement is often attached as a schedule to the Rules. Section 18 of the *Co-operative Association Act* sets out as follows:

Effect of memorandum and rules

18 The memorandum and rules, when registered, bind the association, its members and its investment shareholders to the same extent as if the memorandum and rules

(a) had each been signed and sealed by the association, each member and each investment shareholder, and

(b) each contained covenants on the part of each member and investment shareholder to observe the memorandum and rules.

This section creates the contractual obligations between the member and the co-op.

5. Policies

The co-op policies are often also referred to as "regulations" or "house rules". The policies tend to address a variety of subjects that are not ordinarily set out in the occupancy agreement. Matters that are often set out in co-op policies include vehicle and parking policies, pet policies, housing charge and arrears policies, participation policies, maintenance tasks and work party policies and key policies. The category of policies that may be adopted by a co-op is virtually endless.

More often than not, co-ops have no documentation setting out how policies are to come into force. Generally speaking, proposed policies are brought before the general membership at a general meeting. Policies are voted upon by the membership and if passed by a majority, come into force.

Occupancy Agreements should have provisions whereby the policies passed by the membership become part of the occupancy agreement and are contractual between the co-op and the member. What often causes trouble for the co-ops is a lack of a records to establish a date the policy was approved or attempts by the co-op to enforce policies that have never been adopted by the general membership.

6. Resources

The Co-operative Housing Federation of British Columbia has published *Effective Governance for B.C. Housing Co-operatives Volume I: Co-op Act and Model Rules* and *Effective Governance for B.C. Housing Co-ops Volume II: Co-op Policy Manual.*

These are excellent references for anyone dealing with Rules, Occupancy Agreements or Policies and can be obtained from CHF BC. CHF BC's website is www.chf.bc.ca.

C. Human Rights Considerations

Co-operatives, much like anyone else, must tread carefully to make sure that they are not violating any provision of the *Human Rights Code*. Co-operatives might be more inclined to unwittingly contravene the *Code* because of their nature. That is, they can be "club like" and take on the attitude that member applicants and those accepted into membership be just like them without taking heed to their obligations under the *Human Rights Code*.

If there are membership restrictions, there are usually two major allowable over-riding membership criteria;

1. Demonstrable co-operative and/or community oriented attitude; and
2. Financially ability.

It is possible for a co-operative to be granted an exemption under the *Human Rights Code*. That is, the co-op would be allowed to discriminate under an enumerated head in the *Human Rights Code*, on application to the Human Rights Tribunal, the co-op applies and receives an exemption. Section 41 of the Human Rights Code sets out as follows:

> **Exemptions**
>
> **41** If a charitable, philanthropic, educational, fraternal or religious or social organization or corporation that it is not operated for profit has a primary purpose for promotion of the interest 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 its members of the identifiable group or class of persons.
>
> **Special Programs**
>
> **42**
>
> ……
>
> (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 its objective of 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.

Aside from membership issues, the co-operatives must also keep in mind that they have a duty to accommodate individuals under the *Human Rights Code* should they require it. This is generally of most concern to housing co-operatives who provide ongoing accommodation services to their members.

D. Co-op's Obligations under BC Housing and CMHC Operating Agreements

1. Generally

As noted above, operating agreements with CMHC and BC Housing are slowly coming to an end. More than half of those operating agreements are terminating before the end of 2015. Once those agreements have terminated, the co-op is free from any restrictions that might have been imposed on their operations by CMHC or BC Housing. The following commentary applies to those co-ops with existing operating agreements.

From their beginnings, co-ops were funded by Federal monies. CMHC entered into operating agreements with these early co-ops and continued to do so for many years. The first operating agreement contracts between the co-ops and CMHC were known as Section 56.1 agreements, referring to a section of the *National Housing Act* which defined co-ops as eligible contribution recipients for the purpose of that section. Although the section has been renumbered to Section 95, the agreements are still referred to in the sector as Section 56.1 agreements.

In or about the mid l980's, CMHC amended their operating agreements slightly to provide for index-linked mortgages for new housing co-operatives. A co-op with this type of agreement is referred to as an I.L.M.

Over the years the co-op housing movement has sought to provide people with affordable accommodation. At the same time, the co-op housing movement sought to ensure that those living in the co-operative were able to control their own affairs so as to enhance the ownership quality that the co-op provided. The operating agreements between CMHC and the co-op have done a good job of advancing that goal. The agreements are not terribly onerous upon the co-op. There are probably many things in the agreement, that, in hindsight, CMHC would like to have included. Nevertheless, co-ops have operated successfully for years pursuant to these agreements.

Matters of note within the agreement include details on CMHC's contributions to reduce occupancy costs, restrictions on occupancy charges, treatment of surpluses in subsidy, replacement reserve funds, and prohibition against encumbering the project without CMHC's approval.

The most important provision to CMHC is the project management provision. The co-op is under a contractual obligation to CMHC to manage the business and the assets of the co-op in a manner acceptable to CMHC.

CMHC's remedies if the co-op fails to abide by any of the provisions in the operating agreement include:

(1) the ability to halt any further funding to the co-op;
(2) enforce the co-op's obligations under the agreement; and
(3) in some cases, buy the project back from the co-op.

All new housing co-ops in British Columbia have operating agreements with BC Housing. The BC Housing operating agreements are far more detailed than the CMHC agreements. BC Housing has ensured greater responsibility on the co-op's part with regard to reporting. In some cases, BC Housing has also sought to limit the types of persons or families that may apply for membership in the housing co-op. All in all, the BC Housing operating agreements tend to decrease the amount of autonomy that a housing co-operative would otherwise enjoy under a CMHC operating agreement

2. Onerous Conditions for Leaky Co-ops

As with condomiums, housing co-ops were also swept up in the leaky building crisis. Many co-ops in the Province have reported complete building envelope failure. Many co-ops are operating today with condemned units that are left vacant.

After years of negotiation, CMHC finally stepped in to provide funding to fix leaky co-ops. However, the funding came at a time when construction costs were astronomical and therefore, in many cases, the costs for an envelope fix turned out to be prohibitive for co-ops. It is hard to say if the current economic slowdown will be beneficial for co-ops; the help will come too late for some. Some co-ops were facing redevelopment as it is economically unfeasible to fix them.

The only source for repair funds to fix leaky co-ops is from CMHC. No other lender has indicated any desire to fund these projects. CMHC typically enters into a Loan Agreement secured by second or third mortgages. The Loan Agreements increase the obligations owed to CMHC by the co-op above and beyond the Operating Agreement with CMHC. CMHC has the ability to review and approve budget annual budgets. There are extra reporting requirements by the co-op to CMHC. Some the Loan Agreements make housing charge increases mandatory on a year-by-year basis in order to meet the future financial obligations of the co-op.

The bottom line is that much of the financial autonomy that co-ops had over the years is lost when they enter into the Loan Agreement with CHMC. Therefore, when acting for a housing co-op, the story regarding obligations to CHMC or BC Housing may not end with the Operating Agreement. It would be prudent to make inquiries regarding other agreements that might have been executed by the co-op that would alter, amend or increase the obligations of the co-op to their lenders.

E. Membership Disputes

As might be expected, disputes arise from time to time between members of the housing co-operative. Disputes may also arise from time to time between the member and the corporate co-op. Co-op's are armed with a number of mechanisms by which they might resolve disputes. The various mechanisms are found in the following places:

1. Rules

Most co-ops have a section within their rules entitled "Disputes". What is set out in the dispute portion of the rules can be varied, but most co-op rules set out that disputes can be submitted to a three member panel for final disposition. All the members of the panel must be members of the co-op unless otherwise provided for in the Rules. Each party to the dispute selects a member for the panel with the two members chosen selecting the third member. Decisions are final and can be enforced on application to the Court.

This provision provides for resolution of disputes between members and between the co-op and a member. Care should be taken to review the wording of the dispute resolution section. In many cases, the section says that the dispute "may" be submitted to the three-member panel. In some cases, mandatory language like "shall" is used. Cases often arise where the co-op is in no mood to arbitrate or resolve issues with a member who clearly has no intention of being co-operative. A dispute resolution procedure would only delay the ultimate remedy that the co-op desires; expulsion. Often, co-ops go directly to expulsion procedures. The question of whether a dispute resolution procedure is mandatory has not been clearly addressed by the courts. Where the language regarding dispute resolution is permissive, the writer suggests that dispute resolution is not mandatory prior to going directly to expulsion procedures. (*Riverbend Housing Co-operative v Cabrera,* (September 30, 1998) Vancouver Registry No. A9A2365 (B.C.S.C.).

2. Occupancy Agreement

Occupancy agreements generally have the same type of dispute resolution provisions. Often they are under the heading of "Grievance". Care should also be taken with regard to "legal proceedings" sections which often set out as follows:

"Neither the co-op nor any member shall commence legal proceedings without having previously exhausted all procedures outlined in this agreement."

Care should be taken to ensure that mandatory dispute resolution proceedings are completed prior to commencing legal proceedings.

3. Policies

Dispute Resolution policies can be varied if they exist at all. In some cases, they will contradict what is set out in the rules and the occupancy agreement. Dispute resolution policy should be carefully reviewed and a decision made as to whether the policies are enforceable and should be followed.

4. The *Co-operative Association Act*

Section 208 of the *Co-operative Association Act* sets out how disputes are to be arbitrated. The procedure is to be conducted in accordance with the *Commercial*

Arbitration Act. This can be quite an onerous procedure and one that should be avoided. Most co-ops have provisions within their rules specifically setting out that Section 208 does not apply to termination procedures.

Section 156, the oppression remedy, is often included as one of those sections of the *Co-op Act* that does not apply to terminations. This is an allowable exclusion within the rules of the housing co-operative.

F. Termination and Eviction Issues

As set out above, the *Residential Tenancy Act* does not apply to housing co-operatives. There are two ways by which a co-op might terminate a member's membership in order to obtain possession of their unit:

1. Directors Resolution to terminate for conduct detrimental pursuant to the *Co-op Act;*
2. Directors Resolution to terminate for non-payment of arrears or breach of a material condition pursuant to the *Co-op Act*; and

The procedures for both methods of termination are set out in detail in Sections 35 to 37 of the *Co-operative Association Act*. Please note the following matters:

(a) The *Co-op Act* states that the co-op may provide in its Rules for the termination of the membership of a member. If they do so, the procedure is subject to s. 35 to 37 of the Act.
(b) It has been suggested the co-op can rely on Sections 35 to 37 without having adopted those sections into their rules thereby relying on the *Act* rather than their own rules pursuant the termination. The argument has not yet been addressed by the Courts; and
(c) The Courts continue to provide new insight and interpretation on the lengthy and complicated procedures of set out within Sections 35 to 37.

1. Conduct Detrimental

(a) The authority for this procedure arises from s. 35(4) of the *Act*. The directors must first recognize that a specific action by a member is detrimental to the co-op. In some cases, conduct detrimental is defined in occupancy agreements. This is not the best situation as the co-op becomes restricted in its ability to find conduct detrimental to the co-op. A co-op should not be trying to define conduct detrimental.

Assuming the co-op is not restricted, the courts have decided that it is up to the co-op to decide what is conduct detrimental. It is not for the courts to step in and substitute their own judgment for that of the members of the co-op. *Tyee Housing Co-operative v Alfred Youngs*, (May 2nd, 1990) Victoria Registry No. 90 0399 (B.C.S.C.). In *Manji v Four Sisters Housing Co-operative*, (April 4th, l989) Vancouver Registry No. CC884474 (B.C.S.C.), Mr. Justice Boyle said:

> *"It seems to me the Court should be reluctant to intervene in the affairs of a co-op where the members are acting in a democratic fashion, within their jurisdiction and are fair in their dealings – by "fair" I mean observing natural justice and the rules they have chosen to live by."*

(b) Although it does not say so in the *Act*, it is recommended that the directors pass a resolution by majority setting out that they intend to proceed with the termination procedure for conduct detrimental against a specific member.

(c) The member whose membership is proposed to be terminated is entitled to seven (7) days notice of the directors meeting at which the resolution to terminate the member's membership is to be considered. The notice provisions set out in the rules should be followed exactly. Members should be invited to appear, either in person or with counsel or by representative.

(d) The co-op must consider elements of natural justice. The member subject to termination must know the case they have to meet and must be given adequate time to address the allegations made against them. The written 7-day notice to the member should set out full particulars of the matters which could lead to the member's termination. This would include statements of account if the matter involves arrears and written statements signed by complaints for behavioural issues. Written statements can cause problems with a co-op as those who complain often request that their complaints not be given to the person who is subject to termination as the complaints fear retaliation or simply wish to remain anonymous. That is not permissible in these situations. The complaint must be prepared to back up their allegation or the Board should refuse to pursue the termination procedure.

Bias is another issue the Board of Directors have to be aware of at the director level. As co-ops tend to be close knit communities, it is quite possible that one or more of the Directors may have personal knowledge of the matter being dealt with. It is possible that one of the directors is a complainant. *Roberts v. Lori Krill Housing Co-operative* 2008 BCSC 1034 dealt with this very issue. The court found that the operation of a cooperative by its members acting as directors is akin to a self-governing profession. The Court followed the Court of Appeal decision is *Kuntz v. College of Physicians and Surgeons* (1996), 21 BCLR (3d) 219 where Southin J.A. recognized the unique circumstances of a self-governing profession and said that in a limited sense its governing body could be said to be judges in its own cause. In considering what would amount to bias on the part of a member of the council of the College of Physician and Surgeons, she said that nothing short of personal *amimus* founded on something other than knowledge of the member's technical competence would suffice. Clearly, in the absence personal *amimus*, directors who can be said to have a *prima facie* bias against the member facing termination are allowed to vote in that termination.

There are good policy reasons for this decision. In order to pass a the director level, three quarters of all the directors are required to vote in favour of the termination. Someone subject to termination could thwart the process by simply antagonizing a sufficient number of directors such that a ¾ vote of all directors would not be possible. For instance, 7 directors means that a ¾ majority vote requires 6 directors to vote in favour. The person subject to termination would be able to avoid termination altogether by simply creating personal run-ins with 2 of the 7 directors. Before bias was a factor, the co-op would never have obtained a three-quarter vote of all the directors to terminate.

(e) In order for the resolution to pass, three-quarters of all directors must vote in favour of the resolution. Confusion often arises over whether the vote must be passed by three-quarters of those directors in attendance at the meeting or three-quarters of all directors. The legislation requires three-quarters of all directors. If for instance, five of nine directors show up at the meeting where the resolution is to be considered, the resolution is automatically defeated if voted upon, even if the vote is unanimous among those directors attending.

(f) The member whose membership is proposed to be terminated must be informed in writing of the outcome of the decision within seven (7) days of the meeting.

(g) Assuming that the directors' vote is in favour of termination, and excepting arrears terminations, the member has the ability to appeal the directors' decision to the general membership. The appeal must be made to the association by the member within seven (7) days of the member's receipt of the directors' notice regarding the outcome of the directors meeting.

(h) As above, there is no appeal to the general membership on arrears termination. The members' appeal on an arrears termination, if they wish to exercise that appeal, is to the Supreme Court.

(i) A general meeting should be called to consider a resolution to confirm the directors' decision to terminate the member's membership. All procedures regarding the calling of general meetings as set out in the co-ops rules should be followed. At the meeting, the directors' decision must be confirmed by a special resolution.

(j) Natural justice issues must be adhered to. *Roberts v. Lori Krill* case cited above did not deal with the issue of bias at the membership appeal level. Therefore, it is recommended that those persons who have made complaints against the person subject to termination should not vote at the general membership level. This could create an anomaly where a director who has complained was able to vote at the director level but is not able to vote at the general membership level.

(k) Prompt notice of the outcome of the general membership meeting must be delivered to the member in question. Assuming that the membership confirmed the termination, notice in the prescribed form under the *Act* must also be

delivered at the same time to the member. The form is currently form 9 of Schedule C of The *Co-operative Association Act Regulations*. The form sets out in exquisite detail the members right to appeal the general memberships' decision to terminate the member's membership.

(l) The terminated member may appeal the termination to the Court on any of the following grounds:

a. That the housing co-operative failed to observe the principals of natural justice in terminating the membership;

(ii) The decision of the housing co-operative is not reasonably supported by the facts; or

(iii) The decision of the housing co-operative is not authorized by Section 35 of the *Act*.

(m) The appeal must be commenced in accordance with the Rules of Court. At the written request of the appellant, and as long as the appellant is not in arrears, the co-op must issue to the appellant the amount of the filing fees made payable to the Court Registry in which the Notice of Appeal is to be filed.

There remains some uncertainty as to how the Appeal will before the Court. There is the option for a trial *de novo*. However, every Appeal undertaken to date appears to have been treated as a true appeal. That is, the Courts restrict the review to questions of law and natural justice (s.37(5).

As far as remedy goes, Section 35(5) sets out that the Court must either restore the membership of the person who is terminated or confirm the termination, or as an alternative to those two remedies, make any other Order the Court considers appropriate (s.37(5)(b)). There are some uncertainty as to what additional remedy the Court might impose after either restoring the membership or confirming the termination.

2. Breach of a Material Condition

(a) Directors also have the ability to terminate the membership of a member for breach of a material condition of an agreement made between the member and the co-op, or for arrears. The agreement referred to is most often the occupancy agreement. Sometimes material conditions are defined within the occupancy agreements and sometimes they are not. Definitions within the occupancy agreements are helpful as there has been some debate as to what exactly a material condition of an agreement is. (*Creekview Housing Co-operative v Rupp* (19 Jan., 1996) Vancouver Registry No. CA 019418 (B.C.C.A.) The new Model Occupancy Agreements produced by the sector support group at CHF BC define most of the provisions of the Occupancy Agreement as material conditions in reference to the Rules and Termination Procedures.

Part of the termination process is that the co-op must notify the member in writing of the breach and provide a reasonable time for the member to rectify that breach (s.35 (3) (b)) a reasonable time is not defined in the *Act* nor has it been determined in the case law. Only if the member fails to rectify the breach can the co-op move forward with the termination proceedings.

Termination for breach of material conditions is not well suited for behavioral matters. For instance, a member may hold a loud party. That might be a breach of the good neighbour provision in the Occupancy Agreement. However, it is not a continuing breach. The co-op could not send a letter demanding that the breach be rectified. It was essentially a "one off" incident. The matter would better suited for a conduct detrimental termination. Example of subject matter suitable for termination for breach of material conditions is the failure of a member to remove a derelict care from a parking spot in contravention of parking policy.

a. The procedure for breach of a material condition is virtually identical to the conduct detrimental procedure. The only major difference arises where the member has appealed the decision of the directors to the general membership. In that case, a simple majority vote of the membership is required to uphold the decision of the directors to terminate.

The procedures set out in the *Act* are complicated and exceptionally onerous for co-ops. It would be difficult to imagine a housing co-operative, without legal counsel, navigating the entire process from beginning to end.

Membership Terminations: How Can an Advocate Help?

There are generally 3 reasons why a co-op may terminate a person's membership:

1. Failure to pay money owing to the co-op, including housing charges, within a reasonable time;
2. Material breach of an agreement with the co-op (often the occupancy agreement) that is not rectified within a reasonable time; or
3. Conduct detrimental to the co-op.

There are generally (though not always) 4 steps in a membership termination:

1. Notice from the co-op advising the member of a problem and providing an opportunity to fix it.
2. Vote by the co-op's Board of Directors (the "Directors").
3. Appeal to the co-op's general membership.
4. Appeal to the Supreme Court of BC.

There are several ways an advocate can help at each stage.

<u>Step 1 – Client receives notice from the co-op that there is a problem</u>

For certain terminations, including breaching a material term of the person's agreement with the co-op or failing to pay housing charges, the co-op must give the person notice of the problem in writing and a reasonable opportunity to correct it. Even if the co-op isn't legally required to give the member a warning and an opportunity to correct the problem, the co-op will sometimes make the client aware of the problem before trying to terminate their membership.

How an advocate can help if a client has received warning:

1. Help client determine the exact nature of the problem: Sometimes co-ops are vague about the complaint. The advocate can contact the co-op to help determine the exact nature of the problem so the client can address it.

2. Read the person's occupancy agreement, along with the co-op's rules and policies: Sometimes a client may not think that their behavior is a problem, but the co-op's rules clearly say otherwise. Each member should have a copy of the co-op's rules and policies. If the member does not, you can ask the co-op for a copy.

3. Clarify any relevant facts with co-op: Sometimes the co-op may not have all the relevant information. A letter explaining the situation may resolve the dispute, especially when backed up by some evidence. Keep in mind that very lengthy, ranting submissions from the member are generally unhelpful. A concise letter that is to the point is much more effective.

4. Make a plan to correct the problem: If there really is a problem, its best to make a plan to fix it as early as possible, before the co-op tries to terminate the person's membership.

5. Advise the client about the consequences they face: If there is a real problem, the advocate should make sure client knows that it could put their housing at risk, so it's not something to be ignored.

Step 2- Vote by the Directors

If the co-op wants to terminate a person's membership, it must seek a resolution from its Directors. However, the member has the right to receive notice and make submissions to directors before the Directors' vote.

How an advocate can help if the Directors of the co-op are voting on whether to terminate a person's membership:

1. Ensure the member got notice of the Director's meeting at least 7 days in advance.

2. If you have not already done so, ensure the Directors have clearly set out the basis for the termination. Fairness requires that the member know the case against them.

3. Ensure the Directors have disclosed the evidence or other material they are relying on to support the termination.

4. Help the client submit any material he or she feels will support the continuation of their membership. Again, lengthy and ranting submissions are not helpful.

5. Ensure that enough time has been set aside at the Directors' meeting for the member to make their case.

6. Attend the Directors' meeting with the client and make submissions supporting the continuation of their membership.

7. Ensure that none of the Directors have bias against the member. Remember that bias will not arise just because the member had negative dealings with the director in the past or the member thinks the Director doesn't like them. You should call a lawyer for legal advice before making any allegation of bias.

8. Ensure the client receives notice of the Directors' decision no later than 7 days after the Directors vote.

Step 3 - Appeals to the Membership

If the Directors terminate a person's membership in the co-op, he or she can appeal to the general membership of the co-op within 7 days of being informed of the Directors' decision. An appeal to the general membership means that all the members of the co-op can vote on whether the person should be terminated or not.

Keep in mind that there is an exception: If the termination is for non-payment of any money owing to the co-op, the co-op's rules may say that the person cannot appeal to the membership, and must instead go straight to court. It is therefore important to read the co-op's rules and policies.

How an advocate can help if the member wants to appeal to the co-op's general membership:

1. Ensure the client appeals within 7 days of being notified of the results of the Directors' vote.

2. Ensure the client has disclosure of all material the Directors relied on to make their decision.

3. Ensure the client knows when the next meeting of the co-op will be held.

4. Ensure that any members who will support the client know about the meeting and are present at the meeting.

5. Attend the meeting with the client and make submissions supporting the continuation of their membership.

6. Ensure that the members are only considering the matters raised in the Directors resolution terminating the membership, and not completely new matters that never formed the basis for the Directors' decision to terminate.

7. Ensure that the member receives notice of the membership's decision promptly.

8. Ensure that the co-op has given the member notice of their right to appeal, along with the necessary forms.

Step 4 – Appeal to the BC Supreme Court

A member can appeal the termination of their membership to the BC Supreme Court. A client who wishes to pursue an appeal should be referred to a lawyer for legal advice. However, the advocate may be able to provide some general information to the client.

1. The advocate should remind the client that he or she only has 30 days to appeal, so they need to seek legal advice right away.

2. The co-op is required to pay the member's court filing fees, but the member must make the request within 10 days of receiving notice of the membership's decision to terminate.

The Writing on the Wall: Strategies when a tenancy is likely to end (Day 3)

- Readings

Separating sheet

- Exercises

Separating sheet

- Precedents

Readings

Managing Expectations Checklist

At some point after you have spoken with the client and developed an understanding of what she would like you to help with, it's very important to consider these questions before you commit to a hearing. *Keep in mind, not all clients will benefit from going to hearing! It's your job as an advocate to help the client to make a good decision about what approach to take.*

Go over these questions <u>with the client</u>:

- ☐ What, exactly, does the client want to achieve? Why has she come to see you?
- ☐ Is the client's goal realistic? What specific results can realistically be expected?
- ☐ If your client has a specific plan in mind (e.g. take her landlord to the RTB), is that specific plan likely to be helpful to the client?
- ☐ If the client goes to a hearing, does she have at least some chance of succeeding?
- ☐ Are there other options that you and the client should explore as well or instead (e.g. negotiation)?
    - ☐ What are the pros and cons of each possible option?
- ☐ What should your client be doing to protect herself while these options are explored (e.g. look for somewhere else to live, pack up and store belongings)?

NEGOTIATION

September 12, 2013

Presented by Kaity Cooper and Kevin Love
Community Legal Assistance Society
604-685-3425

This handout will cover:

- some basics underlying negotiation and alternatives to proceeding to a hearing;
- how to identify what types of files might be appropriate for alternatives to a hearing;
- how to identify what leverage your client might have to reach a negotiated resolution without the need for a hearing;
- the issues you need to think about before negotiating an alternative to a hearing; and
- how you might propose a negotiated resolution to the opposing party.

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Originally prepared by Kendra Milne and Jess Hadley

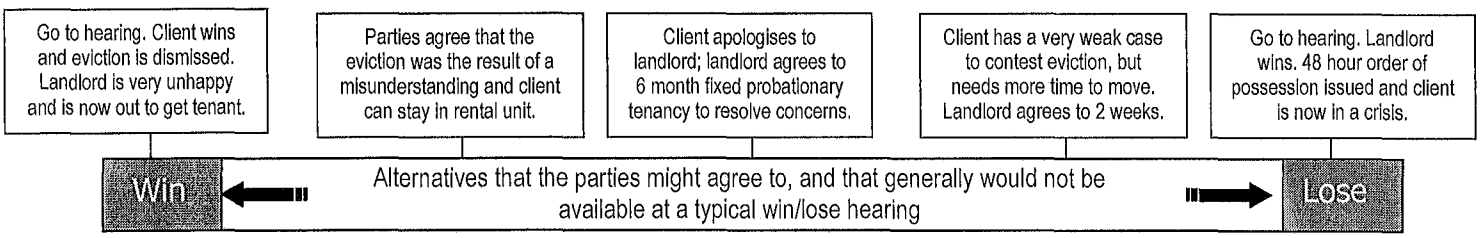
Negotiating an alternative resolution: the basics

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 resolve a dispute by negotiation. 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 negotiated resolution, the parties can agree to resolve whatever issues they wish.
- 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. A DRO only has the power to order a negotiated solution if both 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 alternative resolutions, you need to do a merit assessment of the client's case at the outset. Once you have a sense of the risks going into a hearing, you will be better able to come up with an appropriate range of possible negotiated resolutions. More importantly, you will be able to give the client an idea of what she would be conceding and what she would be gaining with each potential negotiated resolution.

When deciding whether a negotiated resolution might be appropriate for a specific client's legal issue, you should follow these steps:

(1) Turn your mind to what negotiated resolutions might be available in the specific case, as well as the pros and cons of each possible resolution.

(2) Then turn your mind to what leverage, if any, your client might have for each of the alternative resolutions you've come up with.

(3) Go over with the client each potential negotiated resolution, 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 negotiated resolutions in the case, and what are the pros and cons of each?

The first step to determine whether a negotiated 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 alternative resolutions, you need to think about what the case is about and what both parties are trying to achieve. What are the parties' concerns? 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 clients stop complaining to him.
- to not have to look for new tenants if complaining tenants leave.
- to not have to deal with complaining tenants filing for dispute resolution for loss of quiet enjoyment.
- to have a secure building and not have his 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 alternative 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, listening to her music with headphones 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: she 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 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.
2) 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.
3) Your client missed the rent. The landlord issued a Notice to End Tenancy and unfortunately your client missed the 5-day timeline to pay the rent or dispute the Notice to End. Your client did eventually pay the rent, but the landlord has now applied for an Order of Possession.

Step 2: What leverage does your client have?

Once you've come up with a list of possible negotiated resolutions for your client, it's time for you to think about what leverage she has to get the other party to agree to one of her the proposals. Leverage is essentially anything that might persuade the other party to accept the resolution you're putting forward. It can be positive (the benefits for the other party if he agrees to the resolution) or negative (the pitfalls the other party can avoid if he agrees to the offer).

Some types of leverage you may want to think about are:

- Legal leverage. Is the other party likely to lose the case if it goes to hearing? Would it be better for him to accept a small benefit in your offer now, rather than risk getting nothing at a hearing?

- Financial leverage. Will the offered resolution save the other party money? Will going to a hearing cost him money?

- Emotional leverage. Is your client particularly 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?

- Chance to resolve underlying issues. Is there a tangential issue that can't be directly addressed in the hearing but that could be resolved via a negotiated resolution? In other words, can negotiation solve a problem for the other party that would have no chance of getting resolved at a hearing? On the other hand, would your client be willing to agree not to pursue a tangential issue if a resolution can be reached on the main issue?

Exercise: what leverage might your client have?

For the following client situations, think about the possible negotiated resolutions you came up with and determine what leverage your client might have.

1) 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.
2) 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.

3) Your client missed the rent. The landlord issued a Notice to End Tenancy and unfortunately your client missed the 5-day timeline to pay the rent or dispute the Notice to End. Your client did eventually pay the rent, but the landlord has now applied for an Order of Possession.

Step 3: Things to think about before negotiating

A negotiated settlement between two parties is a legal contract and breaching it can have 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 offering an alternative resolution to the opposing party, make sure you've thought about the following:

- Your client's instructions. Many negotiated 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 an offer on her behalf and it is accepted, make absolutely sure that you have clearly explained all the options to your client and that she instructs you to put the offer forward.

- Deadlines for hearing. While you are exploring alternative resolutions and trying to negotiate an agreement, you still need to make sure that you are getting ready for the hearing and complying with all deadlines, in case the hearing is required. Think of it as two parallel ways to resolve a file – you may well be able to reach an agreed resolution, but you may not. You need to make sure that your client is ready to proceed to a hearing and argue her case if the parties can't negotiate a resolution.

- Without prejudice offers. If you are offering an alternative 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 that 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, think carefully about timing. Unless you state otherwise, any settlement offer remains open until it is retracted. It's generally good practice to put a deadline for a response in your offer (e.g. "this offer is open until 5:00 p.m. on November 23rd) so that you and your client know well before the hearing whether the offer has been accepted.

- Not giving legal advice to the other party. Obviously you can only represent *your* client and act in *her* best interests. However, 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 create a risk that the other party will try to ask you for advice about his own situation (especially if he is unrepresented). Be very careful not to give the other party legal advice. It is generally a good idea to specifically state that you cannot give the other party advice, and to 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.

Your approach to putting forward an offer will vary depending on what you know about the file, and about the opposing party. For example, if your client has a very strong case to win if the matter goes to a hearing, you may take a more aggressive approach in how you communicate with the other side. This might mean you set out the weaknesses of the other party's case and state that you think there is a strong chance he will lose the hearing, so it would be in his interests to agree to an alternative resolution. On the other hand, if your client has a weak case and will likely lose the hearing if it proceeds, you will probably want to take a much more subtle and conciliatory approach. You don't want to come out swinging when you've got nothing to back it up! Instead, 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. Most important, always 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 you to negotiate a resolution! It's also good to try

and build a reputation as always being reasonable and respectful in your communications.

Step 5: Finalizing the negotiated resolution

If you reach an agreement, be sure to get the agreement in writing! Whether you have been communicating with the other party in writing or by phone, make sure to always confirm the agreement in writing. Here are some ways you can do that:

- If you negotiated the final agreement by phone or in person, **write the other party a letter outlining your understanding of the terms of the agreement.** In your letter, ask them to let you know right away if your understanding isn't correct, and say that if you don't hear from them you will assume your letter accurately sets out the terms of the agreement.

- If you made a settlement offer in writing and the other party has accepted the offer, **get the other party to make a note on the offer letter** saying that they accept the offer. Also get them to sign and date the notation.

- Ideally, **create a written agreement** setting out the details of the negotiated resolution and have both parties sign. This is the best and clearest way to record a settlement agreement.

If your client no longer needs to go to a hearing because an agreement has been reached, be sure to let the court or tribunal know the hearing is not going ahead.

Examples: ways of confirming a negotiated resolution in writing

The next few pages have examples of different ways you can confirm a settlement agreement in writing. Remember these are just examples and it is very important to customize what you are doing to suit the facts of your case. Because settlement agreements are legally binding, it's a good idea to get input from a lawyer if you need it.

Exercises

NEGOTIATION EXERCISE

What are some potential negotiated resolutions? Pros and cons of each for your client?

Potential resolution	Pros	Cons

What leverage might your client have? Remember to think about positive and negative leverage, and different types of leverage such as legal leverage, financial leverage, emotional leverage, the desire for certainty, and the chance to resolve underlying issues.

Potential resolution	Leverage

CLIENT INTERVIEW EXERCISE

What are some potential courses of action for your client (including possible negotiated resolutions)? Pros and cons of each for your client?

Possible Course of Action	Pros	Cons

What leverage might your client have? Remember to think about positive and negative leverage, and different types of leverage such as legal leverage, financial leverage, emotional leverage, the desire for certainty, and the chance to resolve underlying issues.

Possible Course of Action	Leverage

Precedents

Community Legal Assistance Society
providing specialized legal assistance to promote social justice since 1971

COMMUNITY LAW PROGRAM

Please direct your reply to:
Kaity Cooper

Via Fax

WITHOUT PREJUDICE

September 30, 2013

ABC Management Ltd.
#123 West Georgia
Vancouver, BC

Attention: John Smith

Dear Mr. Smith:

Re: ABC Management and Jane Thomas
Residential Tenancy Branch File #34567

I am writing because Jane Thomas has sought my assistance with respect to this tenancy issue.

I understand from speaking with Ms. Thomas that you gave her a 10 day eviction notice for unpaid rent for the month of September (the "Eviction Notice"). She has now filed an application with the Residential Tenancy Branch to dispute the Eviction Notice. However, Ms. Thomas also informs me that she actually does not want to continue living in her present apartment and she would prefer to find new housing with a different landlord. Rather than proceeding with an unnecessary hearing, she is proposing that she voluntarily move out on November 30, 2013.

Ms. Thomas requires some additional time to move out because she is 75 years old and has limited mobility due to her arthritis. This makes it difficult to search for new housing and also limits her housing options because she cannot go up or down stairs. Even if you were to obtain an order of possession from the Residential Tenancy Branch, Ms. Thomas would simply not be able to move out of her apartment on short notice. It seems unnecessary to go through the considerable time and expense of an RTB hearing and hiring court bailiffs when Ms. Thomas will agree to move out voluntarily. Furthermore, Ms. Thomas tells me that she can now pay the outstanding rent for September, along with the overdue rent for October, provided she does not need this money to cope with the added expense of an eviction on short-notice.

Ms. Thomas has therefore instructed me to make the following proposal to wrap-up this tenancy:

1. Ms. Thomas will sign a Mutual Agreement to End Tenancy effective November 30, 2013;
2. Ms. Thomas will pay you $1,400 (rent for September and October) by October 13, 2013;
3. Ms. Thomas will pay her usual rent of $700 on November 1st, 2013;
4. Ms. Thomas will withdraw her application for dispute resolution by October 13, 2013; and
5. You will let Ms. Thomas stay in her apartment until 1 pm on November 30, 2013.

David Mossop, Q.C.
James Sayre
Diane Nielsen
Frances Kelly
Aleem Bharmal
Joni Worton
Dan Soiseth
Rose Chin
Vicki Shillington
Lindsay Waddell
Jessie Hadley
Kevin Love
Scott Hicks
Kendra Milne
Devyn Cousineau
Kaity Cooper

Please let me know if this proposal is acceptable by **noon on Friday, October 11, 2013**. If I do not hear from you by then, I will assume the offer is rejected and Ms. Thomas will proceed with her application at the Residential Tenancy Branch.

I look forward to hearing from you.

Yours truly,

COMMUNITY LEGAL ASSISTANCE SOCIETY
Per:
Kaity Cooper
Kaity Cooper
Barrister & Solicitor

EXAMPLE OF LETTER SETTING OUT VERBAL AGREEMENT

March 7, 2007

Via Fax: [redacted]

[redacted]
Attention: [redacted]

Dear Mr. [redacted]

Re: [redacted] v. [redacted] – TERMS OF SETTLEMENT AGREEMENT

This letter will summarize the terms of the settlement agreement we reached this morning, to resolve the dispute between my client [redacted] and your company [redacted] **Please let me know right away if you think this is not an accurate summary of what we agreed, otherwise I will take it that you are in agreement with the terms of this letter.**

Ms. [redacted] will discontinue her claim against [redacted] (see the Statement of Claim filed March 6, 2007) on condition that:

1. You will pay [redacted] $1320.68 as compensation for the expenses that she incurred due to [redacted] seizure of her Pontiac car.

2. You will allow Ms. [redacted] to pick up the Pontiac, with a full tank of gas, and the car will be in the same condition that it was in prior to the seizure.

3. You will ensure that title to the vehicle is in her name, with you (a) having covered any costs associated with transferring title, and (b) indemnifying her for any possible GST or PST on the transfer.

4. You will waive all of the fees that you purported to charge her after the vehicle was seized (see the attached document).

5. The loan agreement dated May 1, 2006 will proceed as before with the February payment added to the end of the loan term.

As discussed, all of the above conditions will be met by **11:30 am on Thursday March 8th**, otherwise we will proceed with the hearing on Friday.

Yours truly,

COMMUNITY LEGAL ASSISTANCE SOCIETY
Per:

Jessie Hadley
Barrister & Solicitor

EXAMPLE OF OFFER LETTER THAT THE OTHER SIDE CAN ENDORSE

September 25, 2006

WITHOUT PREJUDICE

Geselbracht Brown
Barristers and Solicitors
3-4488 Wellington Rd.
Nanaimo, BC V9T 2H3

Via Courier

Attention: Mr. Michael Brown

Dear Mr. Brown:

Re: [redacted] *et al*

Ms. [redacted] is prepared to settle this matter and discontinue her human rights complaint in exchange for **$4,000.00**. She is also willing to sign a reasonable confidentiality agreement regarding the terms of this settlement.

This offer is open for acceptance until 4:00 pm tomorrow, September 29, 2006.

If you can agree to the terms of this offer please sign below to indicate your agreement.

Yours very truly,

COMMUNITY LEGAL ASSISTANCE SOCIETY
Per:

Kevin Love
Articling Student

KL:njt
Enc.

By signing below I agree to the offer set out above.

Michael Brown
On behalf of [redacted]

SETTLEMENT AGREEMENT

This Agreement dated for reference March 31, 2010

Among

[redacted] (the "Tenant"), who resides at [redacted], Vancouver, British Columbia (the "Rental Unit")

And

[redacted] (the "Landlord"), who resides at [redacted], Vancouver, British Columbia

Background Facts

1. On March 19, 2010 the Residential Tenancy Branch issued an Order for Possession for the Rental Unit (the "Order of Possession").

2. On March 19, 2010 the Residential Tenancy Branch issued a monetary order against the Tenant for $297.00 (the "Monetary Order").

3. On March 26, 2010, the Tenant applied to review both the Order of Possession and the Monetary Order, and the decision that led to them.

IN CONSIDERATION OF THE MUTUAL PROMISES CONTAINED IN THIS AGREEMENT, THE PARTIES AGREE AS FOLLOWS:

1. The Tenant will pay the Landlord $490 on April 1st, 2010 for his April rent ($450) and $40 towards the Monetary Order.

2. The Tenant will move out of the Rental Unit by 9:00 p.m. on April 30, 2010.

3. The Landlord will not take any steps to enforce the Order of Possession or Monetary Order before 9:00 p.m. on April 30, 2010.

The parties have executed this Agreement on March 31, 2010.

[redacted]

[redacted]

In the Alternative – Request for Appropriate Time to Move

If the Dispute Resolution Officer upholds my eviction, I respectfully request that I not have to vacate the rental unit until _____. The authority to grant this request is set out below.

I make this request because:

[List any compelling reasons why your client can't move out on short notice. Provide details that clearly explain why your client's circumstances make it hard for him/her to move quickly. Submit evidence of the circumstances whenever possible. Some examples are set out below. These are only examples.]

- *I have ___ children. I need time to pack my things and my children's things and move them safely. I also need to try to find new housing in their school's catchment area.*
- *I have disabilities: _____. Because of my disabilities, I need specialized housing with no stairs. I need enough time to find appropriate new housing. I also have difficulty physically packing and moving, so I need time to complete that.*
- *I live on a fixed income of _____. Because there low-cost housing is so limited, I need adequate time to find new housing I can afford.*
- *I need time to request money to cover the cost of moving from the Ministry of Social Development, which takes time because I have to submit moving quotes.*
- *I have a pet, which limits my rental options. I need time to find housing that will accept my pet.*
- *I have no family or friends in town that I can temporarily stay with if I am evicted on very short notice.*
- *My manufactured home is my only asset and I cannot move it on short notice. The manufactured home is 25 years old and is very difficult to move on a trailer. I will have to have some structural work done on the manufactured home before it can be transported. I have talked to one mechanic who said he could do the work but he could not get it done until four weeks from now. I require time to get this done so that I can move my home.*

All of these factors mean that I need adequate time to find appropriate new housing. If I have to leave the rental unit on very short notice, such as 48 hours, I will not be able to find adequate new housing and I will risk becoming homeless.

In addition, it would cause minimal hardship and it would not be unfair to my landlord if I am allowed to continue living in the rental unit until the date stated above because:

[List any compelling reasons that minimize the hardship to the landlord if your client gets more time to move. Submit any evidence available to support each reason. Some examples are set out below. These are only examples.]

- *My rent is up-to-date.*
- *I am willing and able to pay rent for the time period in question (submit proof if there is any reason for the DRO or landlord to doubt this, such as a history of non-payment).*
- *It is halfway through the month, and the landlord would likely not re-rent the unit until the end of the month anyway.*
- *I have taken good care of the property and gotten along with neighbours, and I will continue to do so until I move.*
- *I am being evicted for having a cat. I will arrange for my cat to live with a friend of mine until the date stated above. Attached is a letter from my friend (name) confirming the arrangement.*

The following sections of the *Residential Tenancy Act / Manufactured Home Park Tenancy Act* provide the authority to grant me adequate time to move:

- Section 68(2)(a) of the *Residential Tenancy Act*, which gives Dispute Resolution Officers the power to order that a tenancy ends on a date other than the effective date shown on the notice to end the tenancy.
- Section 55(3) of the *Residential Tenancy Act*, which gives Dispute Resolution Officers the power to issue an order of possession before or after the date when a tenant is required to vacate a rental unit, and the order takes effect on the date specified in the order.
- Section 61(2)(a) of the *Manufactured Home Park Tenancy Act*, which gives Dispute Resolution Officers the power to order that a tenancy ends on a date other than the effective date shown on the notice to end the tenancy.
- Section 48(3) of the *Manufactured Home Park Tenancy Act*, which gives Dispute Resolution Officers the power to issue an order of possession before or after the date when a tenant is required to vacate a rental unit, and the order takes effect on the date specified in the order.

TAB 6: Resources and Services

- **Legal Services Society Intake and Duty Counsel (Day 1)**
    - Materials available at the session and online after the conference

Orange sheet

- **Family Law Resources (Day 1)**
    - LSS Fact Sheets and Self Help Guides List

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-

LEGAL SERVICES SOCIETY

Family Duty Counsel Program **(FDC)**

The FDC Program provides up to 3 hours of short next step advice to self-represented family law clients. The current annual budget for the FDC Program is $3.6 million. This service is designed to provide legal advice to the many clients that LSS is unable to assist through legal representation referrals.

Financial eligibility guidelines (available on the LSS website) for this service are higher than the guidelines for legal representation referrals. A policy and procedure manual for the program is available on the LSS website under "practice resources for lawyers". This outlines the parameters of this advice program: http://www.legalaid.bc.ca/lawyers/Practiceresources.php.

The following is a summary of the various services provided through the Family Duty Counsel Program:

1. ***In-court advice service***: Lawyers are available in most courts in BC on family remand dates. These are usually first appearance dates in court when family applications have been filed and delivered to the opposing side. Usually 2 lawyers are available to provide legal advice.

2. ***Family Case Conference Referrals*** – FDC clients may be eligible for legal representation at a Family Case Conference. Lawyers receive a referral which provides up to 3 hours preparation with the client and up to 2 hours attendance at 1 Family Case Conference per client. Conferences are required in both Supreme Court and Provincial Court before almost all contested matters may be set for hearing. Many issues are resolved by consent at case conferences.

3. ***Lead Family Duty Counsel*** – in 8 locations LSS has contracts with lawyers to act as family duty counsel on a regular or full-time basis. In these locations lawyers have been equipped by LSS with laptop computers, printers, paper supplies, and Divorce Mate software. In these locations it is usually possible to schedule an appointment in advance. Contracted lead lawyers provide continuity of service to clients and liaise with clients and the court on behalf of LSS. They also provide invaluable advice to LSS on the FDC Program in general.

   Lead Family Duty Counsel locations are:
   a. Vancouver – full time 5 days a week
   b. Surrey – full time 5 days a week
   c. New Westminster – full time 5 days a week

d. Kelowna – full time 5 days a week
e. Port Coquitlam – 3 days a week
f. Kamloops – 3 days a week
g. Prince George – 3 days a week
h. Nanaimo – 3 days a week

4. ***Family Justice Centres*** – Lawyers provide advice to family justice clients by referral and appointment with Family Justice. These are usually clients of Family Justice who have reached mediated agreements with the assistance of Family Justice Counsellors. The locations where these advice services are available are:

   a. Vancouver
   b. Victoria
   c. Nanaimo
   d. New Westminster
   e. Prince George
   f. Kamloops
   g. Kelowna
   h. Surrey

5. ***Family LawLINE*** – 2 lawyers are available by telephone from 9:30 am to 3:00 pm Monday through Friday on the telephone (9:30 am to 2:00 pm on Wednesdays) by calling the LSS Provincial Call Centre at 604.408.2172 (greater Vancouver) or 1.866.577.2525 elsewhere. Lawyers may provide advice in many languages by connecting with a contracted interpreter service on the telephone.

6. ***Community Agency Advice Clinics*** – LSS has partnered with community agencies in various locations to provide Family Duty Counsel advice to clients of these agencies. Appointments are arranged by a coordinator within the agency for scheduled advice clinics. Advice clinics are currently being offered in the following locations:

   a. Sheway Fir Square – Downtown Eastside Vancouver and Fir Square at BC Women's Hospital – advice to mothers dealing with issues related to drug/alcohol addiction
   b. Peardonville Treatment Centre – advice clinics offered to mothers in treatment for substance abuse at Peardonville Treatment Centre Abbotsford
   c. Seabird Island – advice clinic offered at Seabird Island First Nation – Agassiz
   d. Sto:lo Nation – advice clinic at medical centre on Vedder Road – Chilliwack
   e. Houston Friendship Centre – advice clinics are offered monthly.

7. ***Family Circuit Counsel*** – LSS provides family lawyers in 3 circuit court locations. In these locations the court travels to remote communities on a regular rotation. LSS contracts lawyers to travel to these locations to provide regular family duty counsel advice and legal representation to clients who qualify for legal aid referrals.

   The following are the circuit court locations have regular family duty counsel:

   a. **Tsay Keh Dene** – the circuit travels to Tsay Keh Dene and Kwadacha 3 times a year and LSS provides lawyers for criminal, family and child protection matters.

   b. **Haida Gwaii** – the circuit court travels monthly to Massett and Queen Charlotte City. LSS provides 2 lawyers – one for criminal and one for family and child protection matters.

   c. **Bella Bella/Bella Coola/Klemtu** – the circuit court travels 4 times a year to Bella Bella and 4 times a year to Bella Coola and twice a year to Klemtu. LSS provides 1 lawyer for family and child protection and 1 lawyer for criminal matters in each of these locations.

Fact sheets

Click on each of the headings below (Aboriginal people, Abuse & family violence, etc.) to see a drop-down list of all fact sheets available on that topic.

Aboriginal people

Child protection

Child protection and the Aboriginal community
Identifies the law around **child protection** for **Aboriginal** children in BC, sets out some aspects of the child protection/removal process, and explains parents' and band rights and responsibilities.

Understanding Aboriginal child protection/removal matters
Describes what Aboriginal parents can do if they're being investigated for a child protection matter.

Understanding Aboriginal delegated agencies
An overview of Aboriginal delegated agencies (a part of the Ministry of Children and Family Development who provide child welfare services) and their potential role in Aboriginal child protection matters.

Understanding court orders and hearings — Information for Aboriginal families
Describes the court **orders** and hearings that are part of the process for child protection cases.

Family law

Aboriginal people and family law issues
A brief overview of family law legal issues as they apply to Aboriginal people. Covers caring for children, **parenting arrangements**, child and spousal **support**, **property**, and income assistance.

Abuse & family violence

Abuse

What is abuse?
A list of examples of relationship abuse (family violence) that are physical, emotional or verbal, psychological, sexual, and financial; describes types of abuse that are crimes and where to get legal and other help.

Family law protection orders
Explains what a **family law protection order** is, how to apply for one, and what happens once the protection order is in place.

What if your ex is harassing you through the courts?
Describes the kinds of behaviour involved in court-related abuse and harassment and suggest what people can do about it and what

the court can do.

What to take with you if you leave your relationship
A list of the important documents and belongings to take along if you're leaving a relationship.

What's the difference between peace bonds and family law protection orders?
Describes the difference between a **peace bond** and a family law protection order, explains which one to choose for each situation, and sets out what each one can do/cover.

Getting help

How to prepare for a meeting with a family duty counsel lawyer
Tips on how to prepare for a meeting with family **duty counsel**, including a list of which documents to bring along.

What an advocate can do for you
Information about what an advocate is, what they can do, and where to find one.

Adoption

Adoption

Adoption
Defines adoption, sets out how adoption works in BC, and provides links to other resources.

Grandparents/relatives

Benefits for grandparents and other relatives raising children
Charts that describe the kinds of benefits grandparents or other relatives raising children might get and under what circumstances, and links to other sites that explain how and where to apply for these benefits.

Children's right to time with grandparents
Information for grandparents who want to apply for **access** to or **contact** with their grandchild.

Step-parents

Step-parents' rights and responsibilities
Information for step-parents who want to apply for **guardianship**, custody, or access to or contact with their step-children, and about whether they are responsible to pay child support.

Getting help

How to work well with a lawyer
Tips for working well with a lawyer, including how to prepare for meetings, keep records, help the lawyer work efficiently, and follow through on your responsibilities. Also provides a downloadable checklist of all the tips.

Child protection/removal

Aboriginal people

Child protection and the Aboriginal community
Identifies the law around child protection for Aboriginal children in

BC, sets out some aspects of the child protection/removal process, and explains parents' and band rights and responsibilities.

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Benefits for grandparents and other relatives raising children
Charts that describe the kinds of benefits grandparents or other relatives raising children might get and under what circumstances, and links to other sites that explain how and where to apply for these benefits.

Making plans for your child's care

Collaborative planning and decision making in child protection cases
Describes how to work with the Ministry of Children and Family Development to make a plan or agreement about your child's care. Options include family group conferences, traditional decision making for Aboriginal families, and **mediation** to resolve issues instead of going to court.

Family group conferences
Explains the option of collaborative decision making, where a child's parents, relatives, close friends, or other community members meet about how to keep the child safe and to develop a plan for the child's well-being.

Family support services
Family support services can provide parents with temporary help from the Ministry of Children and Family Development or an Aboriginal delegated agency to care for their children in rough times.

Making agreements for your child's care
Describes help you can get to care for your child and reduce the strain on your family, including from community services or government programs and by making family support agreements, Voluntary Care Agreements, or Special Needs Agreements.

Special Needs Agreements
Describes assistance programs from the Ministry of Children and Family Development for children with permanent or long-term severe or developmental disabilities or identified as at risk for developmental delay.

Tips about making agreements for your child's care
Describes what to keep in mind if you're thinking of making an agreement with the Ministry of Children and Family Development about your child's care. Tips include getting legal help, being part of

decision making, and keeping notes.

Voluntary Care Agreement
Describes the Voluntary Care Agreement, a written agreement proposed when parents face a crisis that leaves them temporarily unable to care for their children at home.

Mediation

Mediation
Describes mediation and mediators, sets out where to find a mediator, provides information about distance mediation and the Supreme Court mediation pilot project, and includes links to a list of available family mediators.

Mediation in child protection cases
defines mediation, describes when it can help in child protection/removal cases, lists tips for working with a mediator, and provides links to other useful resources.

Youth

Why see a lawyer about your court-ordered plan of care? (for youth aged 12–18)
Information for young people aged 12 to 18 about their rights if they have been asked to agree (in writing) to a court order for a plan of care by a child protection worker for the director of Child, Family, and Community Services.

Getting help

Getting legal aid if your children are (or may be) taken away
Advises parents whose children are (or may be) taken away by the Ministry of Children and Family Development to see a lawyer as soon as possible, and sets out their rights to legal aid if they are financially eligible.

What an advocate can do for you
Information about what an advocate is, what they can do, and where to find one.

Children & teens

Child support

Can you sue your parents for support?
Explains under which circumstances and how a child (anyone under 19, or anyone over 19 but with a disability or who is otherwise unable to support him or herself) is entitled to go to court to ask for child support from his or her parents.

Court-ordered plan of care

Why see a lawyer about your court-ordered plan of care?
Information for young people aged 12 to 18 about their rights if they have been asked to agree (in writing) to a court order for a plan of care by a child protection worker for the director of Child, Family, and Community Services.

Guardianship

Can you become a guardian of your younger brother or sister?
Explains when older brothers or sisters who are 19 or over may apply to court for guardianship of their siblings who are under 19 and sets out the factors the court considers in making the decision.

How can you become a guardian?
Describes who is a child's guardian, who can apply to become a guardian, and how to apply to become a guardian under the new BC Family Law Act requirements. Includes links to the necessary self-help guides and court forms.

If your parents separate

Best interests of the child
Describes the "**best interests of the child**," which the law says parents and judges must consider in making decisions about **parenting**.

Children's right to time with grandparents
Information for grandparents who want to apply for access to or contact with their grandchild.

If your parents separate, can you decide which parent you want to live with?
Describes the rights of youth when their parents separate and what the courts consider when making custody decisions.

Parental consent

Do you need your parents' permission to see a doctor?
Sets out the rights of children and youth, if they are capable, to see a doctor and have their visit kept confidential from their parents.

Getting help

How to work well with a lawyer
Tips for working well with a lawyer, including how to prepare for meetings, keep records, help the lawyer work efficiently, and follow through on your responsibilities. Also provides a downloadable checklist of all the tips.

What you can expect from a lawyer
Provides a description of what a lawyer can do for a family law client, and a list of suggested questions clients can ask their lawyers.

Common-law relationships

Separation

Frequently asked questions about marriages, divorces, and annulments inside and outside Canada
Answers some frequently asked questions about how moving from country to country can affect your marital status in BC and abroad.

Separation
Describes what separation is, whether it's between married or **common-law** couples. Includes what to take with you when you leave and the reasons for writing a **separation agreement**.

Spousal support
Defines spousal support, identifies the relevant laws and guidelines, and explains what kind of financial information **spouses** have to provide to each other. Also talks about **enforcing** or changing a spousal support **agreement** or order.

What if one party doesn't live in BC? (Interjurisdictional issues)
Describes a few examples of **interjurisdictional** issues and what

would happen in each situation, including cases begun in BC before one **party** left the province, cases where the children are in another province, and beginning a case in BC even though one party is outside the province.

What to take with you if you leave your relationship
A list of the important documents and belongings to take along if you're leaving a relationship.

Agreements

Making an agreement after you separate
Describes agreements (often called separation agreements), how to make one, what to do with it once you've made it, how to change or enforce an agreement, and when to get a **consent order** instead.

Making an agreement when you live together
Information for married or common-law couples about how to make a written agreement (sometimes called a cohabitation or marriage agreement) while you live together.

Dividing property

Dealing with debts after separation (for married and common-law couples)
Describes what the basic guidelines are around debts after separation for married and common-law couples.

How to divide property and debts
Describes what the law says about dividing property/debt, defines family property, **family debt**, and **excluded property**, sets out when and how unequal division is possible, and outlines time limits for settling property/debt after separation/ **divorce**.

Wills and estates

If your common-law partner dies
Describes the rights common-law partners have if their partner dies.

Getting help

How to prepare for a meeting with a family duty counsel lawyer
Tips on how to prepare for a meeting with family duty counsel, including a list of which documents to bring along.

Mediation
Describes mediation and mediators, sets out where to find a mediator, provides information about distance mediation and the Supreme Court mediation pilot project, and includes links to a list of available family mediators.

Who can help you reach an agreement?
Provides information about who can help you come to an agreement with your spouse about your family law issues, and includes descriptions of family justice counsellors, mediators, and collaborative family lawyers as well as links to how to find them.

Divorce & separation

Divorce & separation

Divorce

Explains what divorce is, including the difference between uncontested and contested divorce, what's required to get a divorce, and an overview of the process. Also lists several available resources for getting help.

Separation
Describes what separation is, whether it's between married or common-law couples. Includes what to take with you when you leave and the reasons for writing a separation agreement.

Frequently asked questions about marriages, divorces, and annulments inside and outside Canada
Answers some frequently asked questions about how moving from country to country can affect your marital status in BC and abroad.

How can you prove you're separated if you and your spouse still live together?
Describes how you can prove to a court that you and your spouse have actually separated if you're still living together for financial or other reasons but want to get a divorce and/or divide up your **assets**.

What to take with you if you leave your relationship
A list of the important documents and belongings to take along if you're leaving a relationship.

Agreements

Making an agreement after you separate
Describes agreements (often called separation agreements), how to make one, what to do with it once you've made it, how to change or enforce an agreement, and when to get a consent order instead.

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Grandparents/Relatives

Adoption

Adoption
Defines adoption, sets out how adoption works in BC, and provides links to other resources.

Benefits

Benefits for grandparents and other relatives raising children
Charts that describe the kinds of benefits grandparents or other relatives raising children might get and under what circumstances, and links to other sites that explain how and where to apply for these benefits.

Information for seniors about benefits, services, and planning for the future
Describes and provides links to three new booklets published by the People's Law School about government benefits and services for seniors.

Guardianship

How can you become a guardian?
Describes who is a child's guardian, who can apply to become a guardian, and how to apply to become a guardian under the new BC Family Law Act requirements. Includes links to the necessary self-help guides and court forms.

Spending time with your grandchild/relative

Access
Defines access to children and what this means in family law, and sets out some of the different types of access (specified, supervised) that may be arranged by parents and guardians (applies also to grandparents, aunts and uncles, and other relatives).

Best interests of the child
Describes the "best interests of the child," which the law says parents and judges must consider in making decisions about parenting.

Children's right to time with grandparents
Information for grandparents who want to apply for access to or contact with their grandchild.

Spending time with a child if you're not a guardian: Contact
Describes **contact with a child**, which is what the BC Family Law Act calls the time that someone who's not a guardian (for example, a non-guardian parent or grandparent) spends with a child.

Step-parents

Step-parents' rights and responsibilities
Information for step-parents who want to apply for guardianship, custody, or access to or contact with their step-children, and about whether they are responsible to pay child support.

Getting help

How to work well with a lawyer
Tips for working well with a lawyer, including how to prepare for meetings, keep records, help the lawyer work efficiently, and follow through on your responsibilities. Also provides a downloadable checklist of all the tips.

Mediation
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Information about what an advocate is, what they can do, and where to find one.

What you can expect from a lawyer
Provides a description of what a lawyer can do for a family law client, and a list of suggested questions clients can ask their lawyers.

Immigrants

Getting help

How to work well with a lawyer
Tips for working well with a lawyer, including how to prepare for meetings, keep records, help the lawyer work efficiently, and follow through on your responsibilities. Also provides a downloadable checklist of all the tips.

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Information about what an advocate is, what they can do, and where to find one.

What you can expect from a lawyer
Provides a description of what a lawyer can do for a family law client, and a list of suggested questions clients can ask their lawyers.

Legal help & lawyers

Aboriginal people

Understanding Aboriginal child protection / removal matters
Describes what Aboriginal parents can do if they're being investigated for a child protection matter.

Mediation

Mediation
Describes mediation and mediators, sets out where to find a mediator, provides information about distance mediation and the Supreme Court mediation pilot project, and includes links to a list of available family mediators.

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defines mediation, describes when it can help in child protection/removal cases, lists tips for working with a mediator, and provides links to other useful resources.

Youth

Why see a lawyer about your court-ordered plan of care?
Information for young people aged 12 to 18 about their rights if they have been asked to agree (in writing) to a court order for a plan of

care by a child protection worker for the director of Child, Family, and Community Services.

Getting help

Filling out court forms — Who can help
Provides a list of people and organizations who can help with filling out court forms, explains where these organizations are located, and provides links to more information about them.

Getting legal aid if your children are (or may be) taken away
Advises parents whose children are (or may be) **taken away by the Ministry of Children and Family Development** to see a lawyer as soon as possible, and sets out their rights to legal aid if they are financially eligible.

How to prepare for a meeting with a family duty counsel lawyer
Tips on how to prepare for a meeting with family duty counsel, including a list of which documents to bring along.

How to work well with a lawyer
Tips for working well with a lawyer, including how to prepare for meetings, keep records, help the lawyer work efficiently, and follow through on your responsibilities. Also provides a downloadable checklist of all the tips.

Swearing an affidavit — Who can do it
Provides a list of all the people who are authorized to act as **commissioners of oaths** and can **swear** or **affirm affidavits**, in BC and elsewhere (includes lawyers, **notaries**, and government officials).

What an advocate can do for you
Information about what an advocate is, what they can do, and where to find one.

What you can expect from a lawyer
Provides a description of what a lawyer can do for a family law client, and a list of suggested questions clients can ask their lawyers.

Who can help you reach an agreement?
Provides information about who can help you come to an agreement with your spouse about your family law issues, and includes descriptions of family justice counsellors, mediators, and collaborative family lawyers as well as links to how to find them.

Legal system & courts

Abuse

What if your ex is harassing you through the courts?
Describes the kinds of behaviour involved in court-related abuse and harassment and suggest what people can do about it and what the court can do.

Agreements

Making an agreement after you separate
Describes agreements (often called separation agreements), how to make one, what to do with it once you've made it, how to change or enforce an agreement, and when to get a consent order instead.

What happens if an agreement isn't followed?
Describes agreements, sets out when and why you would file an agreement at the court registry, and explains what you can do to ask the court to enforce your agreement or order if the other party refuses to follow it.

Who can help you reach an agreement?
Provides information about who can help you come to an agreement with your spouse about your family law issues, and includes descriptions of family justice counsellors, mediators, and collaborative family lawyers as well as links to how to find them.

Court forms

Filling out court forms — Who can help
Provides a list of people and organizations who can help with filling out court forms, explains where these organizations are located, and provides links to more information about them.

Frequently asked technical questions about the Supreme Court family forms
Answers to some of the more common technical questions about how to use the Supreme Court family forms.

Court orders

All about court orders
Describes both final orders and **interim orders**, and touches on how to appeal and change orders and how to make an interim order into a final order.

Can you appeal an order?
Explains under which circumstances, and in which court, orders can be appealed.

Family law protection orders
Explains what a family law protection order is, how to apply for one, and what happens once the protection order is in place.

Understanding court orders and hearings — Information for Aboriginal families
Describes the court orders and hearings that are part of the process for child protection cases.

When can you change a final order?
Describes when you can apply to change an order and what the court can do.

Court process

Checklist of information to include in an affidavit or present in court
A checklist of the information/facts needed to support an application for child or spousal support/maintenance, guardianship/custody, or contact/ **parenting time**/access. Also contains a link to a downloadable PDF version of the checklist.

Costs and expenses
Defines **costs** and expenses in the context of a family law court case, sets out the difference between costs and expenses and what they consist of, and explains how to collect them. Includes links to the necessary blank forms for Supreme Court and the Court of Appeal.

Do you need to go to Provincial (Family) Court or Supreme Court?
Describes the difference between Provincial and Supreme Court for

family law issues and explains when you might use each court.

Family Case Conference checklist
A checklist of the information/facts you need when you attend a **Family Case Conference** in Provincial Court to try to settle some of the issues around parenting, guardianship, and contact with a child (and sometimes about child and spousal support) without going to court for a full hearing.

Family Case Conferences in Provincial Court
Explains what a Family Case Conference in Provincial Court is and sets out what might happen at such a conference.

How to prepare for a trial in Provincial Court
Describes the Provincial Court trial process and explains how to prepare a trial book.

Judicial Case Conferences in Supreme Court
Describes **Judicial Case Conferences** in Supreme Court, explains when they take place, who must attend them, and who may be excused from attending.

What happens in a Supreme Court Chambers hearing?
Describes what happens when you go to Supreme Court Chambers to make (or respond to) an application.

What if the other party doesn't follow the parenting agreement or order?
Describes what might happen if the other party doesn't follow the parenting agremeent or order and sets out the various penalties the court might impose.

What to do if the other party doesn't respond to your application for an order
Explains what you should do if the other party hasn't responded to your application for a court order and the deadline to respond has passed.

What will happen at my Provincial Court trial?
Describes what happens at a Provincial Court trial and what you need to do to be well-prepared.

Divorce & separation

Divorce
Explains what divorce is, including the difference between uncontested and contested divorce, what's required to get a divorce, and an overview of the process. Also lists several available resources for getting help.

Guardianship

How can you become a guardian?
Describes who is a child's guardian, who can apply to become a guardian, and how to apply to become a guardian under the new BC Family Law Act requirements. Includes links to the necessary self-help guides and court forms.

Legislation/Court rules

Family law in BC after March 18, 2013
Describes what was updated on this website to reflect the new Family Law Act that came into effect on March 18, 2013.

Frequently asked questions about marriages, divorces, and annulments inside and outside Canada

Answers some frequently asked questions about how moving from country to country can affect your marital status in BC and abroad.

Frequently asked questions about the new BC Family Law Act
Answers to commonly-asked questions about the new law.

If you started your Supreme Court case before July 1, 2010
Links to all of the resources (process descriptions, forms, etc.) on the Family Law website that came into effect July 1, 2010.

Old Rules/New Rules in Supreme Court
A list of the terms and form names used under the old Supreme Court Rules and the new Supreme Court Family Rules that came into effect on July 1, 2010, for people to use if they started cases under the old rules and now need to figure out what the new terms/forms are called.

Questions about the Supreme Court Family Rules in effect July 1, 2010
Some questions and answers about the new Supreme Court Family Rules that came into effect on July 1, 2010 and changed many Supreme Court family law court processes.

What if one party doesn't live in BC? (Interjurisdictional issues)
Describes a few examples of interjurisdictional issues and what would happen in each situation, including cases begun in BC before one party left the province, cases where the children are in another province, and beginning a case in BC even though one party is outside the province.

Which laws apply to your case?
Describes the two statutes that apply to family law in BC (the Divorce Act and the Family Relations Act) and case law, and sets out when each of these might be used in a **family law case.**

Mediation

Making mediation happen in a family law case in Supreme Court
Explains a Supreme Court pilot project started March 29, 2012 to allow either party in a family law proceeding started under either the Family Relations Act or the Divorce Act in that registry to apply for mediation.

Parentage

Who is a parent?
Explains the basics of the new law that defines **parentage** and includes definitions of birth mother; biological father; birth mother's partner; sperm, egg, or embryo donor; and surrogacy.

Getting help

Filling out court forms — Who can help
Provides a list of people and organizations who can help with filling out court forms, explains where these organizations are located, and provides links to more information about them.

How to prepare for a meeting with a family duty counsel lawyer
Tips on how to prepare for a meeting with family duty counsel, including a list of which documents to bring along.

How to work well with a lawyer
Tips for working well with a lawyer, including how to prepare for meetings, keep records, help the lawyer work efficiently, and follow through on your responsibilities. Also provides a downloadable

checklist of all the tips.

Swearing an Affidavit — Who can do it
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What an advocate can do for you
Information about what an advocate is, what they can do, and where to find one.

What you can expect from a lawyer
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Who can help you reach an agreement?
Provides information about who can help you come to an agreement with your spouse about your family law issues, and includes descriptions of family justice counsellors, mediators, and collaborative family lawyers as well as links to how to find them.

Parenting, custody & access

Parenting apart

Parenting apart
Describes all the legal terms about parenting after separation that were introduced by the BC Family Law Act and explains how they relate to the Divorce Act legal terms.

Best interests of the child
Describes the "best interests of the child," which the law says parents and judges must consider in making decisions about parenting.

Access

Access
Defines access to children and what this means in family law, and sets out some of the different types of access (specified, supervised) that may be arranged by parents and guardians (applies also to grandparents, aunts and uncles, and other relatives).

Contact

Spending time with a child if you're not a guardian: Contact
Describes contact with a child, which is what the BC Family Law Act calls the time that someone who's not a guardian (for example, a non-guardian parent or grandparent) spends with a child.

Custody

Custody
Defines **custody** of children and what this means in family law, and describes some of the different types of custody orders (sole, joint), as well as terms such as split custody and shared custody that describe custody arrangements.

Guardianship

Guardianship: Parenting time and parental responsibilities

Describes guardianship under the Family Law Act, and includes who is a guardian, who can apply to become one, what being a guardian means, what happens when you separate, what you need to put into an agreement about guardianship, and whether guardianship issues can be settled in court.

Can you become a guardian of your younger brother or sister?
Explains when older brothers or sisters who are 19 or over may apply to court for guardianship of their siblings who are under 19 and sets out the factors the court considers in making the decision.

How can you become a guardian?
Describes who is a child's guardian, who can apply to become a guardian, and how to apply to become a guardian under the new BC Family Law Act requirements. Includes links to the necessary self-help guides and court forms.

What will happen if you die or can't take care of your child?
Describes what will happen if you die without making arrangements for who will look after your child, what you can do about it (appoint a **standby** or **testamentary guardian**), and how you can record your decisions.

Grandparents/Relatives

Children's right to time with grandparents
Information for grandparents who want to apply for access to or contact with their grandchild.

Moving or travelling

Can you move — With or without your child?
Describes what a parent or guardian must do (give notice) before moving to another city with children, and what could happen if the other parent/guardian doesn't agree with the move.

Do you need any legal documents to be able to leave Canada with your child?
Describes what documents you must bring along to prove that you're allowed to take your children out of the country if you travel without the other parent.

Parentage

Who is a parent?
Explains the basics of the new law that defines parentage and includes definitions of birth mother; biological father; birth mother's partner; sperm, egg, or embryo donor; and surrogacy.

Step-parents

Step-parents' rights and responsibilities
Information for step-parents who want to apply for guardianship, custody, or access to or contact with their step-children, and about whether they are responsible to pay child support.

Getting help

Mediation
Describes mediation and mediators, sets out where to find a mediator, provides information about distance mediation and the Supreme Court mediation pilot project, and includes links to a list of available family mediators.

Parenting After Separation courses
Describes the course (a free, three-hour information session for BC parents and other family members, dealing with parenting and

support issues) and who can/must attend it.

Parenting coordinators
Describes how professional **parenting coordinators** can help parents resolve day-to-day conflicts about parenting agreements or orders, where to find parenting coordinators, and how parenting coordinators can get in involved.

Who can help you reach an agreement?
Provides information about who can help you come to an agreement with your spouse about your family law issues, and includes descriptions of family justice counsellors, mediators, and collaborative family lawyers as well as links to how to find them.

Staying out of court

Agreements

Making an agreement after you separate
Describes agreements (often called separation agreements), how to make one, what to do with it once you've made it, how to change or enforce an agreement, and when to get a consent order instead.

Making an agreement when you live together
Information for married or common-law couples about how to make a written agreement (sometimes called a cohabitation or marriage agreement) while you live together.

What happens if an agreement isn't followed?
Describes agreements, sets out when and why you would file an agreement at the court registry, and explains what you can do to ask the court to enforce your agreement or order if the other party refuses to follow it.

Who can help you reach an agreement?
Provides information about who can help you come to an agreement with your spouse about your family law issues, and includes descriptions of family justice counsellors, mediators, and collaborative family lawyers as well as links to how to find them.

Making plans for your child's care

Collaborative planning and decision making in child protection cases
Describes how to work with the Ministry of Children and Family Development to make a plan or agreement about your child's care. Options include family group conferences, traditional decision making for Aboriginal families, and mediation to resolve issues instead of going to court.

Family group conferences
Explains the option of collaborative decision making, where a child's parents, relatives, close friends, or other community members meet about how to keep the child safe and to develop a plan for the child's well-being.

Family support services
Family support services can provide parents with temporary help from the Ministry of Children and Family Development or an Aboriginal delegated agency to care for their children in rough times.

Making agreements for your child's care
Describes help you can get to care for your child and reduce the strain on your family, including from community services or government programs and by making family support agreements, Voluntary Care Agreements, or Special Needs Agreements.

Special Needs Agreements
Describes assistance programs from the Ministry of Children and Family Development for children with permanent or long-term severe or developmental disabilities or identified as at risk for developmental delay.

Tips about making agreements for your child's care
Describes what to keep in mind if you're thinking of making an agreement with the Ministry of Children and Family Development about your child's care. Tips include getting legal help, being part of decision making, and keeping notes.

Voluntary Care Agreement
Describes the Voluntary Care Agreement, a written agreement proposed when parents face a crisis that leaves them temporarily unable to care for their children at home.

Mediation

Making mediation happen in a family law case in Supreme Court
Explains a Supreme Court pilot project started March 29, 2012 to allow either party in a family law proceeding started under either the Family Relations Act or the Divorce Act in that registry to apply for mediation.

Mediation
Describes mediation and mediators, sets out where to find a mediator, provides information about distance mediation and the Supreme Court mediation pilot project, and includes links to a list of available family mediators.

Mediation in child protection cases
defines mediation, describes when it can help in child protection/removal cases, lists tips for working with a mediator, and provides links to other useful resources.

Parenting

Parenting After Separation courses
Describes the course (a free, three-hour information session for BC parents and other family members, dealing with parenting and support issues) and who can/must attend it.

Parenting coordinators
Describes how professional parenting coordinators can help parents resolve day-to-day conflicts about parenting agreements or orders, where to find parenting coordinators, and how parenting coordinators can get in involved.

Separation

Separation
Describes what separation is, whether it's between married or common-law couples. Includes what to take with you when you leave and the reasons for writing a separation agreement.

Support — child

Child support

Child support
Defines child support; identifies the relevant laws and guidelines; defines " **undue hardship**," " **special or extraordinary expenses**," and the "40 percent principle"; sets out income tax implications; outlines the financial information that parties must provide; and touches on **arrears**.

Can you sue your parents for support?
Explains under which circumstances and how a child (anyone under 19, or anyone over 19 but with a disability or who is otherwise unable to support him or herself) is entitled to go to court to ask for child support from his or her parents.

What if one party doesn't live in BC? (Interjurisdictional issues)
Describes a few examples of interjurisdictional issues and what would happen in each situation, including cases begun in BC before one party left the province, cases where the children are in another province, and beginning a case in BC even though one party is outside the province.

What the child support guidelines are and how they work
Describes the child support guidelines and how they work and provides links to the federal guidelines and the tables.

When does child support end?
Information about when the responsibility for paying child support ends.

Child support orders

Information for people with family law cases (child support orders) in Kelowna Provincial Court
Describes the Child Support Recalculation Service, which has been in effect in Kelowna since June 1, 2006. The service automatically recalculates child support amounts every year by applying the child support guidelines to updated income information.

Family Maintenance Enforcement Program

How you can get your driver's licence back if the Family Maintenance Enforcement Program takes it away
If you've fallen behind in your support payments and the **Family Maintenance Enforcement Program** has advised ICBC not to issue or renew your driver's licence, here's what you have to do to get it back.

Grandparents/Relatives

Benefits for grandparents and other relatives raising children
Charts that describe the kinds of benefits grandparents or other relatives raising children might get and under what circumstances, and links to other sites that explain how and where to apply for these benefits.

Parentage

Who is a parent?
Explains the basics of the new law that defines parentage and includes definitions of birth mother; biological father; birth mother's partner; sperm, egg, or embryo donor; and surrogacy.

Step-parents

Step-parents' rights and responsibilities

Information for step-parents who want to apply for guardianship, custody, or access to or contact with their step-children, and about whether they are responsible to pay child support.

Getting help

Mediation
Describes mediation and mediators, sets out where to find a mediator, provides information about distance mediation and the Supreme Court mediation pilot project, and includes links to a list of available family mediators.

Parenting coordinators
Describes how professional parenting coordinators can help parents resolve day-to-day conflicts about parenting agreements or orders, where to find parenting coordinators, and how parenting coordinators can get in involved.

Who can help you reach an agreement?
Provides information about who can help you come to an agreement with your spouse about your family law issues, and includes descriptions of family justice counsellors, mediators, and collaborative family lawyers as well as links to how to find them.

Support — spousal

Spousal support

Spousal support
Defines spousal support, identifies the relevant laws and guidelines, and explains what kind of financial information spouses have to provide to each other. Also talks about enforcing or changing a spousal support agreement or order.

What if one party doesn't live in BC? (Interjurisdictional issues)
Describes a few examples of interjurisdictional issues and what would happen in each situation, including cases begun in BC before one party left the province, cases where the children are in another province, and beginning a case in BC even though one party is outside the province.

Family Maintenance Enforcement Program

How you can get your driver's licence back if the Family Maintenance Enforcement Program takes it away
If you've fallen behind in your support payments and the Family Maintenance Enforcement Program has advised ICBC not to issue or renew your driver's licence, here's what you have to do to get it back.

Getting help

Mediation
Describes mediation and mediators, sets out where to find a mediator, provides information about distance mediation and the Supreme Court mediation pilot project, and includes links to a list of available family mediators.

Who can help you reach an agreement?
Provides information about who can help you come to an agreement with your spouse about your family law issues, and includes descriptions of family justice counsellors, mediators, and

collaborative family lawyers as well as links to how to find them.

Self-help guides

Which guide should I choose? Is there a self-help guide for my situation?

Divorce

How to do your own undefended (uncontested) divorce (Supreme Court)

How to get a copy of your marriage certificate

Agreements

How to file your agreement in Provincial Court

How to file your agreement in Supreme Court

How to set aside all or part of an agreement (Provincial or Supreme Court)

Agreements and orders

How to enforce a parenting agreement or order (Provincial or Supreme Court)

Child protection / removal

How to ask the ministry for help

How to get help if someone reports you to the ministry

How to make a complaint against the ministry

Court fees: What to do if you can't afford them

How to get an order to waive fees (Supreme Court)

Court forms

How to deal with a Provincial Court Financial Statement (Form 4)

How to deal with a Supreme Court Financial Statement (Form F8)

How to use a Supreme Court Notice of Intention to Proceed (Form F48)

Family Maintenance Enforcement Program

How to deal with a committal hearing (because you've fallen behind in your support payments)

Family orders

(includes parenting [guardianship, contact, custody, or access] and/or child/spousal support)

If you can't agree with the other party: Step 1

How to start a family law case (Provincial or Supreme Court)

How to start a family law case to change an order (Provincial Court)

If you can't agree with the other party: Step 2

How to get a final family order (Provincial or Supreme Court)

How to get an interim family order (Provincial or Supreme Court)

How to change a family order (Provincial or Supreme Court)

How to deal with a Judicial Case Conference (Supreme Court)

If you both agree:

How to get a final family order (Provincial or Supreme Court)

How to get an interim family order (Provincial or Supreme Court)

How to change a family order (Provincial or Supreme Court)

Serving documents

How to serve Provincial Court documents

How to serve Supreme Court documents

How to serve court documents outside BC (Provincial or Supreme Court)

How to arrange for alternative (substitutional) service (Provincial or Supreme Court)

TAB 7: Skills

- **Romancing the Statute (Day 1)**
  - Materials

  Orange sheet

- **Laying the Groundwork: effectively prepare your client's case (Day 2)**
  - Materials

  Orange sheet

- **Can you Convince me? How to develop persuasive written arguments (Day 3)**
  - Materials

  Orange sheet

- **Staying on the Bucking Bronco: maintaining control in hearings (Day 3)**
  - Materials

Romancing the Statute

Provincial Training Conference, 2013

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.

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Introduction to statutory interpretation 4
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The basics of legislation

Statutes are passed by Parliament or the Legislature and set out the general skeleton of a statutory scheme, as well as what can be expanded on in regulations. Regulations are generally passed by the executive branch and don't have to be debated in the Legislature or Parliament. Regulations are subordinate to statutes and can only regulate within the bounds of the statute. Policies are not legislation and are generally not binding on decision-makers.

STEPS FOR FINDING RELEVANT LEGISLATION

(1) Start with a secondary source, if available

In some legal areas, you may already know what legislation to look at. If you don't know, a good place to start is a secondary source (a text book, policy guide or other resource that compiles and summarizes information about the area of law you're dealing with). These resources often have a subject index that might bring to a section that can tell you which legislation to look at. Some examples of secondary sources include the annotated *Residential Tenancy Act,* the Ministry of Social Development Online Resource or the annotated *Canada Pension Plan.*

NOTE: this is not the end of the research road. You still always need to go through the following steps and look at the actual wording of the legislation.

(2) Go to the text of the statute

Once you know which statutory sections might be relevant to your client's legal issue, find them. You can usually use one of the consolidated statute sites (CanLII, BC Laws, etc.) or the website of the body that administers the legislation (so the Residential Tenancy Branch site for tenancy legislation, or the Ministry of Social Development site for income assistance legislation, etc.). Once you find the text of the statute or regulation, make sure to check the following:

a. Is the provision the most up-to-date version?

Legislation changes on a regular basis. In particular, regulations can change very quickly and with no notice. Make sure to check that you are looking at an up-to-date version of the statute or regulation. If you are looking at an online version, there will generally be a note at the top of the document setting out "regulation is current to…" or "includes amendments up to…". Check that date, and of it's not current, you may need to make sure there is not a more recent version of the legislation.

b. Is the provision in force?

Once you find the legislation, check to make sure it is in force. Sometimes statutes can be passed in the legislature, but not actually be in force, for years.

c. Is there any companion legislation?

If you're looking at a statute, are there any regulations? If you're looking at regulations, do you also have the statute it was enacted under? You need the whole picture to start interpreting. Don't forget key pieces of the puzzle.

d. Do you have a version that is formatted correctly?

Finally, while it may seem obvious, make sure you have a version of the legislation that is properly formatted (don't just copy it into a word document). Indenting and punctuation are very important when interpreting legislation and you can make serious errors because of silly formatting issues.

(3) Apply the interpretation methods set out in the rest of this article.

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? What aspects are unclear?
2) Context
    - 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)?
    - 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?
    - Do you use what the artist intended the painting to mean?
        - Is there any evidence of what the artists meant the painting to mean?
    - 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?
3) How persuasive (or binding) is the context you found?

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) What **context** supports this interpretation?
3) How persuasive are the sources you found to support your 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.

[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 a historic war? 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 think of different kinds of context that might help to understanding the language of the provisions, or to argue for a specific interpretation.

Context specific to the provision you're interpreting

You can use external aides 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 of the BC *Interpretation Act*, 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."

   Also see s. 29, which provides definitions for a variety of terms used in provincial legislation.

   These sections are binding in the sense that they are valid law enacted by the legislature, although the provisions about how to interpret statutes will rarely be the

one source of context that will win a case because they apply to every statute and every decision applying a statute.

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. In most situations, the rules of procedure for a tribunal may not be binding, but they may be very, very persuasive.

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.

Interpretations by others

It is important to know how others have interpreted the provision – this is also context. 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/. If you access the legislation through CanLII, you can often click on the blue section number and any court cases referencing that section will come up.

   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. Secondary sources are not binding, but if they are authored by a recognized expert in the area, they may be very persuasive.

   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.

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 legislation, we do have tools to look at what the legislature, or the body that enacted the provision, intended it to mean.[2]

[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.

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.

While not binding, 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.

The wider context: how does your section fit in?

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.

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 and headings 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 intention or purpose of the specific provision you are interpreting.)

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. (See for example para. 35 of *Hudson v. British Columbia*, 2009 BCSC 1461for a list of cases confirming this principle.)

   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.

How to put it all together

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.

When applying this method to a case, you can:

(1) Decide the plain language meaning of the provision, and identify any aspects that are unclear or ambiguous.
(2) What other tools or context can you find to help resolve the ambiguity?
(3) How much can rely on the contextual interpretation tools? (Are they binding? Are they only persuasive?)
(4) Do any of the tools support an interpretation that will help your client's case?

PREPARING YOUR CASE

ESSENTIAL CHECKLIST FOR ADVOCATES

PTC 2013

Presented by Kendra Milne and Kaity Cooper
Community Legal Assistance Society

This checklist will take you through some key steps in handling a client file that is headed to a hearing. We hope it will give you some helpful ideas to handle these files with skill and confidence!

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Evidence-gathering 7
Some tips about documentary evidence 8
Preparing to present your case 9
Preparing yourself for hearing 11
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Original materials by Jess Hadley.

Initial assessment of your case

Always do this assessment before committing to represent a client

At some point after you have spoken with the client and developed an understanding of what she would like you to help with, it's very important to consider these points before you commit to take on her case.

Go over these questions <u>with the client</u>:

☐ What, exactly, does the client want to achieve? Why has she come to see you?

☐ Is the client's goal realistic? What specific results can realistically be expected?

☐ If your client has a specific plan in mind (e.g. take her landlord to the RTB, challenge a reconsideration decision at EAAT), is that specific plan likely to be helpful to the client? Is it possible that plan will put the client in a worse position?

☐ Are there other options that you and the client should explore as well or instead? (e.g. negotiation, doing nothing, a different legal option, re-applying, etc.)

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 will it take to assist this client? Given your overall workload, do you have enough time to do the work necessary?

☐ If there is a hearing or a deadline coming up, can you get ready in time?

☐ If the client is set to go to hearing, does she have at least some chance of succeeding in the hearing?

☐ Have you gone over all the options with your client and has she given you clear instructions to proceed?

Only commit to doing a hearing when you're satisfied there is a good reason to do so.

File management

Steps to take as soon as you're ready to commit to the hearing

After you have gone over all the above steps and you're ready to commit to assisting the client, always make sure to ask yourself these file management questions.

- ☐ Does your office have a system for checking for conflicts of interest? If so, have you checked for conflicts?
- ☐ Have you clearly communicated to the client exactly what you can and cannot do for her? (e.g. who will file the notice of appeal? When? Who will gather the evidence for the case?)
- ☐ Have you completed an opening letter for the client?
    - O Does it confirm exactly what assistance you can provide, and what assistance you cannot provide?
    - O Does it set out any ground rules for your or your program's continued assistance?
    - O Does it explain confidentiality, including any applicable exceptions?
- ☐ Do you need any consent forms signed by the client? (e.g. to act for the client at a tribunal, or to gather any evidence you might need for the case)
- ☐ Do you have reliable contact information for the client? If not, have you thought about how you will communicate?
- ☐ Do you need the client to provide any additional documents? When?
- ☐ Have you opened a file or do you have another means to organize the correspondence and documents for the file?
- ☐ Are there any deadlines you are aware of at this stage? Have you put them in a reliable calendar system?

The rest of this handout is geared toward cases that are going to hearing. But keep in mind, not all clients will benefit from going to hearing! It's your job as an advocate to help the client to make a good decision about what approach to take.

Getting started

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 in this hearing?

☐ **Make sure you have all the relevant documents.**

Get your client to give you *all* the relevant documents. (Re-assess whether you need the client to sign any additional releases.)

If it's an appeal hearing of any kind, it's essential that you get a copy of the decision being appealed, as well as all the documents that were submitted to or relied on by the lower level decision-maker.

☐ **Think about the nature of the tribunal.**

How are hearings done at this tribunal? Formal or informal? In person, by phone, or in writing? What are the rules governing procedure at this tribunal? If the rules are published, review 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 a reliable calendar system.

☐ **Locate the law that applies.**

What statutes and regulations will you rely on? Is there any policy or case law relevant to your case? Read these materials carefully and find the specific parts you will rely on.

Think about the interpretation of the statutes and regulations. Are there any statutory interpretation issues you need to sort out?

If in doubt, ask your supervising lawyer or a senior advocate, to make sure you are finding everything and focusing on the right stuff.

Develop a case plan

We strongly suggest you put in the time at the outset to come up with a good case plan that identifies the following elements.

☐ **1: Key legal principles or legal arguments.**

- Think carefully about the legislation, policy and any case law that might apply.
- Take your time to figure out what the legal issues are and to break them down into their elements. It can take some effort.
- If in doubt, talk it over with a more senior advocate or supervising lawyer. It's very helpful to get this stuff straight as early as possible.

☐ **2: Key factual points that need to be proven.**

- Looking at each element of the legal test that applies in your case, what factual points need to be proven in order for your client to have a shot at winning?

☐ **3: What evidence you will rely on to prove each of these points.**

- Evidence can be contained in all kinds of documents (such as pictures, letters, emails, contracts, receipts, etc.)
- Evidence can be in the form of a witness's testimony. If a witness cannot attend the hearing, he/she can write a signed and dated statement, or swear an affidavit if it's a really key point.
- Consider: what would be the simplest and most convincing way to prove each point? It is usually best to keep it as simple as possible.

  ***NOTE**: It's very helpful if you can create a table lining up the factual points that need to be proven in one column, and the evidence to prove those points in the other column. (see next page)*

☐ **4: Theory of the case**

- Come up with a brief (1-3 bullet point) statement summarizing how you will argue the case. Every case can be boiled down into a simple "This case is about…" statement.

Note: the number of facts that you need to prove will vary with each legal issue

Legal Requirement #1	
Fact to Prove	**How you will prove it**
Legal Requirement #2	
Fact to Prove	**How you will prove it**
Legal Requirement #3	
Fact to Prove	**How you will prove it**

Evidence-gathering

☐ Decide what documents you need for evidence by looking at your "How will you prove it" it column in your case plan. If you have them already, great. If not, 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. We recommend an evidence folder *separate from the rest of the file.*

☐ Decide what witnesses you might need by looking at your "How will you prove it" column in your case plan. 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 might want to rely on?

Once you have gathered your evidence, it needs to be organized and sent in to the decision-maker (and to the other side if required at this specific tribunal) 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.

Before sending the evidence, think about the following tips for submitting documentary evidence

Some tips about documentary evidence

Remember that everything you put before a decision-maker is an opportunity to advocate for your client and get the decision-maker on your side. Think about how to submit your documentary evidence in the most persuasive and helpful way possible.

☐ This might be obvious, but when you send in your documentary evidence, it makes a huge difference if you can **organize the documents in a helpful way** (chronologically, conceptually, or some combination of the two).

☐ It's also very helpful if you can **number the pages** so that everyone can refer to it easily.

☐ Ideally, try to create **a list of your documents,** like a table of contents, and include the list when you send your documents in to the tribunal. This is especially helpful if the case is complex. There is an example list of documents at the back of this checklist.

☐ If the evidence deadlines allow, you can send your **written submissions** to the decision-maker along with your documentary evidence, in a neat package. This makes life much easier for the decision-maker. (More on written submissions later.)

☐ Remember that your job is to **make it easy for the decision-maker to find in your client's favour**, so think about how you can accomplish that.

- Do you have time to put all the documentary evidence, the list of documents, and your submissions into a neat binder?
- If you are faxing in your evidence, can you make the cover page as clear, professional and helpful as possible?
- Is there anything else you can do to make the evidence easy to navigate?

Preparing to present your case

☐ **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.

Some people prefer to write just a list of points to cover; others like to write out the whole question. Either way the questions you ask 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 <u>leading</u> questions as long as the subject-matter is not contentious in the case. (Leading questions 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 <u>cannot</u> be leading questions. The goal is to stay out of the witness's way as much as possible so that your witness is telling her story. 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.

☐ **Make a plan for how you will draw the tribunal's attention to all the important documentary evidence.** Will the documents be discussed during the witnesses' testimony? If possible, it is a good idea to bring them in that way, rather than just referring to them in your argument. Have a plan for bringing each important document to the tribunal's attention.

☐ **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 (some witnesses may have to stay out of the hearing until they have given their evidence so they don't hear other witnesses).
- Explain the duty to tell the truth, and how you will guide the witness get her evidence out, but you will not be telling her what to say.
- 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.

☐ **If possible, practice the direct examination with your witness (especially if it's an important witness).**

☐ **Prepare your witnesses for cross-examination by the other side.**

Explain that the other side might ask questions to try and (A) get evidence that hurts your client's case; and/or (B) attack your witness's credibility.

Go over any topics you think might 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.

☐ **Get ready in advance if you are hoping to get helpful admissions from the other side's witnesses.**

Sometimes you can anticipate that the other side's witnesses will be able to admit a point that will help your case.

If that seems likely, come up with a plan to get the helpful evidence. <u>It's usually only a good idea to try and get helpful evidence from the other side's witness if you are very confident you can get it.</u> More on this later.

Brainstorm leading (narrow!) questions, such as:

- "You didn't ever respond to the tenant's request, did you?"
- "In a 3 year tenancy, this tenant has always paid his rent on time, right?"
- "There have been problems with bedbugs in several units in this building, haven't there?"

Preparing yourself for hearing

☐ Remind yourself of the rules and tone of this tribunal and make sure you have everything you might need during the hearing.

☐ Ask yourself whether there are any procedural request you need to make prior to the hearing or at the hearing itself.

☐ We suggest you prepare a **hearing binder** containing your notes for the hearing. You can re-use the same binder for different hearings. Helpful things for the binder to 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 any; and

(E) Any other materials you may not want to refer to.

☐ If you do not have a written argument, we suggest you prepare the following items to put in the hearing binder. This will really help with getting ready for the hearing.

(A) Your opening statement including your statement of what, exactly, you are asking the tribunal to do. (Remember your theory of the case and your "This case is about…" statement.)

(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. Sometimes a table is helpful with the fact on one side and the relevant document on the other.

(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.

SAMPLE 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:

    a. Quote from Sears re: La-Z Boy Armchair
    b. Print-out from Rexall website for Obusforme back rest
    c. Print-out from London Drugs website for Sunbeam electric blanket

SAMPLE OF TABLE ADDING UP A MONETARY CLAIM

Summary of monetary claim made by the tenant (*Tenant's documents 8A, 8B, and 8C*).

Item	**Replacement cost**	**Proof**
La-Z Boy Armchair	$459.99	Quote from Sears (document 8A)
Obusforme back rest	$112.99	Print-out from Rexall website (document 8B)
Sunbeam electric blanket	$49.99	Print-out from London Drugs website (document 8C)
TOTAL	**$622.97**	
Plus HST 12%	$74.76	
TOTAL LOSSES INCLUDING TAX	**$697.73**	

Writing Persuasive Submissions

Provincial Advocacy Training Conference 2013

Presented by Kendra Milne and Devyn Cousineau,
Community Legal Assistance Society

The goal of written submissions

What is the goal of written submissions? To persuade!

Written submissions provide an important opportunity (and sometimes the only opportunity) to put forward your client's argument. Through effective written submissions, you will build sympathy for your client, become a trusted helper for the decision-maker, and help your client appear reasonable. Everything about the submission is an opportunity to assist your client's case, from how the argument appears, to its content, organization and tone. Your submission should help, and ideally compel, the decision maker to decide the case in your client's favour.

Below are some general tips for how to use written arguments to assist your client's case.

Be helpful

Your job is to make life easy for the decision-maker. You may dislike an institutional decision-maker or think they do a lousy job, but it is your role as an advocate to make it as easy as possible to decide in your client's favour.

When you are writing your submission, always be thinking about what would be helpful for the decision maker. Do not become sidetracked by ideas, facts or arguments that your client wants you to include, or that you want to include, for reasons other than helping the decision maker.

So what will help the decision maker?

To answer this question, you need to first think about who the decision maker is. Many of the administrative tribunals that you practice in front of are informal, underfunded, and over worked. Decision makers may be notoriously frustrated, curt and ill-informed with the context in which

you work and your client lives. Regardless of what you think about the decision maker, this is important to acknowledge when you plan your advocacy. If they are over-worked, you know they are less likely to spend a lot of time wading through evidence, facts and legal submissions to get to your point. You know they are even less likely to do research themselves to find the right answers. If they are ill-informed with your client's world, you know you need to briefly orient them. If they are easily frustrated, make sure to appease them by making your arguments attractive and accessible. You will not help anyone, least of all your client, if you do not cater to the reality of the decision maker you are appearing before.

With that in mind, the following points are ways you can help your decision maker.

Do the work to analyse your case. As an advocate, this is your main job. Do not assume that the decision maker will do your work for you; in fact, assume she will not. You can irritate a decision maker by leaving all the work of finding the law, summarizing the facts, and drawing conclusions up to her. And, even worse, you take a giant gamble that their work will not lead them to the conclusion that you want. Do the work.

Make your argument organized. Take time before you start writing to structure your argument. It does not help a decision maker to find in your client's favour when she has to wade through a stack of material with no roadmap for how it fits together. How to organize an argument will be discussed in greater detail below.

Make your argument interesting. Be thoughtful about how to present your client's case in a compelling way. This does not mean you should include inflammatory statements (eg. "the landlord is a cruel slumlord and my client has never done anything to deserve the torture that has been inflicted on her"). Nor should you use a lot of exclamation points and bolding to scream your point across (eg. "My client **NEVER** had that loud party!!!!"). It means you should present facts and argument in a way that you would enjoy reading and feel moved by.

Make your argument readable and accessible. Font size, white space, page numbering and binding can help conserve the decision maker's energy so that she can focus on the substance of your argument, rather than straining to access your submissions. Some practical tips include:

- Use a decent sized font (no smaller than 11pt).

- Leave some white space to make it easy to read. Use double spacing, and leave space between paragraphs.
- Use lists for important points.
- If there is a form, don't squeeze the submission onto the form. Use additional pages as required.
- Number the pages and paragraphs whenever possible.
- Put the case name and file number at the top of the cover page and, if you're submitting the argument by fax, at the top of every page.
- If you refer to evidence, direct the decision maker to exactly where she can find the evidence.
- Use headings and subheadings to guide the reader through your argument.
- Explain clearly who everyone is. For example, the first time you mention "Dr. Don Daisy", explain that he is your client's family physician.
- Take the time to proofread! If you can, put the arguments away overnight and proof read them the next day. Spelling and grammar mistakes, typos, and nonsensical sentences can cost you credibility.

Be clear and concise

Distill your case. Before you start writing, sit down with a pen and paper. Write one or two sentences that capture what the case is about. *You can, and should, do this with every case.* No case is too complicated for this method. For example, in a human rights case that took 43 days of hearing, 20 witnesses and over 10,000 pages of documents, the appellants distilled the case to this sentence:

> This case is about how British Columbia's education system failed in its obligation to be inclusive of all children.

Once you have this clear sense of the case, you use this to structure your arguments around supporting your theory of the case.

Clarity requires preparation and organization. Use a case plan to identify:

1. What is the legal test that applies?

2. What facts are relevant to this test?
3. What evidence will support the facts I need to prove?

Again, this takes some work at the outset but will ensure that your arguments are focused on exactly what the decision maker needs to find in order for you to win the case.

Keep the decision maker focused. Your argument can easily lose focus and distract the decision maker if you include facts, arguments, authorities and evidence that are peripheral to the main point of the case. Be confident:

- Do not include facts or evidence that is irrelevant to the issue. It is confusing.
- If you have a choice between one strong argument and four weak arguments, make the strong argument.
- Do not include authorities that are not directly on point and necessary.

Identify your point. The best practice in legal writing is to use "point first" writing. This means that the first sentence of every paragraph will tell your reader what the point of that paragraph is. Then every other sentence goes to that single point. For example, compare this paragraph:

> Rayna James was served with a Notice to End Tenancy on September 30. Then, on October 2, she tried to pay her landlord the rent she owed. He refused it. Ms. James says that the Notice to End Tenancy should be set aside because she tried to pay her rent.

With this one:

> The Notice to End Tenancy in this case should be set aside. Ms. James attempted to pay her rent two days after being served with the Notice, but the landlord refused to accept it.

In the second paragraph, the reader knows immediately what point you are trying to make; they don't have to wait for the punchline.

Be credible

You can really help your client by appearing credible to the decision maker. If you are viewed as a credible advocate, the decision maker will be more likely to find facts in your favour, and adopt

your view of the law. So what makes a person credible?

Don't overstate. Do not overstate your client's case or the evidence. Even one instance of appearing to mislead the decision maker can cost you your credibility. Stick to what is supported by the evidence and its reasonable interpretation. For example, if your client admitted that the police were called to her apartment after a loud argument with her boyfriend at 11pm, do not try to say that she has been a perfect tenant who never caused a commotion. Instead, focus on evidence that none of the neighbours complained, and that she was quick to apologise to the landlord for the inconvenience.

Be thorough. Show the decision maker that you have done the work. This doesn't mean being long-winded, or including all of your research and analysis, no matter how peripheral to the case. It means presenting everything that the decision maker needs to find in your favour.

Address the other side. If there is a legitimate argument against your client, address it head on. Do not try to "get away" with hiding the law or evidence to promote your case. If there is a section in the legislation that does not support you, you need to include it and explain why it doesn't apply. If there is evidence against your client, you need to address why it should not undermine her case.

Know the role of the decision maker. Can she even do what you're asking for? If not, then you can quickly lose credibility by even asking for it.

Don't escalate the conflict. There is an old saying: "the lawyer who represents herself has a fool for a client". Your client is lucky to have you as an advocate because you are not personally involved in the case and so can objectively pursue it. You need to remain above the fray in a dispute. Your tone should be almost clinical in its neutrality. It may seem cold, but it is really the best way to help your client and earn the trust of the decision maker.

Structure your argument

There is a basic structure that you can use in all of your written arguments. Again, make sure to use headings and subheadings throughout the argument to let the decision maker easily follow along.

Start with a concise and engaging opening statement. This will include your distilled explanation of what the case is about and what you want the decision maker to do for you. For example:

> This case is about whether the landlord has established grounds for evicting Jeffrey Leboswki for cause. The evidence will show that the landlord has not met this threshold. Mr. Lebowski asks that you grant his application to set aside the landlord's Notice to End Tenancy.

Next, give a brief statement of facts. Stick to only the facts that are relevant to the case. Do not include every single fact you have discovered in the course of your work with the client. The decision maker does not need to know as much as you do. But they do need to know the facts that support what you are asking them to do.

For every fact that you are asserting, show the decision maker where the evidence supporting that fact comes from. A fact does not become a fact just because you said so. It has to be proven in the evidence.

Explain the law. This might mean setting out statutory provisions, or referring to specific legal authorities. Again, this should be thorough while remaining clear and concise. In other words, you should refer to everything that directly relates to the issue, including authorities or statutory provisions that go against you.

Analyse the law with your facts. This means setting out what law should apply (addressing the other side's arguments), and applying your facts to that law. This will probably be the biggest, and most important, part of your argument.

End with a conclusion and a statement of remedy. Here, provide a brief and compelling summary of why you think your client should win, and set out clearly what you are asking the Tribunal to do.

Finally, sign and date the submissions.

Written submissions can win your case

A thoughtful, organized and well-written submission can win the case for your client. Attention to even small details, like font and spacing, can make the decision-maker's job easier and impress her with your advocacy. A disciplined approach to distilling the nature of the case and focusing your submissions on only the relevant facts, law and evidence will go along way toward achieving the ultimate goal of any advocacy: persuasion.

APPENDIX A: SAMPLE SUBMISSION TO

THE EMPLOYMENT AND ASSISTANCE APPEAL TRIBUNAL

Employment and Assistance Appeal Tribunal

Appeal No.: 2012-00XXX

Written submissions of Jane Doe

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1. This is an appeal of a Ministry decision that found that Ms. Doe was not eligible for the income assistance she received from April 2009 until September 2010 because she owned non-exempt assets over the allowable legislative limit.

2. Ms. Doe received the income assistance as a result of an acknowledged Ministry error (see EAAT Appeal Record, page 43). The Ministry has now found her liable to repay the assistance she received.

3. Ms. Doe originally requested a reconsideration in October, 2010 (see EAAT Appeal Record, page 25). Although the Ministry initially issued a reconsideration decision in November 2010 (see EAAT Appeal Record, page 19), a new "revised decision" was issued on February 23, 2012 (see EAAT Appeal Record, page 9). <u>It is this most recent "revised" reconsideration decision that is under appeal</u>.

Background

The properties in question

4. At the time she received income assistance, Ms. Doe owned four lots located together (collectively the "Lots"). The Lots are very rural, approximately one hour north of Fort St. Smith, BC.

5. All four are named as Fort St. Smith District Lot 1234. The Lots breakdown as follows:

    - "Lot A": PID 003-4456-911, 10 acres;
    - "Lot B": PID 003-4455-084, 10 acres;
    - "Lot 2": PID 004-4456-239, 20 acres; and
    - "Lot 3": PID 004-4787-786, 20 acres.

    (see Appellant's Book of Submissions, Tab 2)

6. Ms. Doe originally lived on Lot A until her home burned down in 2007. The only water hook-up on the Lots is at the site of the burned house on Lot A. There is no hydro access for any of the Lots.

7. After Ms. Doe's home burned down, Ms. Doe lived in a small, dilapidated cabin on Lot 2 with no running water. In 2008, her family assisted Ms. Doe to buy a garage package to build her current home on Lot B. Her home has no running water, phone or hydro.

8. Because she resides on Lot B, the Ministry exempt that property. It is the remaining three Lots (A, 2 and 3) that the Ministry alleges to be non-exempt assets.

Issues in the case

9. There is no dispute that Ms. Doe owned the Lots while she received income assistance. There is also no dispute that Lots A, 2 and 3 were assessed at a total value that exceeded the legislative asset limits.

10. The issues to be decided in this appeal are:

    I. Whether it was a reasonable application of the applicable legislation for the Ministry to conclude that Ms. Doe's equity in Lots A, 2 and 3 was convertible into cash and thus falls under the definition of "asset" in the *Employment and Assistance Regulation*; and

    II. If Lots A, 2 and 3 were saleable, whether it was a reasonable interpretation of the applicable legislation for the Ministry to consider them non-exempt assets in light of s. 11(3) of the *Employment and Assistance Regulation*.

New Evidence

11. Tabs 2-6 in the Appellant's Books of submissions are new evidence:

    - Tab 2: a rough map of the properties relevant to the appeal
    - Tab 3: 2007 MLS listings with Jeff Katz
    - Tab 4: 2008 MLS listing with Moira Reed
    - Tab 5: Email from David Klein regarding saleability of the Lots
    - Tab 6: file history excerpt from Ministry records

12. All of the evidence is submitted in support of the information that was before the Ministry at the time of the reconsideration decision.

Issue I: Any equity in Lots A, 2 and 3 was not convertible into cash

The definition of "asset"

13. The purpose of the asset limits with respect to income assistance eligibility is clear: if applicants/recipients have equity in assets and they can turn that equity into cash, they should generally do so and live on those funds before relying on income assistance. This purpose corresponds with the principle that the Ministry is the payer of last resort and that applicants/recipients are required to exhaust all sources of income.

14. The Ministry itself acknowledges this purpose of asset eligibility restrictions (see Appellant's Book of Submissions, Tab 10).

15. With all of this in mind, it becomes clear why the legislature chose to define "asset" in s. 1 of the *Employment and Assistance Regulation* 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;*
>
> (emphasis added; see Appellant's Book of Submission, Tab 7)

16. For property to be considered an asset, and thus a source of equity for the applicant/recipient to live off of before relying on income assistance, the equity in that property **must be convertible into cash**. Regardless of the amount of equity, if it cannot be converted into cash then applicants/recipients cannot use the proceeds to support themselves.

17. The Ministry's own policy contemplates this very issue:

> *Assets are only assets if they can be converted into 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.*
>
> (emphasis added; see Appellant's Book of Submissions, Tab 11).

18. The "convertibility" or "saleability" of any property must be assessed in combination with the legislative sanctions the Ministry can impose if an applicant/recipient disposes of an asset for what the Ministry considers to be inadequate consideration or value. Section 14 of the *Employment and Assistance Act* sets out:

> ***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****;*

(b) [Not in force.]

(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.*

(emphasis added; see Appellant's Book of Submissions, Tab 8)

19. So, presumably the applicant/recipient can prove that the property cannot be converted to cash by proving that she could not sell the property **for a reasonably assessed value**.

20. Otherwise, applicants/recipients are between a rock and a hard place: they must try to sell their property to live off the equity, but if they reduce the price too much, they risk sanctions for disposing of the property for too little.

Ms. Doe's attempts to sell

21. After her home burned down, Ms. Doe received income assistance for May and June 2007. At that time, the Ministry exempted Lots A, 2 and 3 so she could try to sell them (see Appellant's Book of Submissions, Tab 6). It was in May 2007 that Ms. Doe first attempted to sell the Lots.

22. In **May 2007**, Ms. Doe listed all four Lots with Jeff Katz:

- Lot A: listed for $33,000 (2008 BC Assessment value of $ 44,400[1])
- Lot B: listed for $48,000 (2008 BC Assessment value of $ 44,400)
- Lot 2: listed for $43,000 (2008 BC Assessment value of $62,700)
- Lot 3: listed for $43,000 (2008 BC Assessment value of $62,700)

(For listing prices, see Appellant's Book of Submissions, Tab 3; for 2008 BC Assessment values see EAAT Appeal Record, pages 30-37)

23. In response to the May 2007 listing, there was little sales activity. Mr. Katz noted:

[1] Note: the 2008 BC Assessment values are used because the documents provided by the Ministry and included in the EAAT Appeal Record only go back as far as 2008.

The location and the layout of the properties make it very hard for any interested buyer. A big portion of the properties is not accessible because the creek is dividing the land and there is no access to the other portion.

Two properties are usually flooded due [to] a culvert onto the corner property and need a big job to make the property usable and ready for sale.

[These] properties will hardly find any buyer and at the actual market condition there may be no buyer at all, where ever [sic] the sale price will be.

There are many properties for sale on the market and there are only a few sales.

(see EAAT Appeal Record, page 24)

24. In **April 2008**, Ms. Doe listed Lot 3 with Moira Reed with the hopes of enticing buyers to look at the other properties. Ms. Reed noted:

This letter is to confirm that your property was listed with me for sale for a period of 203 days and nobody has put an offer forward.

The main reason for that is, [sic] that for most of the year a huge portion of the land is flooded due to a "Highways" channelling water through as culvert onto your property.

(see EAAT Appeal Record, page 29; Appellant's Book of Submissions, Tab 4)

25. Despite Ms. Doe's repeated attempts, she has not been able to sell Lots A, 2 and 3. The Lots are very remote, have no hydro access, and have major drainage problems. The only water access is on Lot A and Ms. Doe uses a hose to get water for her current home. Staff from the Ministry of Forests, Lands and Natural Resource Operations have confirmed that water tends to collect on the Lots and the northern parcels of land are "extremely wet and appear to be of limited value for development."

(See Appellant's Book of Submissions, Tab 5)

26. The Lots cannot be converted into cash because Ms. Doe cannot sell them for a reasonably assessed value. It was impossible for her to sell the Lots and live off the proceeds instead of assistance. As a result, Lots A, 2 and 3 do not fit within the definition of "asset" and should not have impacted Ms. Doe's income assistance eligibility.

(Although not binding, see Appellant's Book of Submissions at TAB 12 for a previous EAAT decision on this topic)

Revised Reconsideration Decision

27. The Ministry's revised reconsideration decision is simply not a reasonable application of the legislated definition "asset". The decision seems to find that, as long as there are no" functional impediments" (presumably this means legal barriers, although it is unclear), the property can be converted into cash, even if the property cannot be converted "immediately."

28. Not only does this interpretation not accord with the plain language interpretation of the definition of “asset”, which does require a “legal”, “functional” or any other specific type of barrier to converting the property to cash, but it also seems to run afoul of the Ministry’s own policy.

29. The Ministry’s policy expressly contemplates situations where an applicant/recipient is unable to sell property, including who bears the onus of proving that the property cannot be sold and who makes the final determination.

(see Appellant’s Book of Submissions, Tab 11)

30. In addition, Ministry’s decision also seems at odds with the clear policy intent of asset and income eligibility thresholds – whenever possible, applicants/recipients should sell assets to support themselves. If they cannot sell the property, it is impossible to use the proceeds to support themselves.

31. Eligibility for income assistance is assessed on a month-by-month basis. The determination of whether property is an asset may change from month-to-month. Income assistance is about immediate financial need. It stands to reason that the Ministry’s statement that “[t]he fact of whether or not sale can be accomplished immediately or will be delayed is not part of the definition of ‘asset’” is simply incorrect and is clearly an unreasonable application of the legislation in this case.

32. Such an interpretation would leave applicants/recipients ineligible for assistance because they have assets that they cannot possibly use to support themselves.

Issue II: Even if Lots A, 2 and 3 were saleable, the Ministry could have exempted them

33. Even if the Tribunal finds that Lots A, 2 and 3 were assets as defined under the legislation, the Ministry still had the power to exempt them. Section 11(3)(b) of the *Employment and Assistance Regulation* reads:

> *(3) The minister may authorize one or more of the following:*
>
> *[…]*
>
> *(b) that saleable acreage and buildings owned by an applicant or recipient are to be treated as though they were the place of residence of the applicant's or recipient's family unit for the period specified by the minister.*

(See Appellant’s Book of Submissions, Tab 9)

34. It is very clear that, even if the Ministry felt that Lots A, 2 and 3 were saleable and should fall under the definition of “asset”, the Ministry still has express power to exempt them. This is evidenced by the fact that the Ministry *did* exempt the properties for the two months Ms. Doe received income assistance in 2007 and she listed them for sale that same month. (She was pursuing other means of support, as the legislation requires.)

(See Appellant’s Book of Submission, Tab 6)

35. Although not binding, it is informative that the Tribunal has previously dealt with similar cases where the Ministry failed to consider exempting buildings and acreages from asset calculation. Lots A, 2 and 3 fall under s. 11(3)(b) of the Regulation and could have been exempt from Ms. Doe's asset calculation leaving her eligible for income assistance.

(See Appellant's Book of Submission, Tab 12, 13 and 14)

36. It is particularly concerning that the Ministry failed to consider exempting the Lots in this case. Even if the properties are assets, Ms. Doe did not mislead the Ministry. The Ministry erred by finding her eligible in the first place and is now refusing to consider whether they were exempt and pursing Ms. Doe for an overpayment.

(See EAAT Appeal Record, page 43)

37. Ms. Doe received assistance for which she understood she was eligible and used it to live in very frugal manner. Then, after a year and a half, she was told that the Ministry made a mistake, she was no longer eligible, and she must repay the income assistance she received despite her very low income. Ms. Doe has been clear that, had she ever known that she would have to repay the assistance she received, she would not have accepted the income assistance in the first place.

(See EAAT Appeal Record, page 26)

38. Given the circumstances, the Ministry's decision to find Ms. Doe ineligible for income assistance from April 2009 to September 2010 was an unreasonable interpretation of the legislation in her circumstances.

Conclusion

39. In summary, it is Ms. Doe's position that the Ministry's reconsideration decision was an unreasonable interpretation of the applicable legislation in her circumstances. Specifically:

- Lots A, 2 and 3 should not fall under the definition of "asset" because they cannot be converted into cash despite Ms. Doe's attempts; and
- Even if Lots A, 2 and 3 qualify as assets because they are saleable, they should have been exempt under s. 11(3)(b) of the *Employment and Assistance Regulation*.

40. As a result, Ms. Doe requests that the Ministry's revised reconsideration decision be rescinded by this Tribunal.

All of which is respectfully submitted.

September 30, 2013.

_____
Perry Mason, representative
for Ms. Doe

Staying on the Bucking Bronco:
Maintaining Control and Ensuring Fairness in Hearings

Kaity Cooper & Devyn Cousineau
Community Legal Assistance Society
October 2013

You have prepared yourself. You have prepared your witnesses. You appear at your hearing. You open your mouth to begin your opening submissions. And that's when things start to go off the rails.

A lot of things will be thrown at you during the course of an administrative tribunal hearing. You have to be ready and able to respond to them on the fly. And your response should always be motivated by one goal: to **ensure a fair hearing for your client**.

How do you ensure a fair hearing for your client? Well, for starters that might not always be possible. As an advocate, many things are outside of your control. What you *can* do, though, is learn to spot threats to procedural fairness, and how to anticipate and respond to them.

These materials focus on the legal threshold for what constitutes a fair hearing, and how you can do your best to make sure your client has one.

WHAT IS PROCEDURAL FAIRNESS?

Fairness in a hearing might not always be exactly what you think it is. Tribunals have a lot of power to control their own procedures. Decision makers are allowed to ask as many questions as they'd like. Evidence doesn't necessarily have to be heard in a specific order. The Tribunal does not have to listen to irrelevant evidence. You may not be entitled to an in-person hearing. You may feel a decision maker was curt, dismissive or even downright rude. But that does not necessarily mean that the hearing was unfair.

So what is procedural fairness in an administrative hearing? There are three main concepts for you to remember:

1. You have the right to know the case against you.
2. You have the right to make your case.
3. You have the right to a decision made based on the facts and the law.

Before and during a hearing, the first two of these concepts are the most important. They should always be at the front of your mind. If you are concerned about something happening in the course of a hearing, you need to be asking yourself:

1. Does this compromise my client's right to know the case against her?
2. Does this compromise my client's right to make her case and be heard?

If it does, you may need to make an objection or request some accommodation that will put the hearing back on track.

WHAT KIND OF THINGS SHOULD I BE LOOKING FOR?

Again, always think in terms of the two main concepts above.

The right to know the case against you

The right to know the case against you means that you are aware of the allegations against you, and the evidence being relied on to support those allegations. You can only respond to such allegations, and defend yourself, if you know what they are.

What kind of things can compromise your client's right to know the case against her?

- Not receiving the evidence in a timely manner. Many tribunals have rules setting out timelines for exchanging evidence. When the exchange of evidence does not take place within this timeline, it might mean that the client does not have time to prepare her case in response.
- The Tribunal and other side has evidence that you and your client have not seen.
- The Tribunal has had discussions or communications with the other side that you and your client were not privy to.
- Your client doesn't understand English and there is no (or inadequate) translation of important documents, evidence or argument.
- The other side raises new allegations during the hearing that your client hasn't heard before.

The right to make your case

The right to make your case includes the right to give evidence, make submissions and reply to the submissions of the other side. It also includes the right to challenge the evidence of the other side on important, relevant issues. It may include the right to representation.

What can compromise your client's right to make her case?

- The client is unable to attend the hearing through no fault of her own (eg. a technical problem with the phone line in a telephone hearing).
- The client is not allowed to challenge the other side on an important piece of evidence.
- The client is not served with notice of the hearing.
- The client has a disability or language barrier which prevents her from participating fully in the hearing.
- Your client is prevented from giving her relevant evidence or making submissions.

SO WHAT SHOULD I DO?

If you think something is happening and it isn't fair because it compromises your client's ability to know the case against her or make her case, then you should probably object. But before you object, keep in mind these cautions:

- The Tribunal has a lot of power over their own procedures, and so not every deviation from the standard formula of a hearing will make it unfair. Prepare your client for having to answer a lot of questions, and for having to listen to the other side. Prepare your client that anything could happen, but assure her you will do your best to protect the fairness of the hearing.
- The decision maker is human. Peppering her with too many objections on minor issues can irritate her. Be strategic. Focus on the important problems in the hearing that actually undermine fairness.
- The tone of your objection should be clinical. It should not be emotional, whiny or angry.
- Your client also has obligations to help herself (and ideally, you will help her). If she has been denied procedural fairness because she did not read instructions carefully, or understand the rules of the Tribunal, this may not be something that she can successfully complain about later. The Tribunal is not obligated to tell your client what to do. Be diligent in understanding and following the rules of the Tribunal.
- Think about how the procedural unfairness may or may not affect the outcome of the proceeding. For example, if you learn that the decision maker has a document that you don't have, you might object and ask to see the document. Upon seeing it, you may see that it is completely irrelevant to the case and so proceeding with the hearing won't compromise your client's ability to know the case against her and make her case.

So what options do you have if an issue arises that threatens fairness? Here are some important ones to keep in mind:

1. <u>Anticipate barriers to fairness, and make any necessary requests ahead of time.</u> If your client has particular challenges that you worry will compromise her ability to understand the case against her or make her case, you should try to set up the hearing so that it is fair.

    a. *Example:* Your client needs an interpreter. Depending on the rules or policies of the Tribunal, this may be something that she has to arrange herself. Be in communication with the Tribunal to advise that your client will be relying on an interpreter. If you are helping to arrange an interpreter, you should be alive to the skill level of the interpreter, and particular pitfalls in relying on family or friends to translate.
    b. *Example:* Your client is deaf and can't participate in a teleconference. You will need to make a written request for accommodation in advance of the hearing to arrange for an in-person hearing.

2. <u>Ask for an adjournment or some time</u>. This is a good strategy for when an argument or evidence has been sprung on you. The adjournment can be long, if you need time to review the new evidence and prepare a response, or it can be short, if you just need a few minutes to evaluate relevance or talk to your client. You may also need a brief adjournment to talk to your client during critical settlement negotiations or if your client is acting in a manner that could jeopardize her case.

a. *Example:* During the hearing, the other side refers to evidence that you have not seen. You can say "Excuse me, Madam Arbitrator, I have not been given a copy of that document. I would like an adjournment so that I can be provided with a copy and consult with my client".
b. *Example:* During the hearing, the decision maker is pushing the parties to reach a settlement. You need to talk to your client to make sure she understands what is happening and can give you instructions. You can say "Excuse me, I need a few minutes to discuss this proposal with my client".
c. *Example:* Your client has completely lost her cool and is screaming during the hearing. You can politely ask the decision maker to be allowed to speak privately with your client. The decision maker may even be grateful for the intervention.

3. Politely insist on your client's rights. If there is an argument you must make, evidence you must introduce, or evidence you must challenge, and the Tribunal is preventing you from doing that, you should politely insist. It can be most effective to reference the concepts of procedural fairness that are at play.

    a. *Example:* The arbitrator cuts you off when you are questioning a witness and you still have important questions to cover. You can say "Excuse me, Madam Arbitrator, but I still have a few more questions for this witness." If pressed, you can add "This evidence is important to allow my client to make her case".
    b. *Example:* The arbitrator says she is ready to make up her mind before you have finished presenting your client's case. You can say "Excuse me, Madam Arbitrator, but I still have some important evidence to introduce/ argument to make, in order to advance my client's case".

4. Write it down. If something happens in the hearing that you are concerned about, and you have objected, make a note of it in your notes. That record can be important later on, if the client needs to challenge the way that the hearing was held. You might also ask the Tribunal Member to make a note of your objection.

    a. *Example:* You have asked for an adjournment to respond to new evidence introduced in the hearing, but your request is denied. Politely ask the decision maker to make a note of your objection, and make sure that you do the same.
    b. *Example:* The decision maker says she has made her decision. You politely insist that your client has more evidence to submit, but the decision maker refuses your request. You can say "I'll ask that you make a note of my objection, Madam Arbitrator", and make sure to write down exactly what happened.

CONCLUSION

You will not always be able to maintain control in hearings. But you can, and should, always speak up and protect your client's right to know the case against her and to make her case. Be brave, be objective, be smart and be firm. And for goodness sakes, hang on to that bucking bronco.

APPENDIX A: Sample Objections

Situation	Objection
The Arbitrator is referring to documents you have never seen.	Pardon me Madam Arbitrator but my client was not served with the documents you are referring to. If you intend to rely on them I request an adjournment so my client can be property served.
The Arbitrator cuts you off when you are questioning a witness and you still have important questions to cover.	Excuse me Madam Arbitrator but I still have a few more questions for this witness.
The other side keeps interrupting you as you questioning a witness to ask their own questions or provide their own answers.	Pardon me Madam Arbitrator, would (name of interrupter) please allow me to finish my questioning of the witness.
The Arbitrator does not give you an opportunity to cross-examine the other side's witness.	Excuse me Madam Arbitrator but I have a few questions I would like to ask of this witness.
The Arbitrator tells the parties she is ready to decide the case before you have finished presenting your client's case.	Pardon me Madam Arbitrator but I still have an important witness to call/legal arguments to make.
The Arbitrator is pressuring your client into a settlement you don't think is in their best interest.	Excuse me Madam Arbitrator, could I have a few minutes to discuss the settlement with my client?
Your client is out of control and you think it will affect the outcome of the hearing.	Pardon me Madam Arbitrator, may I have a few minutes with my client.

APPENDIX B: Case examples

Case	Facts	Fair/Not Fair
Fernandez v. Sakr, 2012 BCSC 1024	The landlord applied to the Residential Tenancy Branch for an order requiring the tenant to pay $6,109 for rent owing, utilities and renovation costs. At the hearing, the tenant noticed that she had not been provided with copies of all documentation that the landlord had provided to the Arbitrator, including affidavits, a demand letter, a record of rent payments, copies of receipts, paid invoices and photographs. The tenant raised this issue at the commencement of the hearing, but the Arbitrator did not respond to it. The Arbitrator proceeded with the hearing and issued a monetary order in favour of the landlord.	**Not fair**: The duty of fairness incudes ensuring that the responding party is fully aware of the allegations that are being made against her and that the responding party has been made aware as to what documents are being relied upon in that respect. It is only in that case that a party would be able to adequately respond to those allegations so that a hearing could take place and a decision could be rendered on the merits.
Young v. British Columbia (Workers' Compensation Appeal Tribunal), 2011 BCSC 1209	Prior to his WCAT hearing, the worker requested subpoenas for two of the people involved in conducting his vocational rehabilitation evaluation, which was central to the decision under appeal. The worker wanted to cross-examine these individuals. However, his request was denied. WCAT affirmed the decision denying the worker additional benefits. WCAT's decision relied heavily on the conclusions from the vocational rehabilitation evaluation.	**Not fair:** Given the vocational report's importance to the decision under appeal, cross-examination was necessary to allow the assumptions upon which the report was based to be tested. It was unfair for WCAT to rely on the untested report and conclusions.
Bennett v. Wamboldt, 2012 BCSC 1251	The tenant and the landlord brought cross-applications to the Residential Tenancy Branch ("RTB"). The Arbitrator conducted the hearing by teleconference with only the landlord present, proceeding on the basis that the tenant received notice of the hearing and failed to call in. The Arbitrator granted the landlord a monetary order in the tenant's absence. The tenant says she was told by the RTB that they would call her for the hearing. For this reason, she did not call in.	**Fair:** The instructions for the tenant to call in were clearly marked on the notice of hearing. The tenant was not denied procedural fairness.
Hughes v. Pavlovic, 2011 BCSC 990	The landlord applied for an order of possession and monetary order for rental arrears by way of Direct Request Proceeding. The landlord	**Not fair:** The Arbitrator denied the tenant the opportunity to present his case that he did not

	sent notice of the Direct Request Proceeding to the tenant by registered mail, as permitted by the *Act*. However, the tenant did not receive the notice because the postal strike started the next day. The matter proceeded without the tenant's knowledge. The Arbitrator found that the tenant had been properly served by registered mail and, in any event, the fact that the notice was held up in the mail would not have affected the outcome because the tenant was conclusively presumed to have accepted the end of his tenancy when he did not dispute the Notice to End Tenancy.	receive the Notice to End Tenancy.
Fok v. British Columbia (Residential Tenancy Act, Dispute Resolution Officer), 2010 BCSC 1613	The tenants brought an application for dispute resolution with the RTB claiming compensation for missing jewelry. During the hearing, the Arbitrator noted that the landlords did not submit the written inventory of items left by the tenants at the rental unit. The landlords asserted at the hearing that they did not provide the written inventory because they had previously submitted this and other evidence for a previous proceeding. The landlords were not aware that they needed to resubmit the evidence. The Arbitrator did not offer to adjourn the hearing so this evidence could be resubmitted.	**Fair:** The notice of hearing clearly provides that each party must provide to the other and the Branch a copy of all of their evidence. It is not incumbent on the dispute resolution officer to raise the issue of an adjournment.
Karbalaeiali v. British Columbia (Human Rights Tribunal), 2010 BCSC 1130	The employer applied to dismiss a complaint by the employee of racial discrimination in the workplace. The employer included evidence in the initial application as well as in the reply to the employee's response, including affidavits. The Human Rights Tribunal accepted the reply evidence of the employer and dismissed the complaint. The employee did not have an opportunity to respond to the reply evidence, although he did not ask for an opportunity.	**Fair:** The employee had the opportunity to apply for the right to file a sur-reply or to cross-examine the witnesses on their affidavits. He did not do so. The Tribunal has no obligation to advise parties of their legal or procedural rights.
Ganitano v. Metro Vancouver Housing Corp., 2009 BCSC 787	The tenant applied for dispute resolution at the Residential Tenancy Branch to cancel two Notices to End Tenancy. On the hearing date, when the tenant attempted to call in, she was not connected to the correct hearing until approximately 11 minutes into the hearing, which lasted a total of 20 minutes, due to a technical problem with the teleconference lines. The Arbitrator waited approximately 5 minutes for the tenant to join the hearing and then began the hearing	**Not fair:** The technical problems with the teleconference line infringed the tenant's right to be heard in the application. The tenant had no real opportunity to present her case.

	without her. When the tenant joined the hearing, she was told by the Arbitrator that there was no reason not to grant the order of possession requested by the landlord as the tenant did not dispute the 10-day notice or pay the rent on time.	
Franzke v. British Columbia (Workers' Compensation Appeal Tribunal), 2011 BCSC 1145	In a WCAT hearing, the employer failed to submit the worker's examination for discovery transcript, even though it was directly relevant to the worker's defence. WCAT also did not make any inquiries with respect to this evidence. The worker was aware of the issues being determined by WCAT but did not submit the transcript herself.	**Fair:** The worker was aware of the issues being determined. She was given the opportunity to give evidence, make submissions and reply to the submission of the employer. She elected not to. There is no onus on the applicant employer to adduce all relevant evidence, particularly where the evidence at issue was the worker's evidence.
Djakovic v. British Columbia (Workers' Compensation Appeal Tribunal), 2010 BCSC 1279	The worker was required to attend three separate WCAT hearings.	**Fair:** The tribunal is generally the master of its own procedure. The worker had each of his appeals heard on the merits. The worker was not impeded in his ability to fully present his case in each of the three hearings.

TAB 8: Welfare and Disability Benefits

- **Working Effectively with Doctors: Helping Clients with PWD Applications (Day 1)**
  - Powerpoint

Separating sheet

  - Annotated pwd form

Separating sheet

  - sample pwd form

Separating sheet

  - Pwd cover letter

Separating sheet

  - LSS sample recon letter and doctor question sheet (from bccpd)
  - LSS sample pwd recon mental health letter and doctor question sheet (from bccpd)

Separating sheet

  - Letter to doctor – cover letter
  - Dr. draft letter of support

Orange sheet

- **CPP Disability Appeals and the new Social Security Tribunal (Day 1)**
  - Powerpoint

Separating sheet

  - SST forms.

Orange sheet

- **Welfare and Assets (Day 1)**
  - Options for helping clients who receive lump sums

Separating sheet

  - Advocacy Step-by-step instruction: Establishing a non-discretionary trust

Separating sheet

  - The Challenge – what to do with excess assets
  - Establishing a Non-Discretionary Trust through a Tax-Free Savings Account

Working Effectively with Doctors: Helping clients with Provincial Disability Applications and Appeals

Powerpoint

1) Annotated pwd form
2) sample pwd form
3) Pwd cover letter
4) Lss sample recon ltr and doctor question sheet (from bccpd)

   Lss sample pwd recon mental health letter and doctor question sheet (from bccpd)

5) Letter to doctor – cover letter

   Dr. draft letter of support

Working Effectively with Doctors: PWD Applications and Appeals

An opportunity to collect suggestions and tools for working as effectively as possible with doctors on PWD files

PWD ISSUES OF CONCERN FOR SOME DOCTORS

- Is advocate trying to usurp their authority?
- What are the definitions of terms like severe, restriction, periodic, continuous, Daily Living Activities?
- Is employability a criterion?
- Does PWD designation prevent their patient from working?
- Can PWD designation improve their patient's health?

Issues of Concern – Cont'd

- Patient lives in SRO with no cooking facilities and only small room to keep clean (or cleaning and linen service provided) – how do I evaluate restrictions to meal prep and housework? (See Annotated PWD form)
- Patient's income is so small there is no money to manage – how do I evaluate financial management skills? (see Annotated PWD form)

Issues of Concern – Cont'd

- Patient's family does meal preparation, housework, medication and financial management, etc. for them – how do I evaluate functional restrictions and show need for help? (Note: Receiving help does not prove need for help in accordance with the legislation. – See Annotated PWD form)

PWD APPLICATIONS

- Effective cover letter to doctor should address some issues that may be of concern (see sample Application Cover Letter in your course materials)
- Rough draft of section 2 and possibly section 3 (see Annotated PWD Application and sample Rough Draft in your course materials) to assist doctor in interpreting the form

PWD Applications – Cont'd

- Include helpful medical reports and letters
- If you can connect your client with a qualified assessor (pp 7 and 14 of PWD form) the doctor will only have to do Section 2
- Note Section 2 must be done before Section 3

PWD Applications – Cont'd

Challenge:

- Doctor won't use rough draft
  - Do a comprehensive point form Section 1 (Client self-report) and offer doctor the Annotated PWD form
  - Ensure Section 1 clearly hits on all the criteria (severity, restrictions, need for help)

PWD Applications Cont'd

- Doctor is charging a fee to complete sections of the application
  - Doctors are paid $130.00 for completion of Section 2 and $75.00 for Section 3
  - This totals $205.00 in payment if the Doctor completes both sections
  - Some Doctors may not know how much they are being compensated for completing the form

Cover letter

- A helpful cover letter
  - You write to request the doctor's support for their patient's application
  - Explain legislative test for the PWD designation
  - Explain terms "restriction", "continuous", "periodic", daily living activities
  - Respect for doctor: Your draft is a suggestion for the doctor and is intended as a guide rather than a replacement for the dr's own assessment and writing
  - Government will pay doctor to do the form
  - See sample Application Cover Letter in your binder

Cover letter – cont'd

- Nuancing the letter for more complex cases
  - Add a paragraph to your boilerplate:

  Survivor of war and/or torture

  Survivor of child abuse, residential schools

  Survivor of criminal assault, domestic violence

  Relapsing/remitting condition (examples: poorly controlled epilepsy, bipolar, schizophrenia, MS)

  Learning disability, Brain injury, Lupus

Cover letter – cont'd

- Relapsing/remitting – examples:
  - Joe tells me that despite taking medication he has an average of 3 to 4 *unpredictable* epileptic seizures a week during which he often falls and injures himself and that post-ictal time is generally at least several hours
  - Mary tells me that she experiences *upredictable* flareups of her MS symptoms lasting for several weeks at a time about 6-7 times a year at this point wirh painful spasms, great difficulty transferrirng off bed and chairs, walking, gripping things, speaking and cognitive problems

Cover letter – cont'd

- Bipolar disorder poorly controlled with medication – flareup periods of a month of more at least 6 times a year during which he cannot leave his apartment and most daily living activities are not done
- Brain injury causing severe cognitive issues including difficulty word-finding and poor judgment at times and severe mood swings. (Client's dr may not understand severity of brain injury based on a quick conversation in dr's office.)

PWD Rough Draft

- See Annotated PWD Application and sample Rough Draft in your binder
- In addition to rough draft of Section 2, a rough draft of Section 3 is useful unless client has access to an experienced qualified assessor.
- Qualified assessors listed on pp 7 and 14 of PWD form

PWD Rough Draft – cont'd

- Don't diagnose – but you may want to describe certain symptoms your client has reported that may point to a diagnosis
- Make sure your client understands that these are suggestions for their doctor and not orders and that they should tell the doctor that you asked them lots of questions and these were their answers

PWD RECONSIDERATIONS AND APPEALS

- Cover letter to explain to the doctor what happened, what is needed to win the appeal, where to send it and when
- See sample Recon/Appeal Cover Letter and Doctor's Question Sheet (the second sample is tweaked for mental health) in your course materials

PWD Recon/Appeal – cont'd

- Make it easy for doctor to generate the information that's needed because the ministry won't pay for doctor's work at recon/appeal stage
- Include any helpful medical reports or medical letters, hospital admission/discharge records, etc.

PWD Recon/Appeal – cont'd

- The Doctor's Question Sheets save the doctor the trouble of writing a letter themselves and target the criteria for PWD
- Note: The ministry will not accept a suggestion version of the question sheet with the doctor's signature. Doctor must answer questions themselves

PWD Recon/Appeal – cont'd

- Alternative to Doctor Question sheet:
  - Prepare a letter of support that touches on some of the key points of denial, incorporating info from the application (DR letter of support – Example)
  - Forward the draft template letter to the Doctor for consideration
  - If the letter meets the professional medical opinion of the physician have the draft endorsed by the doctor. (See Letter to Doctor – Cover letter)

Recon/Appeal Challenges

- Dr who filled out form is away for extended period, retired or moved away and new doctor won't write appeal letter
  - Use successful CPP-D application or appeal contents if available
  - Psychiatrist or other specialist may write letter
  - Less powerful but:
    - outreach worker, family member, landlord or other person who knows them well

Challenges – cont'd

- Doctor is averse to paperwork and needs something quick
  - Get client to do another self-report (and sign and date it) that effectively targets criteria for PWD designation and use a doctor's question sheet with only one question: Do you agree with your patient's self-report dated [state date].
  - Assessor did a good job on Section 3 – use a doctor's question sheet with only question: Do you agree with the Section 3 Report prepared by X on date X?

Challenges – cont'd

- Much of form was good but page 11 (and/or page 16 if the person has a severe mental health impairment) was weak given client's health
  - Offer the doctor a blank page 11 (and/or 16) to fill out along with a filled-in version of suggestions
  - Get client to sign and date a new self-report and give dr question sheet asking if dr agrees with client's new self-report

Recon/Appeal Ltr – cont'd

- The whole form was very weak
  - If it's a good case (i.e. compelling health situation) it may be overturned at recon/appeal with strong new information from doctor –use Doctor's Question Sheet and ask doctor to redo page 11 (and 16 if applicable) as discussed here previously
    - Note: remember to tweak the letter 's last paragraph to request receipt of p 11 and/or 16 in addition to letter

Ministry of Housing and Social Development

PERSONS WITH DISABILITIES DESIGNATION APPLICATION
SECTION 1
APPLICANT INFORMATION

You may have someone help you complete this Section of the Application.
***Important Note:** You MUST sign the "Declaration" on page 5 of this form in order for your application to be processed.*

A - PERSONAL INFORMATION

Last Name	First Name	Middle Name	Date of Birth (YYYY MMM DD)

Personal Health Number	Social Insurance Number (optional)	Telephone Number

Street Address	City	Postal Code

Do you need help completing this application? Understanding + completing this form
☒ Yes ☐ No If yes, what help do you need?

B - DISABLING CONDITION

This section provides you with an opportunity to describe your disability and the impact it has on your life. You are not required to complete this section. If you do not complete this Section, your application will be considered based on information provided in the Physician and Assessor Sections of this Application.

☐ **I choose not to complete this self-report.** (Please proceed to Declaration on page 5)

Note - If more space is required, you may attach additional pages.

1. Please describe your disability.

Relevant legislation:
See page 7 of this form
EA PWD Act, s. 2
EA PWD Regs, s. 2

List diagnoses in point form
Cover severity, treatments, restrictions in daily living activities and need for assistance to show how client meets the legislation

Hint:
Looking for more information on your client's condition? Type name of condition followed by "Mayo Clinic". Mayo Clinic information is reliable and conservative. Adjudicators are conservative.

21 pages

B - DISABLING CONDITION (cont'd)

2. How does your disability affect your life and your ability to take care of yourself?

See previous page

B - DISABLING CONDITION (cont'd)

C - DECLARATION AND NOTIFICATION

I, _____, am applying for designation as a person with disabilities as set out in the *Employment and Assistance for Persons with Disabilities Act* and I declare that the information provided in Section 1A and 1B is true and complete. I understand that I will have the opportunity to review completed Section 2, Physician Report and Section 3, Assessor Report before submitting the completed designation application form to the Ministry of Ministry of Housing and Social Development. I understand that the BC government may verify the information in Section 1A, Section 2 and Section 3, as necessary to determine and confirm my eligibility for the designation.

*Applicant Signature	Witness Signature
Date Signed (YYYY MMM DD)	Witness Name (Please Print)
	Witness Address & Telephone

* If the Applicant is incapable of signing this Application, it may be signed by a person who has legal authority to act on behalf of the Applicant as applicable under provisions of relevant BC legislation, for example, a committee, or a person with an enduring power of attorney. If you are signing on behalf of the Applicant, you must state your legal authority to act on behalf of the Applicant and you must attach proof of that legal authority (for example, a copy of the court order naming you as Committee) to this Application.

My legal authority to act for the applicant is _____.

NOTE: Proof of Committee, Power of Attorney and/or Parent/Guardian status must accompany this Application.

Ministry of Housing and Social Development

PERSONS WITH DISABILITIES
DESIGNATION APPLICATION
SECTION 2
PHYSICIAN REPORT

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 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*. If you have any questions about the collection, use or disclosure of this information, please contact your local Employment and Assistance Centre.

'his section is to be filled out by a physician registered and licensed to practice in British :olumbia. The Physician completing this Section of the application may also complete Section 3, \ssessor Report.

he purpose of the Physician Report is to provide information to the ministry about the applicant's hysical or mental impairments associated with diagnosed medical conditions relevant to this application ›r a ***Person with Disabilities (PWD)*** designation. The emphasis is on how the medical conditions and npairment affect the Applicant's ability to perform Daily Living Activities as defined in the *Regulations* ursuant to the *Employment and Assistance for Persons with Disabilities Act*. This Application is <u>not</u> ıtended to assess employability or vocational abilities.

'lease answer all questions completely as this will assist the Ministry of Housing and Social)evelopment, Health Assistance Branch, in determining whether the Applicant meets the criteria for lesignation as a person with disabilities.

'he contents of this report are confidential, but are subject to the following conditions:

- the report will be shared with the applicant;
- the report will be shared with the Prescribed Professional completing Section 3 of this Application;
- the report will be shared with the Employment and Assistance Appeal Tribunal if an appeal is initiated regarding eligibility for the Person with Disabilities (PWD) designation; and
- the report may be reviewed by a prescribed professional consulting with the Ministry of Housing and Social Development

<u>Fee</u>

Payment of fees for completion of the Physician Report is provided through the Medical Services Plan. Payment will be made in accordance with the rate established by the Ministry of Housing and Social Development provided that:

1. The Application process has been initiated by the Employment and Assistance Centre as indicated by the Office stamp and signature on the cover page of this Application; and
2. The Physician has fully completed Section 2 of the Application.

Please keep a copy of the completed Section 2 of this form until such time as you receive payment for your fee.

<u>Physicians having questions regarding this application may contact the Health Assistance Branch, Ministry of Housing and Social Development at 1-888-221-7711</u>

PROGRAM DEFINITIONS

nation of Persons with Disabilities (PWD)

Following is an extract of the section in the Employment and Assistance for Persons With Disabilities ACT that sets out the criteria for designation as a person with disabilities.

2 (1) In this section:
"prescribed professional" has the prescribed meaning;
"daily living activities" has the prescribed meaning;
"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform.

2(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this ACT if the minister is satisfied that the person has a severe mental or physical IMPAIRMENT that
(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and
(b) in the opinion of a prescribed professional
(i) directly and significantly restricts the person's ability to perform DAILY LIVING ACTIVITIES either
(A) continuously, or
(B) periodically for extended periods, and
(ii) as a result of those restrictions, the person requires help to perform those activities.

2(3) For the purposes of subsection (2),
(a) a person who has a severe mental impairment includes a person with a mental disorder, and
(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires
(i) an assistive device,
(ii) the significant help or supervision of another person, or
(iii) the services of an assistance animal.

2(4) The minister may rescind a designation under subsection (2).

The following is an extract of a section in the Employment and Assistance for Persons with Disabilities REGULATIONS.

2 (1) For the purposes of the Act and this regulation, "daily living activities",
(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:
(i) prepare own meals;
(ii) manage personal finances;
(iii) shop for personal needs;
(iv) use public or personal transportation facilities;
(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
(vi) move about indoors and outdoors;
(vii) perform personal hygiene and self care;
(viii) manage personal medication, and

(b) in relation to a person which has a severe mental impairment, includes the following activities:
(i) make decisions about personal activities, care or finances;
(ii) relate to, communicate or interact with others effectively.

2 (2) For the purpose of the Act, "prescribed professional" means a person who is authorized under an enactment to practice the profession of
(a) medical practitioner;
(b) registered psychologist;
(c) registered nurse or registered psychiatric nurse;
(d) occupational therapist;
(e) physical therapist;
(f) social worker;
(g) chiropractor, or
(h) nurse practitioner.

TO BE COMPLETED BY THE APPLICANT'S PHYSICIAN ONLY

A - DIAGNOSES

Specify diagnoses related to the Applicant's impairment using the diagnostic codes below.
"Impairment" is a loss or abnormality of psychological, anatomical or physiological structure or function causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration. Please include additional information as required.

	Diagnostic Code	Specific Diagnosis (e.g. location of paralysis, type of respiratory or heart condition, type of hepatitis, etc.)	Date of onset, If known: Month	Year
1.				
2.				
3.				
4.				
5.				

Comments:

DIAGNOSTIC CODES

Infectious and parasitic diseases
1.0 Other
1.1 HIV
1.2 AIDS
1.3 Hepatitis
1.4 Hepatitis C

Neoplasms
2.0 Neoplastic disorders - other
2.1 Lip, oral cavity & pharynx
2.2 Digestive organs & peritoneum
2.3 Respiratory & intrathoracic organs
2.4 Bone, connective tissue, skin and breast
2.5 Genitourinary organs
2.6 Leukemia

Endocrine, nutritional and metabolic diseases, and immunity disorders
3.0 Endocrine disorders - other
3.01 Immune disorders - other
3.02 Metabolic disorders - other
3.1 Thyroid disorders
3.2 Diabetes

Diseases of the blood and blood-forming organs
4.0 Other diseases of the blood
4.1 Anemia
4.2 Hemophilia

Mental disorders
5.0 Other mental (please specify)
5.1 Delirium, dementia & amnestic & other cognitive disorders
5.2 Schizophrenia & other Psychotic disorders
5.3 Mood disorders
5.4 Developmental disability
5.5 Anxiety disorders
5.6 Somatoform disorders
5.7 Personality disorders
5.8 Substance-related disorders
5.9 Pervasive developmental disorders
5.10 Eating disorders

Diseases of the nervous system & sense organs - Neurological
6.0 Neurological disorders - other
6.1 Epilepsy
6.3 Brain tumors
6.4 Parkinson's disease
6.5 Cerebral palsy
6.6 Paraplegia
6.7 Quadraplegia
6.9 Other paralysis
6.10 Myasthenia Gravis
6.11 Muscular dystrophy
6.12 ALS
6.13 Alzheimer's disease
6.14 Huntington's Chorea
6.15 Friedreich's Ataxia
6.16 Multiple sclerosis

Conditions of the nervous system & sense organs - Sensory
7.00 Sensory disorders - other
7.01 Blindness
7.02 Visually impaired
7.03 Deafness
7.04 Hearing impaired
7.05 Organic speech loss

Diseases of the circulatory system
8.0 Cardiovascular - other
8.1 Ischemic heart disease
8.2 Recurrent Arrhythmias
8.3 Valvular heart disease
8.4 Congenital heart disease
8.5 Cardiomyopathy
8.6 Chronic venous insufficiency
8.7 Peripheral arterial disease
8.8 Cerebral vascular accident

Diseases of the respiratory system
9.0 Respiratory disorders - other
9.1 Cystic fibrosis
9.2 COPD
9.3 Asthma
9.4 Emphysemia

Diseases of the digestive system
10.0 Digestive disorders - other
10.1 Peptic ulcer
10.2 Chronic liver disease
10.3 Cirrhosis
10.4 Crohn's disease
10.5 Colitis

Diseases of the genitourinary system
11.0 Genitourinary disorders - other
11.1 Kidney disease

Diseases of the skin and subcutaneous tissue
12.0 Skin disorders - other
12.1 Psoriasis

Diseases of the musculoskeletal system and connective tissue
13.0 Musculoskeletal system - other
13.1 Lupus
13.2 Rheumatoid arthritis
13.3 Arthritis
13.4 Osteoporosis
13.5 Ankylosing spondolitis
13.6 Degenerative disc disease
13.7 Scoliosis
13.8 Fibromyalgia
13.9 Scleroderma

Congenital anomalies
14.0 Congenital anomalies - other
14.1 Chromosomal abnormalities
14.2 Fetal alcohol syndrome
14.3 Thalidomide syndrome
14.4 Spina Bifida

Injury and poisoning
15.0 Injury and poisoning - other
15.1 Traumatic brain injury
15.2 Amputations

Other conditions
16.0 Other
16.1 Chronic fatigue syndrome
16.2 Sleep apnea
16.3 Environmental sensitivities

List all conditions along with code and date of onset if known. If condition is not listed explicitly see if it fits elsewhere.
Examples:
migraine 6.0
ankle injury 13.0
ADHD 5.9 (debatable)
If no fit try 16.0

B - HEALTH HISTORY

1. Please indicate the severity of the medical conditions relevant to this person's impairment. How does the medical condition impair this person? Test results and other reports or findings may be used here where appropriate.

Diagnosis, severity, treatments, how it restricts DLA's, help needed with DLA's

2. Height and Weight *(if relevant to the impairment)*:

Height: _____ Weight: _____

3. Has the applicant been prescribed any medication and/or treatments that interfere with his/her ability to perform daily living activities? ☐ Yes ☐ No

If yes, please explain:

Example:
Yes
Tylenol 3 causes gastrointestinal problems

If yes, what is the anticipated duration of the medications/treatments:

Indeterminate

Does the applicant require any prostheses or aids for his/her impairment? ☐ Yes ☐ No

If yes, please explain:

Example:
Yes
bathroom grab bars
extra pillows
adapted computer
supportive shoes
(make sure this matches with list at pg 11 and 20)

C - DEGREE AND COURSE OF IMPAIRMENT

1. Is the impairment likely to continue for two years or more from today? ☐ Yes ☐ No
   What is the estimated duration of the impairment and are there remedial treatments that may resolve or minimize the impairment?

Please explain:

Dr must tick "yes" here or automatic denial

Example:
severe and chronic or severe and degenerative not improved with treatment indeterminate – will not be resolved within 2 years if at all, etc

D - FUNCTIONAL SKILLS

Note: For the purposes of questions #1 and #2, "unaided" means without the assistance of another person, assistive device or assistance animal

1. How far can this person walk unaided on a flat surface?
   ☐ 4+ blocks ☐ 1 to 2 blocks ☐ Unknown
   ☐ 2 to 4 blocks ☐ Less than 1 block ☐ Not at all

How far on a bad day w/o symptoms getting worse (pain? fatigue? anxiety? agoraphobia?)
And, if relevant, how much longer does it take than normal?
Example, tick 2-4 blocks and takes 2x longer due to pain and fatigue

2. How many stairs can this person climb unaided?
   ☐ 5+ steps ☐ 2 to 5 steps ☐ None ☐ Unknown

3. What are the person's limitations in lifting?
   ☐ No limitations ☐ 2 to 7 kg (5 to 15 lbs) ☐ No lifting
   ☐ 7 to 16 kg (15 to 35 lbs) ☐ Under 2 kg (Under 5 lbs) ☐ Unknown

How many lbs/kg can client lift w/o any negative consequences
(pain, fatigue, breathing or heart problems, irritable bowel, seizure, etc)
Example, tick max 5 lbs exacerbates pain

4. How long can this person remain seated?
   ☐ No limitation ☐ 1 to 2 hours ☐ Unknown
   ☐ 2 to 3 hours ☐ Less than 1 hour

mark for doctor

5. Are there difficulties with communication other than a lack of fluency in English? ☐ Yes ☐ No
   If yes, what is the cause: ☐ Cognitive ☐ Motor ☐ Sensory ☐ Other

Comments:

6. Are there any significant deficits with cognitive and emotional function? ☐ Yes ☐ No ☐ Unknown
   If yes, check those areas where the deficits are evident and provide details below:
   - ☐ Consciousness *(orientation, confusion)*
   - ☐ Executive *(planning, organizing, sequencing, calculations, judgement)*
   - ☐ Language *(oral, auditory, written comprehension or expression)*
   - ☐ Memory *(ability to learn and recall information)*
   - ☐ Perceptual psychomotor *(visual spatial)*
   - ☐ Psychotic symptoms *(delusions, hallucinations, thought disorders)*
   - ☐ Emotional disturbance *(e.g. depression, anxiety)*
   - ☐ Motivation *(loss of initiative or interest)*
   - ☐ Impulse control
   - ☐ Motor activity *(goal oriented activity, agitation, repetitive behaviour)*
   - ☐ Attention or sustained concentration
   - ☐ Other *(specify)*

Example: Tick yes
Learning disability: functionally illiterate and innumerate
Deafness/hearing imp – conversing
Blindness/vision imp – reading and writing
Mental health –concentration

Comments:

Hint: Some folks with mental health conditions, brain injury, vision or hearing impairments need accompaniment outside the home or perhaps supervision at all times, etc.

Tick off all relevant boxes
"Other" – withdrawn and isolated? suicidal ideation?, etc

If client receives counselling or psychiatric support mention it here

DAILY LIVING ACTIVITIES

Note: If you are completing the Assessor Report, Section 3, in addition to this Physician Report, do not complete this section (Part E)

Does impairment directly restrict the person's ability to perform Daily Living Activities?

☐ Yes ☐ No ☐ Unknown

If yes, please complete the following table:

Daily Living Activities	*Is Activity Restricted? (check one) If yes, describe extent of restriction in "comments" below*			If yes, the restriction is: (check one)	
	Yes	No	Unknown	Continuous[1]	Periodic*[2]
Personal self care	☐	☐	☐	☐	☐
Meal preparation	☐	☐	☐	☐	☐
Management of medications	☐	☐	☐	☐	☐
Basic housework	☐	☐	☐	☐	☐
Daily shopping	☐	☐	☐	☐	☐
Mobility inside the home	☐	☐	☐	☐	☐
Mobility outside the home	☐	☐	☐	☐	☐
Use of transportation	☐	☐	☐	☐	☐
Management of finances	☐	☐	☐	☐	☐
Social functioning** - daily decision making; interacting, relating and communicating with others *(this category only applies for persons with an identified mental impairment or brain injury).* If yes, please provide details	☐	☐	☐	☐	☐

If "Periodic", please explain: (How often and how long?)

* If Social Functioning is impacted, please explain:

Please provide additional comments regarding the degree of restriction:

What assistance does your patient need with Daily Living Activities? *("Assistance" includes help from another person, equipment and assistance animals.)* Please be specific regarding the nature and extent of assistance required.

[1] Continuous assistance - refers to needing significant help most or all of the time for an activity.

[2] Periodic assistance - refers to the need for significant help for an activity some of the time as would be the case where a person required help due to the episodic nature of the impairment.

Consider adding several little "notes" to the dr in different-coloured ink.
Examples:

Dear Dr: If you are not completing Section 3 this page is crucial and needs detail

Dear Dr:
Continuous = if restrictions are present at least 51% of the time person needs to do the task

If restriction is present less than half the time when the person needs to do the task, what %
Example: meal prep is restricted approx 3/7 days by pain, fatigue

Magic sentence:
Severe impairment significantly restricts DLAs ongoing such that s/he requires significant ongoing assistance

Tip:
Make sure the form measures restricted DLAs and not inadequate income or housing
If person is homeless or has inadequate access to bathroom and kitchen, ask them to imagine they have enough money and a kitchen and bathroom to themselves when interviewing them

F - ADDITIONAL COMMENTS

Please provide any additional information that you consider relevant to an understanding of the significance of the person's medical condition, the nature and extent of this person's impairment and the impact these have on his/her daily functioning. *(e.g., hospitalization related to the impairment.)*

A good place to mention hospitalizations, need for special help.
Example: some folks with social phobia or agoraphobia need to be accompanied whenever they leave home; some folks with colitis, Crohn's or IBS need to be near a toilet at all times. Some folks need 24/7 supervision. Some folks are at risk for financial or other exploitation, etc.

G - FREQUENCY OF CONTACT

How long has the Applicant been your patient? _____

Prior to today, how often have you seen the Applicant in the past 12 months?

☐ 0 ☐ Once ☐ 2 - 10 ☐ 11 or more

Comments:

H - CERTIFICATION

I, _____, am a physician registered with the College of Physicians and Surgeons of British Columbia and licensed to practice clinical medicine in BC.

☐ I am a General Practitioner
☐ I am a specialist in _____

Medical Practitioner Number: _____

This report (and attached documents) contains my findings and considered opinion at this time.

Signature	Date (YYYY MMM DD)	Telephone
Fax	E-mail Address (optional)	

Print / Stamp Address

Ministry of
Housing and
Social Development

PERSONS WITH DISABILITIES
DESIGNATION APPLICATION
SECTION 3
ASSESSOR REPORT

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 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*. If you have any questions about the collection, use or disclosure of this information, please contact your local Employment and Assistance Centre.

This Assessor Report is to be completed by one of the following prescribed professionals: Medical Practitioner, Registered Psychologist, Registered Nurse or Registered Psychiatric Nurse, Occupational Therapist, Physical Therapist, Social Worker, Chiropractor or Nurse Practitioner.

The purpose of the Assessor Report is to document the Applicant's impairments and their impact on performance of Daily Living Activities as defined in the *Regulations* pursuant to the *Employment and Assistance for Persons With Disabilities Act*. The Application is <u>not</u> intended to assess employability or vocational abilities.

This section should be completed by a prescribed professional having a history of contact and recent experience with the applicant. **Please complete this section based on your knowledge of the Applicant, observations, clinical data and experience.**

Please answer all questions completely as this will assist the Ministry of Housing and Social Development, Health Assistance Branch, in determining whether the applicant meets the criteria for designation as a person with disabilities.

The contents of this report are confidential, but are subject to the following understandings:

- the report will be shared with the applicant;
- the report may be shared with the Physician completing Section 2 of this application;
- the report will be shared with the Employment and Assistance Appeal Tribunal if an appeal is initiated regarding eligibility for the Persons with Disabilities (PWD) designation; and
- the report may be reviewed by a prescribed professional consulting with the Ministry of Housing and Social Development.

<u>Fee</u>:

Payment will be made in accordance with the rate established by the Ministry of Housing and Social Development provided that:

1. The Application process has been initiated by the Employment and Assistance Centre as indicated by the Office stamp and signature on the cover page of this Application; and
2. The Prescribed Professional has fully completed Section 3 of the Application.

Fees for physicians completing this section are paid through the Medical Services Plan. Other Prescribed Professionals completing this section may submit an invoice in the amount of $75 to the Ministry of Housing and Social Development at the following address (please use tear-off invoice on page 23):

Ministry of Housing and Social Development
Health Assistance Branch
PO Box 9971 Stn Prov Govt
Victoria, B.C. V8W 9R5

Please keep a copy of the fully completed Section 3 of this form until such time as you receive payment for your fee.

<u>Assessors having questions regarding this application may contact the Health Assistance Branch, Ministry of Housing and Social Development at 1-888-221-7711</u>

PROGRAM DEFINITIONS

Designation of Persons with Disabilities (PWD)

Following is an extract of the section in the Employment and Assistance for Persons With Disabilities ACT that sets out the criteria for designation as a person with disabilities.

2 (1) In this section:
"prescribed professional" has the prescribed meaning;
"daily living activities" has the prescribed meaning;
"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform.

2(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this ACT if the minister is satisfied that the person has a severe mental or physical IMPAIRMENT that
- (a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and
- (b) in the opinion of a prescribed professional
  - (i) directly and significantly restricts the person's ability to perform DAILY LIVING ACTIVITIES either
    - (A) continuously, or
    - (B) periodically for extended periods, and
  - (ii) as a result of those restrictions, the person requires help to perform those activities.

2(3) For the purposes of subsection (2),
- (a) a person who has a severe mental impairment includes a person with a mental disorder, and
- (b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires
  - (i) an assistive device,
  - (ii) the significant help or supervision of another person, or
  - (iii) the services of an assistance animal.

2(4) The minister may rescind a designation under subsection (2).

The following is an extract of a section in the Employment and Assistance for Persons with Disabilities REGULATIONS.

2 (1) For the purposes of the Act and this regulation, "daily living activities",
- (a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:
  - (i) prepare own meals;
  - (ii) manage personal finances,
  - (iii) shop for personal needs;
  - (iv) use public or personal transportation facilities;
  - (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
  - (vi) move about indoors and outdoors;
  - (vii) perform personal hygiene and self care;
  - (viii) manage personal medication, and
- (b) in relation to a person which has a severe mental impairment, includes the following activities:
  - (i) make decisions about personal activities, care or finances;
  - (ii) relate to, communicate or interact with others effectively.

2 (2) For the purpose of the Act, "prescribed professional" means a person who is authorized under an enactment to practice the profession of
- (a) medical practitioner;
- (b) registered psychologist;
- (c) registered nurse or registered psychiatric nurse;
- (d) occupational therapist;
- (e) physical therapist;
- (f) social worker;
- (g) chiropractor, or
- (h) nurse practitioner.

-LIVING ENVIRONMENT

[illegible] the Applicant live ☐ Alone? ☐ With Family, Friends, or Caregiver? ☐ In a Care Facility?

MENTAL OR PHYSICAL IMPAIRMENT

mpairment" is a loss or abnormality of psychological, anatomical or physiological structure or functioning causing a istriction in the ability to function independently, effectively, appropriately or for a reasonable duration.

What are the applicant's mental or physical impairments that impact his/her ability to manage Daily Living activities? ***(brief summary)***

. Ability to Communicate **Please indicate the level of ability in the following areas:**	*Good*	*Satisfactory*	*Poor*	*Unable*	Explain / Describe
Speaking					
Reading					
Writing					
Hearing					
Comments:					

I. Mobility and Physical Ability **Indicate the assistance required related to impairment(s) that directly restrict the applicant's ability to manage in the following areas. Check all that apply.**	Independent	Periodic assistance[1] from another person	Continuous assistance[2] from another person or unable	Uses Assistive device	Takes significantly longer (often typical (describe how much longer)	Explain and specify assistive device/s
Walking indoors						
[illegible]king outdoors						
[illegible]ing stairs						
Standing						
Lifting						
Carrying and holding						
Comments:						

[1] Periodic assistance - refers to the need for significant help for an activity some of the time as would be the case where a person required help due to the episodic nature of the impairment.

[2] Continuous assistance - refers to needing significant help most or all of the time for an activity.

List diagnoses from pg 8. Briefly expand on a condition if you think helpful
Example: depression with suicidal ideation; traumatic brain injury with right foot drop and (dom) right hand paralysis

Speaking – sometimes brain injury, stroke or mental health can cause slurred or slow speech, problems word finding or, as on pg 16, other language problems (echoes pp 10 and 16)

Reading and writing – vision problems? painful hands? intellectual impairment? learning disability (dyslexia, ADHD, etc)
Is person functionality illiterate or innumerate even in their 1st language?
(echoes pp 10 and 16)

Hearing – communication (echoes pg 10)

Refer back to pp10 Part D.
Examples:

If person can walk max 5 blocks before having to rest, explain "max 5 blocks and must rest"

If person typically takes 3-4x longer than normal to move about, write that on bottom under "comments" and say why.
Example: moving about takes 3-4x longer than normal due to pain, fatigue, and severe shortness of breath

B - MENTAL OR PHYSICAL IMPAIRMENT (cont'd) =

Complete item #4 for an Applicant with an identified mental impairment or brain injury.

4. Cognitive and Emotional Functioning

For each item indicate to what degree the applicant's mental impairment or brain injury restricts or impacts his/her functioning.

If impact is episodic or impact varies over time, please explain in the comment section below.	*Impact on Daily Functioning*			
	No Impact	Minimal Impact	Moderate Impact	Major Impact
Bodily functions *(e.g., eating problems, toileting problems, poor hygiene, sleep disturbance)*	☐	☐	☐	☐
Consciousness *(e.g., orientation, alert/drowsy, confusion)*	☐	☐	☐	☐
Emotion *(e.g., excessive or inappropriate anxiety, depression, etc.)*	☐	☐	☐	☐
Impulse control *(e.g., inability to stop doing something or failing to resist doing something)*	☐	☐	☐	☐
Insight and judgement *(e.g., poor awareness of self and health condition(s), grandiosity, unsafe behaviour)*	☐	☐	☐	☐
Attention/concentration *(e.g., distractible, unable to maintain concentration, poor short term memory)*	☐	☐	☐	☐
Executive *(e.g., planning, organizing, sequencing, abstract thinking, problem-solving, calculations)*	☐	☐	☐	☐
Memory *(e.g., can learn new information, names etc. and then recall that information; forgets over-learned facts)*	☐	☐	☐	☐
Motivation *(e.g., lack of initiative; loss of interest)*	☐	☐	☐	☐
Motor activity *(e.g., increased or decreased goal-oriented activity; co-ordination, lack of movement, agitation, ritualistic or repetitive actions; bizarre behaviours, extreme tension)*	☐	☐	☐	☐
Language *(e.g., expression or comprehension problems - e.g. inability to understand, extreme stuttering, mute, racing speech, disorganization of speech)*	☐	☐	☐	☐
Psychotic symptoms *(e.g., delusions, hallucinations, disorganized thinking, etc.)*	☐	☐	☐	☐
Other neuropsychological problems *(e.g., visual/spatial problems; psychomotor problems, learning disabilities, etc.)*	☐	☐	☐	☐
Other emotional or mental problems *(e.g., hostility, explain below)*	☐	☐	☐	☐

Comments:

List any mental health conditions, brain injury, stroke or learning disabilities up here as dr might skip page thinking impairment means only psychosis or vegetative state.

Hint: Look back at pgs 15#2, 11, and 10 #5 and 6

Our experience is that if dr has diagnosed any mental impairments or brain injuries on the form and there aren't at least 4-5 major impacts indicated here, the form will fail unless there are severe physical conditions creating a number of continuous restrictions and need help.

Clarify which bodily functions, emotions, etc are affected when ticking boxes

Comments section:
If applicable mention suicide attempts, literacy problems (in first language if ESL – remember the direction on pg 10 #5), anger mgmt and if it's led to legal issues, etc

C - DAILY LIVING ACTIVITIES

Indicate the assistance required related to impairment(s) that directly restrict the applicant's ability to manage in the following areas. Check all that apply.	Independent [2]	Periodic assistance [3] from another person	Continuous assistance [4] from another person or unable	Uses Assistive device (Explain)	Takes significantly longer than typical (describe how much longer)	Explain / Describe
Personal Care						
1. Dressing						
2. Grooming						
3. Bathing						
4. Toileting						
5. Feeding self						
6. Regulate diet [5]						
7. Transfers (in/out of bed)						
8. Transfers (on/off of chair)						
Basic Housekeeping						
1. Laundry						
2. Basic Housekeeping						
Shopping						
1. Going to and from stores						
2. Reading prices and labels						
3. Making appropriate choices						
4. Paying for purchases						
5. Carrying purchases home						

Additional comments *(including a description of the type and amount of assistance required and identification of any safety issues)*:

[3] Periodic assistance - refers to the need for significant help for an activity some of the time as would be the case where a person required help due to the episodic nature of the impairment.
[4] Continuous assistance - refers to needing significant help most or all of the time for an activity.
[5] For example, issues related to eating disorders characterized by major disturbances in eating behaviour.

If client needs an assistive device or needs periodic or continuous assistance do not tick 'independent'

Dressing – help with shoelaces, buttons, zippers, pants, sox, choosing what to wear, reminding to change dirty clothes, etc

Grooming – help with toenails, shaving, hair, reminding to groom, etc

Hint – Info on this page is an expansion on pg 11

Additional comments section:
Instead of writing beside each restricted ADL how much longer it takes to do, consider covering everything off with a comment here, if applicable. Example: Moving about and accomplishing tasks generally takes 3x longer due to pain, fatigue, balance, and cognitive problems

Repeat info on frequency and intensity (e.g. significant ongoing)) of help needed with specific DLAs Example: Always needs significant assistance with dressing (shoelaces and buttons), grooming (foot care), laundry, housekeeping and shopping.

If client needs to use an assistive device for most ADLs (example, a cane, wheelchair, wrist splint, leg brace, back brace or back support elastic) mention it here and don't' forget to tick off 'assistive device' for each applicable ADL. Safety issues to mention here could include falls, economic exploitation, (cognitive problems), etc

C - DAILY LIVING ACTIVITIES (cont'd)

Indicate the assistance required related to impairment(s) that directly restrict the applicant's ability to manage in the following areas. Check all that apply.	Independent	Periodic assistance from another person	Continuous assistance from another person or unable	Uses Assistive device (Explain)	Takes significantly longer than typical (describe how much longer)	Explain / Describe
Meals						
1. Meal planning						
2. Food preparation						
3. Cooking						
4. Safe storage of food (ability, not environmental circumstances)						
Pay Rent and Bills						
1. Banking						
2. Budgeting						
3. Pay rent and bills						
Medications						
1. Filling/Refilling prescriptions						
2. Taking as directed						
3. Safe handling and storage						
Transportation						
1. Getting in and out of a vehicle						
2. Using public transit *(where available)*						
3. Using transit schedules and arranging transportation						

Additional comments *(including a description of the type and amount of assistance required and identification of any safety issues)*:

Meals – need someone else to prepare meals or help with some aspect?
Need help of assistive device like wheelchair and adapted kitchen, wide grip utensils, electric can opener (arthritis in hands, etc), etc

Paying rent and bills
- need cane to stand in line
- pain restricts ability to wait in lineup
- need reminding
- need help reading, understanding, remembering to pay, follow budget, etc

Medications
- see above
- methadone program, blister packaging, difficulty opening pill bottles, encouragement, etc

Hint – info on this pg is an expansion of pg 11

Transportation
- bus ramp, seat, difficulty standing and hanging on, standing at bus stop, asking and following directions, etc

- Additional comments section:
  Instead of writing beside each restricted ADL how much longer it takes to do, consider covering everything off with a comment here, if applicable. Example: Moving about and accomplishing tasks generally takes 3x longer due to pain, fatigue, balance, and cognitive problems

- Repeat info on frequency and intensity (e.g. significant, ongoing) of help needed with what specific DLAs in brief form

C.- DAILY LIVING ACTIVITIES (cont'd)

Social Functioning Only complete this if the Applicant has an identified mental impairment, including brain injury.

Indicate the support/supervision required, as related to restrictions in the following areas:	Independent	Periodic Support/Supervision	Continuous Support/Supervision	Explain / Describe (include a description of the degree and duration of support/supervision required)
Appropriate social decisions (incl. avoiding situations dangerous to self or others, good social judgement)				
Able to develop and maintain relationships				
Interacts appropriately with others (e.g., understands and responds to social cues;problem solves in social context)				
Able to deal appropriately with unexpected demands				
Able to secure assistance from others				
Other (specify) _____				

Describe how the mental impairment impacts the applicant's relationship with his/her:

- **Immediate social network (partner, family, friends)**

☐ good functioning - positive relationships: assertively contributes to these relationships
☐ marginal functioning - little significant participation/communication: relationships often minimal and fluctuate in quality
☐ very disrupted functioning - aggression or abuse: major withdrawn: often rejected by others

Comments:

- **extended social networks (neighbourhood contacts, acquaintances, storekeepers, public officials, etc.)**

☐ good functioning - positive interacts in community: often participates in activities with others
☐ marginal functioning - little more than minimal acts to fulfill basic needs
☐ disrupted functioning - overly disruptive behaviour: major social isolation

Comments:

If the applicant requires help, as indicated above, please describe the support/supervision required which would help to maintain him/her in the community.

ongoing counselling?
supported living?
24/7 supervision?

Additional Comments ***(including identification of any safety issues):***

suicide? economic or other exploitation? violence perhaps due to their own anger mgmt problems or lack of social skills? total social isolation?

D - ASSISTANCE PROVIDED FOR APPLICANT -

Assistance provided by other people

The help required for daily living activities is provided by:

- ☐ Family
- ☐ Friends
- ☐ Health Authority Professionals (e.g., Nurse)
- ☐ Volunteers
- ☐ Community Service Agencies
- ☐ Other

Comments: _____

If help is required but there is none available, please describe what assistance would be necessary.

Assistance provided through the use of Assistive Devices

What equipment or devices does the Applicant routinely use to help compensate for his/her impairment?

Check (✓) appropriate item(s):

- ☐ Cane
- ☐ Crutches
- ☐ Walker
- ☐ Manual Wheelchair
- ☐ Power Wheelchair
- ☐ Scooter
- ☐ Lifting device
- ☐ Hospital bed
- ☐ Prosthesis
- ☐ Splints
- ☐ Braces
- ☐ Feeding device
- ☐ Breathing device
- ☐ Commode
- ☐ Urological appliance
- ☐ Ostomy appliance
- ☐ Communication devices _____
- ☐ Interpretive services _____
- ☐ Toileting aids _____
- ☐ Bathing aids _____
- ☐ Other _____
- ☐ Specially designed adaptive housing

Please provide details on any equipment or devices used by the applicant:

If equipment is required but is not currently being used, please describe the equipment or device that is needed:

Assistance provided by Assistance Animals

Does the applicant have an Assistance Animal? ☐ Yes ☐ No

If yes, please specify either the nature of the assistance provided by the animal or the need:

Hint: Refer back to pp 9, 10, 11, 15, 17, 18 but remember that on this page devices are separated into two groups

E: ADDITIONAL INFORMATION

Please provide any additional information that may be relevant to understanding the nature and [illegible] of the applicant's impairment and its effect on daily living activities.

APPROACHES AND INFORMATION SOURCES

What approaches and information sources did you use to complete this form:

- ☐ office interview with applicant
- ☐ home assessment
- ☐ other assessments (specify) _____
- ☐ file/chart information (specify) _____
- ☐ family/friends/caregivers (specify) _____
- ☐ other professionals (specify) _____
- ☐ community services (specify) _____
- ☐ other (specify) _____

Additional information section:
See pg 12 also

Hint:
Review the form for consistency and possible missed diagnoses such as brain injury, learning disability, back problems, etc Does the data make sense?

Examples:

You've ticked that client can lift less than 5 lbs and then indicate client has 3 year old child, the adjudicator might wonder how the client manages to care for the child if they can only lift 5 lbs. How resolve this? Perhaps tick off next up box (15 –35 lbs with strong comment that client experiences severe exacerbation of symptoms such as pain, fatigue or short breath after lifting and needs to rest to recover)

You've ticked off that person can comfortably climb only 2-5 steps; however, client lives in 3 storey walk up apt with no elevator. How resolve this? Perhaps tick off "5+" steps with strong comment that client's symptoms such as pain, etc are exacerbated after climbing 5 stairs and needs to stop and rest and takes 4x longer than normal to do.

G - FREQUENCY OF CONTACT

1. Is this your first contact with the applicant? ☐ Yes ☐ No

2. How long have you *known* this applicant? _____

3. How often have you *seen* this person in the last year?
   ☐ Once ☐ 2 - 10 times ☐ 11 or more times

4. Briefly describe the type and duration of the program or services you or your organization are providing or have provided to the applicant.

If client has been at same clinic or this dr has taken over practice of client's previous doctor say so and show time with same clinic or practice

H - CERTIFICATION

I, _____, am a _____ practicing in British Columbia.
(enter professional discipline)

I am registered with a professional regulatory body: ☐ Yes ☐ No

Name of regulatory body: _____

My registration number is: _____

I am employed by:

☐ self-employed; private practice ☐ A Health Authority

☐ Other employer (please specify) _____

This report *(and attached documents)* contains my findings and considered opinion at this time.

Signature	Date (YYYY MMM DD)	Telephone
Fax	E-mail Address (optional)	

Print / Stamp Address

CHECKLIST ☑ APPLICANT CHECKLIST

- ☐ Have you completed Section 1, Applicant Information?
- ☐ Have you read and signed the declaration, Section 1C?
- ☐ Has the Physician Report, Section 2, been completed and signed?
- ☐ Has the Assessor Report, Section 3, been completed and signed?
- ☐ Did you keep a photocopy for your records?
- ☐ Did you remember to include any additional information you want considered?
- ☐ Has proof of legal authority to act on behalf of the applicant been attached?

☐ Do you wish to be notified when your application is received by Health Assistance Branch?
If so, please check here and complete the form below

☐ Using the enclosed self-addressed envelope, please mail your completed application to:

Health Assistance Branch
Ministry of Housing and Social Development
PO Box 9999 Stn Prov Govt
Victoria, B.C. V8W 9W9

CONFIRMATION OF APPLICATION RECEIVED BY HEALTH ASSISTANCE BRANCH

Your Application was received on:

Name
Address
City/Town
Postal Code

ASSESSOR'S INVOICE

Invoice No. Invoice Date

Name Applicant DOB Personal Health Number

Completion of PWD Assessors Section..... $75.00

Date of Service Description of Service

Make choque payable to:

Supplier Name

Address Postal Code Telephone

Supplier Signature

It's useful to check these two off and have confirmation of receipt sent to your client in care of yourself to verify HAB receipt of form and calculate adjudication time.

You may have someone help you complete this Section of the Application.
Important Note: *You MUST sign the "Declaration" on page 5 of this form in order for your application to be processed.*

A - PERSONAL INFORMATION

Last Name	First Name	Middle Name	Date of Birth (YYYY MMM DD)
[redacted]	[redacted]		[redacted]

Personal Health Number	Social Insurance Number (optional)	Telephone Number
[redacted]	[redacted]	[redacted]

Street Address	City	Postal Code
[redacted]	[redacted]	[redacted]

Do you need help completing this application?

☑ Yes ☐ No If yes, what help do you need? Understanding + completing

B - DISABLING CONDITION

This section provides you with an opportunity to describe your disability and the impact it has on your life. You are not required to complete this section. If you do not complete this Section, your application will be considered based on information provided in the Physician and Assessor Sections of this Application.

☐ **I choose not to complete this self-report.** (Please proceed to Declaration on page 5)

Note - If more space is required, you may attach additional pages.

1. Please describe your disability.

Severe anxiety + depression
Severe chronic back pain - Left sciatica

B - DISABLING CONDITION (cont'd)

2. How does your disability affect your life and your ability to take care of yourself?

Survivor of severe spousal abuse + he continues to stalk her
Wait listed for specialized counselling @ Cythera
Anxiety attacks, impaired short term memory, executive, concentration, relating with others

Severe chronic back pain 24/7 significantly restricts sitting, standing, bending, lifting, carrying

Significant ongoing restrictions to:
personal self care - ↓ range of motion
meal preparation - ↓ standing, bending, lifting carrying
walking outside home - max 1 block ↑ pain
shopping, housework -
driving + taking bus - ↓ sitting, standing + hanging on
communication - in Farsee severe anxiety + depression restricts concentration on conversations, reading + writing
decision-making + interacting c̄ others

Needs significant ongoing help c̄ these tasks as well as specialized psych counselling for trauma + bathroom grab bars, heating pad, extra pillows

B - DISABLING CONDITION (cont'd)

C - DECLARATION AND NOTIFICATION

I, [redacted], am applying for designation as a person with disabilities as set out in the *Employment and Assistance for Persons with Disabilities Act* and I declare that the information provided in Section 1A and 1B is true and complete. I understand that I will have the opportunity to review completed Section 2, Physician Report and Section 3, Assessor Report before submitting the completed designation application form to the Ministry of Social Development. I understand that the BC government may verify the information in Section 1A, Section 2 and Section 3, as necessary to determine and confirm my eligibility for the designation.

[redacted]
*Applicant Signature

Annette Murray
Witness Signature

2013-04-24
Date Signed (YYYY MMM DD)

Annette Murray (A BCCDP)
Witness Name (Please Print)

604 872 1278
Witness Address & Telephone

* If the Applicant is incapable of signing this Application, it may be signed by a person who has legal authority to act on behalf of the Applicant as applicable under provisions of relevant BC legislation, for example, a committee, or a person with an enduring power of attorney. If you are signing on behalf of the Applicant, you must state your legal authority to act on behalf of the Applicant and you must attach proof of that legal authority (for example, a copy of the court order naming you as Committee) to this Application.

My legal authority to act for the applicant is _____.

NOTE: Proof of Committee, Power of Attorney and/or Parent/Guardian status must accompany this Application.

[redacted] Section 2 Suggestions for dR

TO BE COMPLETED BY THE APPLICANT'S PHYSICIAN ONLY

A - DIAGNOSES

Specify diagnoses related to the Applicant's impairment using the diagnostic codes below.
"Impairment" is a loss or abnormality of psychological, anatomical or physiological structure or function causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration. **Please include additional information as required.**

	Diagnostic Code	Specific Diagnosis (e.g. location of paralysis, type of respiratory or heart condition, type of hepatitis, etc.)	Date of onset, If known: Month	Year
1.	5.5/5.4	Severe anxiety + depression		2010
2.	13.0	Severe chronic back pain (L sciatica)		2002
3.		+ left sciatica		
4.				
5.				

Comments: Severe impairment

DIAGNOSTIC CODES

Infectious and parasitic diseases
1.0 Other
1.1 HIV
1.2 AIDS
1.3 Hepatitis
1.4 Hepatitis C

Neoplasms
2.0 Neoplastic disorders - other
2.1 Lip, oral cavity & pharynx
2.2 Digestive organs & peritoneum
2.3 Respiratory & intrathoracic organs
2.4 Bone, connective tissue, skin and breast
2.5 Genitourinary organs
2.6 Leukemia

Endocrine, nutritional and metabolic diseases, and immunity disorders
3.0 Endocrine disorders - other
3.01 Immune disorders - other
3.02 Metabolic disorders - other
3.1 Thyroid disorders
3.2 Diabetes

Diseases of the blood and blood-forming organs
4.0 Other diseases of the blood
4.1 Anemia
4.2 Hemophillia

Mental disorders
5.0 Other mental (please specify)
5.1 Delirium, dementia & amnestic & other cognitive disorders
5.2 Schizophrenia & other Psychotic disorders
5.3 Mood disorders
5.4 Developmental disability
5.5 Anxiety disorders
5.6 Somatoform disorders
5.7 Personality disorders
5.8 Substance-related disorders
5.9 Pervasive developmental disorders
5.10 Eating disorders

Diseases of the nervous system & sense organs - Neurological
6.0 Neurological disorders - other
6.1 Epilepsy
6.3 Brain tumors
6.4 Parkinson's disease
6.5 Cerebral palsy
6.6 Paraplegia
6.7 Quadraplegia
6.9 Other paralysis
6.10 Myasthenia Gravis
6.11 Muscular dystrophy
6.12 ALS
6.13 Alzheimer's disease
6.14 Huntington's Chorea
6.15 Friedreich's Ataxia
6.16 Multiple sclerosis

Conditions of the nervous system & sense organs - Sensory
7.00 Sensory disorders - other
7.01 Blindness
7.02 Visually impaired
7.03 Deafness
7.04 Hearing impaired
7.05 Organic speech loss

Diseases of the circulatory system
8.0 Cardiovascular - other
8.1 Ischemic heart disease
8.2 Recurrent Arrhythmias
8.3 Valvular heart disease
8.4 Congenital heart disease
8.5 Cardiomyopathy
8.6 Chronic venous insufficiency
8.7 Peripheral arterial disease
8.8 Cerebral vascular accident

Diseases of the respiratory system
9.0 Respiratory disorders - other
9.1 Cystic fibrosis
9.2 COPD
9.3 Asthma
9.4 Emphysemia

Diseases of the digestive system
10.0 Digestive disorders - other
10.1 Peptic ulcer
10.2 Chronic liver disease
10.3 Cirrhosis
10.4 Crohn's disease
10.5 Colitis

Diseases of the genitourinary system
11.0 Genitourinary disorders - other
11.1 Kidney disease

Diseases of the skin and subcutaneous tissue
12.0 Skin disorders - other
12.1 Psoriasis

Diseases of the musculoskeletal system and connective tissue
13.0 Musculoskeletal system - other
13.1 Lupus
13.2 Rheumatoid arthritis
13.3 Arthritis
13.4 Osteoporosis
13.5 Ankylosing spondolitis
13.6 Degenerative disc disease
13.7 Scoliosis
13.8 Fibromyalgia
13.9 Scleroderma

Congenital anomalies
14.0 Congenital anomalies - other
14.1 Chromosomal abnormalities
14.2 Fetal alcohol syndrome
14.3 Thaldomide syndrome
14.4 Spina Bifida

Injury and poisoning
15.0 Injury and poisoning - other
15.1 Traumatic brain injury
15.2 Amputations

Other conditions
16.0 Other
16.1 Chronic fatigue syndrome
16.2 Sleep apnea
16.3 Environmental sensitivities

B - HEALTH HISTORY

1. Please indicate the severity of the medical conditions relevant to this person's impairment. How does the medical condition impair this person? Test results and other reports or findings may be used here where appropriate.

5.3/5.5
Severe anxiety + depression
- wait-listed for specialized counselling for abused/battered women
- former spouse physically + emotionally + financially abusive + still stalks her
- anxiety attacks, insomnia, impaired concentration, short term memory, executive decision making + interacting
- 5 mo ago she experienced major hair loss + specialist said it was caused by depression + anxiety

13.0 Severe chronic back pain - L sciatica
- takes prescription for pain + swelling - pain 24/7 restricts sitting, standing, bending, lifting, carrying

2. Height and Weight *(if relevant to the impairment)*:

Height: 162 cm Weight: 55 kg

3. Has the applicant been prescribed any medication and/or treatments that interfere with his/her ability to perform daily living activities? ☐ Yes ☑ No

If yes, please explain:

If yes, what is the anticipated duration of the medications/treatments:

4. Does the applicant require any prostheses or aids for his/her impairment? ☑ Yes ☐ No

If yes, please explain:
- heating pad
- extra pillows
- bathroom grab bars

C - DEGREE AND COURSE OF IMPAIRMENT

1. Is the impairment likely to continue for two years or more from today? [x] Yes [ ] No
   What is the estimated duration of the impairment and are there remedial treatments that may resolve or minimize the impairment?

Please explain:

Severe + chronic. Unlikely to resolve within 2 yrs despite treatment

D - FUNCTIONAL SKILLS

Note: For the purposes of questions #1 and #2, "unaided" means without the assistance of another person, assistive device or assistance animal

1. How far can this person **walk** unaided on a flat surface? Walking exacerbates pain
   - [ ] 4+ blocks
   - [ ] 1 to 2 blocks
   - [ ] Unknown
   - [ ] 2 to 4 blocks
   - [x] Less than 1 block
   - [ ] Not at all

2. How many **stairs** can this person climb unaided? Climbing stairs exacerbates pain
   - [ ] 5+ steps
   - [x] 2 to 5 steps
   - [ ] None
   - [ ] Unknown

3. What are the person's limitations in **lifting**? ↑ pain
   - [ ] No limitations
   - [ ] 2 to 7 kg (5 to 15 lbs)
   - [ ] No lifting
   - [ ] 7 to 16 kg (15 to 35 lbs)
   - [x] Under 2 kg (Under 5 lbs)
   - [ ] Unknown

4. How long can this person remain **seated**? ↑ pain after 5 minutes
   - [ ] No limitation
   - [ ] 1 to 2 hours
   - [ ] Unknown
   - [ ] 2 to 3 hours
   - [x] Less than 1 hour

5. Are there difficulties with **communication** other than a lack of fluency in English? [x] Yes [ ] No

   If yes, what is the cause: [x] Cognitive [ ] Motor [ ] Sensory [ ] Other

Comments: severe anxiety + depression significantly restricts concentration on reading, writing + conversation in Farsee

6. Are there any significant deficits with **cognitive and emotional function?** [x] Yes [ ] No [ ] Unknown
   If yes, check those areas where the deficits are evident and provide details below:
   - [ ] Consciousness *(orientation, confusion)*
   - [x] Executive *(planning, organizing, sequencing, calculations, judgement)*
   - [ ] Language *(oral, auditory, written comprehension or expression)*
   - [x] Memory *(ability to learn and recall information)*
   - [ ] Perceptual psychomotor *(visual spatial)*
   - [ ] Psychotic symptoms *(delusions, hallucinations, thought disorders)*
   - [x] Emotional disturbance *(e.g. depression, anxiety)*
   - [x] Motivation *(loss of initiative or interest)*
   - [ ] Impulse control
   - [ ] Motor activity *(goal oriented activity, agitation, repetitive behaviour)*
   - [x] Attention or sustained concentration
   - [x] Other *(specify)* Very withdrawn + isolated - trust issues

Comments: Significant deficits

Dear Dr: [redacted] has arranged for a special social worker assessor to undertake Section 3 once your Section 2, which must include this page, is complete

E - DAILY LIVING ACTIVITIES

Note: If you are completing the Assessor Report, Section 3, in addition to this Physician Report, do not complete this page, (Part E)

Does the impairment directly restrict the person's ability to perform Daily Living Activities?

☑ Yes ☐ No ☐ Unknown

If yes, please complete the following table:

Daily Living Activities	Is Activity Restricted? (check one) If yes, describe extent of restriction in "comments" below			If yes, the restriction is: (check one)	
	Yes	No	Unknown	Continuous[1]	Periodic*[2]
Personal self care (trouble w foot care pt on socks, pants ↓ range of motion)	☑	☐	☐	☑	☐
Meal preparation (↓ standing, bending, lift)	☑	☐	☐	☑	☐
Management of medications	☐	☑	☐	☐	☐
Basic housework	☑	☐	☐	☑	☐
Daily shopping	☑	☐	☐	☑	☐
Mobility inside the home	☐	☑	☐	☐	☐
Mobility outside the home (max 1 block pain)	☑	☐	☐	☑	☐
Use of transportation (↓ standing or hanging on)	☑	☐	☐	☑	☐
Management of finances	☐	☑	☐	☐	☐
Social functioning** - daily decision making; interacting, relating and communicating with others *(this category only applies for persons with an identified mental impairment or brain injury).* **If yes, please provide details**	☑	☐	☐	☑	☐

* If "Periodic", please explain: (HOW OFTEN AND HOW LONG?)

** If Social Functioning is impacted, please explain:

Very withdrawn + isolated with difficulty trusting others

Please provide additional comments regarding the degree of restriction:

Significant ongoing restrictions to numerous ADLs as above due to severe anxiety, depression + severe 24/7 back + L leg pain

What assistance does your patient need with Daily Living Activities? *("Assistance" includes help from another person, equipment and assistance animals.)* Please be specific regarding the nature and extent of assistance required.

heating pad, extra pillows, bathroom grab bars. Needs significant ongoing help with foot care, meal prep, housework, transportation (too painful to drive at times) + psychological counselling for emotional support + trauma recovery

[1] **Continuous assistance** - refers to needing significant help most or all of the time for an activity.

[2] **Periodic assistance** - refers to the need for significant help for an activity some of the time as would be the case where a person required help due to the episodic nature of the impairment.

* Dear Dr: Need not necessarily "get" help

F - ADDITIONAL COMMENTS

Please provide any additional information that you consider relevant to an understanding of the significance of the person's medical condition, the nature and extent of this person's impairment and the impact these have on his/her daily functioning. *(e.g., hospitalization related to the impairment.)*

Severe anxiety + depression - husband severely abused her + continues to stalk her - Anxiety attacks

Wait-listed for counselling (4) Cytherea.

Severe chronic back pain 24/7 - origins in workplace injury + exacerbated after birth of last child

G - FREQUENCY OF CONTACT

How long has the Applicant been your patient? 2 years

Prior to today, how often have you seen the Applicant in the past 12 months?

☐ 0 ☐ Once ☑ 2 - 10 ☐ 11 or more

Comments:

H - CERTIFICATION

I, _____, am a physician registered with the College of Physicians and Surgeons of British Columbia and licensed to practice clinical medicine in BC.

☐ I am a General Practitioner

☐ I am a specialist in _____

Medical Practitioner Number: _____

This report (and attached documents) contains my findings and considered opinion at this time.

Signature	Date (YYYY MMM DD)	Telephone

Fax	E-mail Address (optional)

Print / Stamp Address

[redacted] – Section 3 Suggestions for dr

A -LIVING ENVIRONMENT

1. Does the Applicant live ☐ Alone? ☑ With Family, Friends, or Caregiver? ☐ In a Care Facility?

Comment: With 2 sons ages 11 & 14

B - MENTAL OR PHYSICAL IMPAIRMENT

"Impairment" is a loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function Independently, effectively, appropriately or for a reasonable duration.

1. **What are the applicant's mental or physical impairments that impact his/her ability to manage Daily Living activities?** ***(brief summary)***

Severe anxiety + depression / severe abuse from ex-spouse - he continues to stalk her / severe chronic back pain + left sciatica

2. Ability to Communicate **Please indicate the level of ability in the following areas:**	Good	Satisfactory	Poor	Unable	dr can Dr: Needs detail Explain / Describe
Speaking	✓				
Reading			✓		severe anxiety + depression / restricted concentration so these tests are done poorly
Writing			✓		
Hearing	✓				
Comments:					

3. Mobility and Physical Ability **Indicate the assistance required related to impairment(s) that directly restrict the applicant's ability to manage in the following areas. Check all that apply.**	Independent	Periodic assistance [1] from another person	Continuous assistance [2] from another person or unable	Uses Assistive device	Takes significantly longer than typical (describe how much longer)	dr can Dr: needs detail Explain and specify assistive device/s
Walking indoors	✓				✓	
Walking outdoors	✓				✓	max 1 blocks ↑↑↑ pain
Climbing stairs	✓				✓	max 2-5 ↑↑ pain
Standing	✓				✓	max 5 min ↑↑ pain
Lifting		✓			✓	max 5 lbs → pain
Carrying and holding		✓			✓	
Comments:						

severe chronic back + left leg pain 24/7

[1] **Periodic assistance** - refers to the need for significant help for an activity some of the time as would be the case where a person required help due to the episodic nature of the impairment.

[2] **Continuous assistance** - refers to needing significant help most or all of the time for an activity.

B - MENTAL OR PHYSICAL IMPAIRMENT (cont'd)

Complete item #4 for an Applicant with an identified mental impairment or brain injury.

4. Cognitive and Emotional Functioning

For each item indicate to what degree the applicant's mental impairment or brain injury restricts or impacts his/her functioning.

If impact is episodic or impact varies over time, please explain in the comment section below.	***Impact on Daily Functioning***			
	No impact	**Minimal impact**	**Moderate impact**	**Major impact**
Bodily functions *(e.g., eating problems, toileting problems, poor hygiene, sleep disturbance)*	☐	☐	☐	☑
Consciousness *(e.g., orientation, alert/drowsy, confusion)*	☑	☐	☐	☐
Emotion *(e.g., excessive or inappropriate anxiety, depression, etc.)*	☐	☐	☐	☑
Impulse control *(e.g., inability to stop doing something or failing to resist doing something)*	☑	☐	☐	☐
Insight and judgement *(e.g., poor awareness of self and health condition(s), grandiosity, unsafe behaviour)*	☑	☐	☐	☐
Attention/concentration *(e.g., distractible, unable to maintain concentration, poor short term memory)*	☐	☐	☐	☑
Executive *(e.g., planning, organizing, sequencing, abstract thinking, problem-solving, calculations)*	☐	☐	☐	☑
Memory *(e.g., can learn new information, names etc. and then recall that information; forgets over-learned facts)*	☐	☐	☐	☑
Motivation *(e.g., lack of initiative; loss of interest)*	☐	☐	☑	☐
Motor activity *(e.g., increased or decreased goal-oriented activity; co-ordination, lack of movement, agitation, ritualistic or repetitive actions; bizarre behaviours, extreme tension)*	☑	☐	☐	☐
Language *(e.g., expression or comprehension problems - e.g. inability to understand, extreme stuttering, mute, racing speech, disorganization of speech)*	☑	☐	☐	☐
Psychotic symptoms *(e.g., delusions, hallucinations, disorganized thinking, etc.)*	☑	☐	☐	☐
Other neuropsychological problems *(e.g., visual/spatial problems; psychomotor problems, learning disabilities, etc.)*	☑	☐	☐	☐
Other emotional or mental problems *(e.g., hostility, explain below)*	☑	☐	☐	☐

Comments:

Severe anxiety & anxiety attacks, insomnia

C - DAILY LIVING ACTIVITIES

Indicate the assistance required related to impairment(s) that directly restrict the applicant's ability to manage in the following areas. Check all that apply.	Independent	Periodic assistance[3] from another person	Continuous assistance[4] from another person or unable	Uses Assistive device (Explain)	Takes significantly longer than typical (describe how much longer)	Explain / Describe
Personal Care						
1. Dressing	✓				✓	↓ range of motion
2. Grooming		✓			✓	Foot care - must ask help
3. Bathing				✓	✓	→ bathroom grab bars
4. Toileting				✓	✓	
5. Feeding self	✓					
6. Regulate diet[5]	✓					
7. Transfers (in/out of bed)		✓			✓	→ needs help due to severe pain
8. Transfers (on/off of chair)		✓			✓	
Basic Housekeeping						
1. Laundry		✓			✓	→ needs help → pain
2. Basic Housekeeping		✓			✓	→ not done often as needed due to pain
Shopping						
1. Going to and from stores		✓			✓	
2. Reading prices and labels		✓			✓	→ need assist help due to pain
3. Making appropriate choices		✓			✓	→ that restricts
4. Paying for purchases		✓			✓	flexibility, lifting +
5. Carrying purchases home		✓			✓	mobility

Additional comments *(including a description of the type and amount of assistance required and identification of any safety issues):*

Needs significant ongoing help with foot care, laundry, basic housekeeping & shopping due to severe chronic pain

[3] **Periodic assistance** - refers to the need for significant help for an activity some of the time as would be the case where a person required help due to the episodic nature of the impairment.

[4] **Continuous assistance** - refers to needing significant help most or all of the time for an activity.

[5] For example, issues related to eating disorders characterized by major disturbances in eating behaviour.

C - DAILY LIVING ACTIVITIES (cont'd)

Indicate the assistance required related to impairment(s) that directly restrict the applicant's ability to manage in the following areas. Check all that apply.	Independent	Periodic assistance from another person	Continuous assistance from another person or unable	Uses Assistive device (Explain)	Takes significantly longer than typical (describe how much longer)	Explain / Describe
						Dear Dr: Needs detail
Meals						
1. Meal planning		✓			✓	pain restricts standing at stove + sink, bending, lifting, etc - needs help
2. Food preparation		✓			✓	
3. Cooking		✓			✓	
4. Safe storage of food (ability, not environmental circumstances)		✓			✓	
Pay Rent and Bills						
1. Banking	✓				✓	Takes 3x longer due to severe anxiety + depression
2. Budgeting	✓				✓	
3. Pay rent and bills	✓				✓	
Medications						
1. Filling/Refilling prescriptions	✓				✓	Takes 3x longer due to pain + impaired memory
2. Taking as directed	✓				✓	
3. Safe handling and storage	✓				✓	
Transportation						
1. Getting in and out of a vehicle		✓			✓	Severe pain - needs help
2. Using public transit *(where available)*			✓			Too painful
3. Using transit schedules and arranging transportation			N/A			N/A

Additional comments *(including a description of the type and amount of assistance required and identification of any safety issues):*

Needs significant ongoing help with all aspects of meals + getting in/out of vehicle.

C - DAILY LIVING ACTIVITIES (cont'd)

Social Functioning Only complete this if the Applicant has an identified mental impairment, including brain injury.

Indicate the support/supervision required, as related to restrictions in the following areas:	Independent	Periodic Support/Supervision	Continuous Support/Supervision	Explain / Describe (include a description of the degree and duration of support/supervision required)
Appropriate social decisions (incl. avoiding situations dangerous to self or others, good social judgement)		✓		needs a lot of help
Able to develop and maintain relationships		✓		from a close friend -
Interacts appropriately with others (e.g., understands and responds to social cues;problem solves in social context)		✓		is easily overwhelmed - needs special counselling
Able to deal appropriately with unexpected demands		✓		for abused women
Able to secure assistance from others		✓	/	
Other (specify) _____				

Describe how the mental impairment impacts the applicant's relationship with his/her:

- **immediate social network (partner, family, friends)**

☐ good functioning - positive relationships: assertively contributes to these relationships
☑ marginal functioning - little significant participation/communication: relationships often minimal and fluctuate in quality
☐ very disrupted functioning - aggression or abuse: major withdrawn: often rejected by others

Comments:

- **extended social networks (neighbourhood contacts, acquaintances, storekeepers, public officials, etc.)**

☐ good functioning - positive interacts in community: often participates in activities with others
☑ marginal functioning - little more than minimal acts to fulfill basic needs
☐ very disrupted functioning - overly disruptive behaviour: major social isolation

Comments:

If the applicant requires help, as indicated above, please describe the support/supervision required which would help to maintain him/her in the community.

Significant ongoing support & counselling

Additional Comments *(including identification of any safety issues):*

D - ASSISTANCE PROVIDED FOR APPLICANT

Assistance provided by other people

The help required for daily living activities is provided by:

- ☐ Family
- ☐ Health Authority Professionals (e.g., Nurse)
- ☐ Community Service Agencies
- ☑ Friends
- ☐ Volunteers
- ☐ Other

Comments: friend must help with child care, meals, housework, and when she is too much pain to drive

If help is required but there is none available, please describe what assistance would be necessary.

Assistance provided through the use of Assistive Devices

What equipment or devices does the Applicant routinely use to help compensate for his/her impairment?

Check (✓) appropriate item(s):

- ☐ **Cane**
- ☐ **Crutches**
- ☐ **Walker**
- ☐ **Manual Wheelchair**
- ☐ **Power Wheelchair**
- ☐ **Scooter**
- ☐ **Lifting device**
- ☐ **Hospital bed**
- ☐ **Prosthesis**
- ☐ **Splints**
- ☐ **Braces**
- ☐ **Feeding device**
- ☐ **Breathing device**
- ☐ **Commode**
- ☐ **Urological appliance**
- ☐ **Ostomy appliance**
- ☐ **Communication devices** _____
- ☐ **Interpretive services** _____
- ☐ **Toileting aids** _____
- ☐ **Bathing aids** _____
- ☑ **Other** heating pad + extra pillows
- ☐ **Specially designed adaptive housing**

Please provide details on any equipment or devices used by the applicant:

If equipment is required but is not currently being used, please describe the equipment or device that is needed:

Bathroom grab bars

Assistance provided by Assistance Animals

Does the applicant have an Assistance Animal? ☐ Yes ☑ No

If yes, please specify either the nature of the assistance provided by the animal or the need:

E - ADDITIONAL INFORMATION

Please provide any additional information that may be relevant to understanding the nature and extent of the applicant's impairment and its effect on daily living activities.

Severe anxiety, depression + chronic pain 24/7

I support her application.

F - APPROACHES AND INFORMATION SOURCES

What approaches and information sources did you use to complete this form:

- ☐ office interview with applicant
- ☐ home assessment
- ☐ other assessments (specify) _____
- ☐ file/chart information (specify) _____
- ☐ family/friends/caregivers (specify) _____
- ☐ other professionals (specify) _____
- ☐ community services (specify) _____
- ☐ other (specify) _____

G - FREQUENCY OF CONTACT

1. Is this your first contact with the applicant? ☐ Yes ☑ No

2. How long have you known this applicant? 2 years

3. How often have you seen this person in the last year?
   ☐ Once ☑ 2 - 10 times ☐ 11 or more times

4. Briefly describe the type and duration of the program or services you or your organization are providing or have provided to the applicant.

H - CERTIFICATION

I, _____, am a _____ practicing in British Columbia.
(enter professional discipline)

I am registered with a professional regulatory body: ☐ Yes ☐ No

Name of regulatory body: _____

My registration number is: _____

I am employed by:

☐ self-employed; private practice ☐ A Health Authority

☐ Other employer (please specify) _____

This report *(and attached documents)* contains my findings and considered opinion at this time.

Signature	Date (YYYY MMM DD)	Telephone

Fax	E-mail Address (optional)

Print / Stamp Address

Dear Doctor:

Re: _____ – DOB _____
Disability (PWD) Application

Your patient came to us for assistance with the provincial PWD (disability) application form. A disability designation with the Ministry of Social Development will provide your patient with a little more money and medical coverage to aid in health promotion. Unlike with CPP Disability, employability is not at issue.

The key criteria are severity, duration of at least 2 years, restrictions in daily living activities* and need for help. On this form the term "severe" is not defined and a restriction means it takes someone significantly longer than normal to perform a daily living activity and/or that they cannot do it without encouragement and/or help from another person and/or assistive device. Restrictions are continuous if they are present ongoing. A restriction can be continuous or periodic for extended periods.

*Daily living activities
2 (1)For the purposes of the Act and this regulation, "daily living activities",
(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:
(i) prepare own meals;
(ii) manage personal finances;
(iii) shop for personal needs;
(iv) use public or personal transportation facilities;
(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
(vi) move about indoors and outdoors;
(vii) perform personal hygiene and self care;
(viii) manage personal medication, and
(b) in relation to a person who has a severe mental impairment, includes the following activities:
(i) make decisions about personal activities, care or finances;
(ii) relate to, communicate or interact with others effectively.

We write to request your assistance in supporting your patient's application. Attached please find the application form along with a rough draft of suggestions for your consideration in completing Section 2 of the form. This draft is an assessment based on a detailed interview with your patient and is intended as a guide rather than a replacement for your own assessment and writing. If you like, we can arrange for a social worker Assessor to meet with your patient in our office to complete the detailed and lengthy Section 3 Assessor Report once your section is complete.

Physicians who complete the form are paid by the government. Please see page 6 of the form. Thank you for taking time to read this letter and consider this request

Dear Doctor:

Re: x – DOB x - Disability appeal

X came to us for assistance with his appeal for denial of the person with disability (PWD) designation. As you may know, that designation is not permanent and will provide your patient with a little more money and medical coverage to aid in health promotion. **Unlike with Canada Pension Plan Disability, employability is not at issue.**

We are hopeful that a little more information from you will clarify the severity of your patient's impairment and his restrictions in daily living activities and need for (not necessarily receipt of) assistance from devices and/or other people so that the Ministry can approve his PWD application.

After interviewing your patient and reviewing the application and Ministry decision, and in order to save you time and facilitate communication with the Ministry, I have enclosed a doctor's question sheet with some questions for you to answer. For your convenience I have also included a copy of the questions with answers suggested for your consideration in answering the questions. Please note the ministry will not accept your signature on the version of the doctor's question sheet with answers inserted by your patient and I. It is necessary for you to answer the questions yourself in your own writing and to sign, date and office stamp your work.

Thank you for taking the time to respond to this request. The government does not pay doctors for their valuable work on appeals and neither can we afford to pay you since we are a non-profit non-government organization.

Unfortunately the time allowed to file appeals is very short. If you decide to assist your patient in this way, we need your response as soon as possible. **May I suggest that you fax the doctor's question sheets to me (Attn: X, Fax X) no later than Thursday May 16, 2013.** If you wish to help but need more time, please tell your patient so I can apply for a short extension. Thank you for considering this matter.

Sincerely,

To Whom It May Concern:

Re: X - Eligibility for Disability Benefits (PWD)

Dear Dr: These questions and answers are not intended to substitute for your professional expertise. They are designed to target the criteria for PWD and to save you time since we cannot afford to pay you for your work on the appeal.*

The following questions are posed to the applicant's doctor in order to assist in determining eligibility for the disability designation.

---

1. When the impact of his conditions on his daily functioning is considered, does your patient have a severe impairment? If so, please explain:

Yes. Angina with 6 blockages – cardiologist is contemplating surgical options severely restricts stamina and mobility as does COPD. Major depression with previous suicide attempts significantly restricts daily functioning – see **attached** letter from counselor Trevor Walsh.

2. Does your patient often take significantly longer than normal to complete most daily living activities as a direct result of his limitations?

Yes.

3. Is your patient's level of activity significantly reduced as a direct result of his impairment?

Yes

4. Is his ability to cope with the stresses of daily life, make appropriate decisions in a timely manner, and interact with other people significantly restricted by his mental impairment?

Yes

5. How often is he significantly restricted in his ability to perform daily living activities by one or more of his recurring symptoms?

Daily.

6. Overall, do his health limitations significantly restrict his ability to perform a range of daily living activities continuously (or periodically for extended periods?) Please comment and give examples of activities he has difficulty performing.

Yes.
Personal self care (poor hygiene and grooming and severe dental issues), meal preparation, housework, shopping, transportation (must have a seat on transit), moving about indoors and out (dizzy spells – falls risk), forgets to take medications and pay bills, very withdrawn and isolated with significant deficits to short term memory, concentration, and executive.

7. As a result of his health restrictions, can you confirm that your patient needs significant help or supervision from other people to manage daily living activities?

Yes. Needs cane and bathroom grab bars and a lot of help with encouragement to do personal self-care, meal preparation (gets all meals from soup kitchen next door), housework, shopping, transportation (a drive or must have a seat on transit), financial management, encouragement and reminding to take medications, outreach from community workers.

Doctor: The following pages have questions for you to answer if you are willing.

To Whom It May Concern:

Re: X - Eligibility for Disability Benefits (PWD)

The following questions are posed to the applicant's doctor in order to assist in determining eligibility for the disability designation.

---

1. When the impact of his conditions on his daily functioning is considered, does your patient have a severe impairment? If so, please explain:

2. Does your patient often take significantly longer than normal to complete most daily living activities as a direct result of his limitations?

3. Is your patient's level of activity significantly reduced as a direct result of his impairment?

4. Is his ability to cope with the stresses of daily life, make appropriate decisions in a timely manner, and interact with other people significantly restricted by his mental impairment?

5. How often is he significantly restricted in his ability to perform daily living activities by one or more of his recurring symptoms?

6. Overall, do his health limitations significantly restrict his ability to perform a range of daily living activities continuously (or periodically for extended periods?) Please comment and give examples of activities he has difficulty performing.

7. As a result of his health restrictions, can you confirm that your patient needs significant help from other to manage daily living activities?

_____ _____

Physician's signature **Date**

Office stamp or name and address:

Date:

RE: Jane Doe – DOB – November 6, 1963

Dear Dr._____ ,

I am assisting a patient of your office, Ms. Jane Doe, with her application for the Ministry of Social Development and Social Innovation's, Person with Disability (PWD) status request for reconsideration as she was recently denied this designation. This medical status promotes her access to enhanced medical and other benefits as well as providing an exemption from the income assistance time limit. Thank you for taking time to complete the applications.

I have prepared a letter to be used as a template to assist you in drafting a support letter for Ms. Doe. The information contained in the letter has been taken from the information you provided in the initial application as well as Ms. Doe's personal testimonial. I appreciate that your time is precious and hope that you will find this letter helpful in preparing your own letter. The information contained within the letter is in no way intended to replace your professional medical opinion. If there are any inaccuracies present in the document please contact me directly and I would be pleased to edit the text on your behalf, should you require it. If you would like a copy of the letter sent to you in digital form so that you may edit the content please send your request to#####@####.com. In the case that the template letter accurately reflects your professional medical opinion please feel free to transfer the letter to your office letter head and sign.

Thank you for taking the time to respond to this request. Unfortunately, the government does not pay doctors for their valuable work on appeals and neither can we afford to pay you since we are a non-profit non-governmental organization.

Regrettably, the time allowed to file appeals is short. If you decide to assist Ms. Doe in this way, we need your response urgently. May I suggest that you fax the doctor's question sheet to me (Attn: Advocate Fax (###) ###-####) no later than Monday, Aug 06, 2013. If you want to help but need more time, please tell Ms. Doe so I can apply for an extension in the appropriate time. Thank you for considering this matter.

Sincerely,

_____

, Legal Advocate

Date:

RE: Client Name – DOB - ####/##/##

To Whom it May Concern,

This letter is in reference to the recent denial of persons with disability designation to Ms. Jane Doe who has been diagnosed with Osteomyelitis, Psychiatric disorder, and Depression. Please note that it is my professional medical opinion that Mr. Doe's impairments, when considered in combination, serve to significantly restrict him in terms of independent function and should be described as severe in nature. As stated in the initial application, it is difficult to determine the duration of his impairments given the nature of his treatment plan. However, it is highly likely that his impairments will present a significant level of restriction for the next two years at least. Certainly his restrictions, in terms of cognitive function, will continue to limit independent executive function for the foreseeable future.

Mr. Doe requires a significant level of support to aid him in performing activities of daily living on an ongoing and frequent basis. He faces significant daily restriction in terms of basic mobility as a direct result of osteomyelitis – right leg. He has increasing difficulty with basic housekeeping and in bending and lifting. He is highly restricted from the use of public and private transportation and requires the assistance of others to coordinate appointments and errands outside of his home. Grocery shopping is particularly difficult and Mr. Doe requires the assistance of another person when going to the store or attending the food bank. The level of restriction that Mr. Doe faces in regard to independent physical function is significant and ongoing.

Additionally, Mr. Doe is highly restricted in terms independent cognitive function as noted in the psychiatry consult conducted by Dr. Compassionate on February 43, 2020. It is my understanding that Doe relies on support from community workers to assist him in these areas. Mr. Doe is significantly restricted from communicating and interacting effectively with other, obtaining the kind of assistance that he requires, in making good decisions about his personal self- care and in terms of organizing and sequencing. Please note that the level of restriction that Mr. Doe lives with is significant and should be described as severe and ongoing. The frequency of restriction that Mr. Doe faces is daily and likely to continue for a minimum of two years.

In conclusion, I request that the ministry reconsider the decision to deny Mr. Doe additional medical and financial support available through PWD designation. Mr. Doe faces a significant amount of ongoing restriction on a daily basis as a result of severe impairment. He requires ongoing and frequent support in order to complete activities of daily living and he will likely require assistance for the foreseeable future.

Sincerely,

BC COALITION OF PEOPLE WITH DISABILITIES

CANADA PENSION PLAN DISABILITY BENEFITS

The Social Security Tribunal

CPP Disability Checklist

Contributions

- After March 2008: 3 out of 6 years if applicant has 25 years of contributions.
- January 1998 to present: 4 out of 6 years.
- January 1987 to December 1997: 2 out of 3 or 5 out of 10 years.

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 caregiver but she can transfer CRD to spouse if the spouse was the one who stayed at home to care for children.

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 applicant has been in receipt of retirement benefits for 15 months or more.

Credit Splitting

- Must be divorced or separated.
- Common-law couples not eligible prior to January 1, 1987.
- Same sex couples not eligible prior to July 31, 2000.
- Must have lived with former spouse/partner for 12 consecutive months.
- Must apply within 36 months of the death of a former spouse.
- According to Service Canada cannot use the credits to qualify for disability benefits if the disability arose prior to the divorce or separation

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

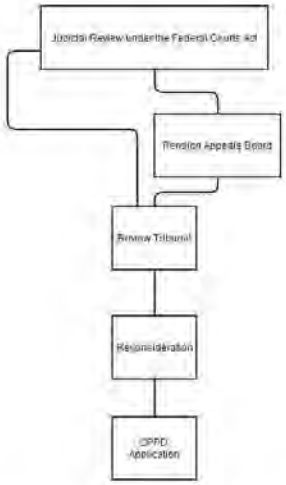
42 (2) For the purposes of this Act,

(a) a person shall be considered to be disabled ly if he is determined in a prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,

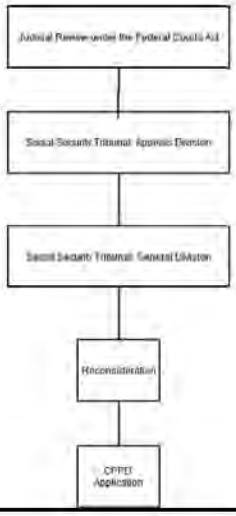
(i) a disability is severe only if by reason thereof the person in respect to whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and

(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 results in death;

Appeals and Judicial Reviews – before April 1, 2013



Appeals and Judicial Reviews – as of April 1, 2013



Appeals to the General Division

Social Security Tribunals

- De novo appeals. New material not already in the file may be presented and considered.
- Appeal must be made in writing.
- Social Security Tribunal website has a Notice of Appeal form: http://www.servicecanada.gc.ca/eng/common/sst-tss/forms-formulaires/SST-NOA-GD-IS-CPP.pdf



Social Security Tribunal / Tribunal de la sécurité sociale

PROTECTED B (when completed)

NOTICE OF APPEAL to the SOCIAL SECURITY TRIBUNAL (SST) - GENERAL DIVISION

for individuals seeking to appeal the reconsideration decision made by Human Resources and Skills Development Canada (HRSDC) regarding their **Canada Pension Plan (CPP)** Pension/Benefit

INSTRUCTIONS FOR SUBMITTING AN APPEAL

Disponible également en français

BEFORE YOU SUBMIT AN APPEAL

You must complete ALL mandatory (required) fields:

- One appeal will not be considered filed until all mandatory information has been provided.
- Appellants are encouraged to use the interactive (electronic) version of the Notice of Appeal form. The interactive version of the Notice of Appeal form automatically highlights the mandatory fields.

Note: HRSDC may also be referred to as Service Canada.

1 - APPELLANT INFORMATION (PAGE 3)

Section 1 is to be completed using the Appellant's personal and contact information.

The following fields, in Section 1, are mandatory:

- ☐ First Name
- ☐ Last Name
- ☐ Social Insurance Number (SIN)*
- ☐ Address
- ☐ City
- ☐ Province/Territory/State
- ☐ Postal/ZIP Code
- ☐ Telephone Number
- ☐ Fax Number (if applicable)
- ☐ Email Address (if applicable)

* If the appeal concerns a Survivor, Orphan, Death, or Disabled Contributor's Child Benefit, include the Contributor's SIN.

2 - DECISION UNDER APPEAL (PAGE 4)

Section 2 is to be completed using information about the reconsideration decision and the reason(s) for the appeal.
If you need more space, continue on a separate sheet. Clearly indicate the question number on the separate sheet.

The following fields, in Section 2, are mandatory:

- ☐ 2(A) Date you received the reconsideration decision from HRSDC
- ☐ 2(C) Reason(s) for the Appeal - Tell us why you are appealing the reconsideration decision

Your appeal must be received by the SST within 90 days of the date that you received the reconsideration decision (including mail time).
If the appeal is being made late (more than 90 days after receipt of the reconsideration decision), you must complete Section 2(B), Reason(s) for Late Appeal, and address the following criteria:

- ☐ Reasonable explanation for the delay
- ☐ Prejudice to HRSDC or other party (if applicable)
- ☐ Continuing intent to appeal
- ☐ Any other reason
- ☐ Existence of an arguable case

Space has been provided in 2(D) to record any additional documentation submitted in support of the appeal.

3 - REPRESENTATIVE INFORMATION (PAGE 5)

Section 3 is to be completed based on whether the Appellant is represented.

The following fields, in Section 3, are mandatory:

- ☐ Fill the appropriate cells based on whether the Appellant has a Representative. Only fill one cell.

If the Appellant has a Representative (i.e. "I have a Representative" was selected), an Authorization to Disclose form must be submitted with this Notice of Appeal and the following fields are mandatory:

- ☐ Representative's First Name
- ☐ Representative's Last Name
- ☐ Representative's Address
- ☐ City
- ☐ Province/Territory/State
- ☐ Postal/ZIP Code
- ☐ Telephone Number
- ☐ Fax Number (if applicable)
- ☐ Email Address (if applicable)

SST-NOA-GD-IS-CPP (2013-03-001) E Page 1 of 5

Canada



4 - DECLARATION AND SIGNATURE (PAGE 5)

If the form was *completed by the Appellant*, the following fields, in Section 4, are mandatory:

- ☐ Signature of the Appellant (Must be signed by the Appellant to be accepted)
- ☐ Date Signed by the Appellant

If the form was *completed by a Witness*, the following fields, in Section 4, are mandatory:

- ☐ Name of Witness
- ☐ Signature of the Witness
- ☐ Date Signed by Witness
- ☐ Witness' Address
- ☐ City
- ☐ Province/Territory/State
- ☐ Postal/ZIP Code
- ☐ Telephone Number

If the *Appellant is Represented* ("I have a Representative" was selected in Section 3), a signature from the Appellant is still required. The following fields, in Section 4, are mandatory:

- ☐ Signature of the Representative
- ☐ Date Signed by Representative

ATTACHMENTS - The following documents must be attached to your printed Notice of Appeal form:

- ☐ A copy of the reconsideration decision that you are appealing.
- ☐ Any documents that you consider will help to support and/or explain your case.
- ☐ *If you have a representative*, attach an Authorization to Disclose signed by both yourself and your representative.
  - The Authorization to Disclose form can be found under Forms on the SST website.

MAILING INSTRUCTIONS

- ☐ Mail this Notice of Appeal and attachments to:

Social Security Tribunal
Attention: General Division (IS)
PO Box 9812 STN T CSC
Ottawa, ON
K1G 6S3

CONTACT INFORMATION

Need help completing the forms? The SST hours of operation are 07:00 to 20:00 (EST).

Internet : www.canada.gc.ca/sst
Telephone: 1-877-227-8877
TTY: 1-800-465-7735
E-Mail : info.sst-tss@canada.gc.ca
Fax: 1-855-814-4117

REMINDERS

As per s. 6 of the *Social Security Tribunal Regulations*: "A party must file with the Tribunal a notice of any change in their contact information without delay." Failure to do so could have a detrimental impact on your appeal.

Notify the SST if you authorize a Representative after submitting this Notice of Appeal.

Keep a copy of this Notice of Appeal and supporting documents for your records.

PROTECTION OF PERSONAL INFORMATION

The information you provide is collected under the authority of the *Department of Human Resources and Skills Development Act* and the *Canada Pension Plan* to file a Notice of Appeal.

The Social Insurance Number (SIN) is collected under the authority of the *Department of Human Resources and Skills Development Act* and the *Social Security Tribunal Regulations* and in accordance with the Treasury Board Secretariat Directive on the SIN. The SIN will be used as a file identifier.

Participation is voluntary. Refusal to provide the specified personal information may prevent the appeal from being properly filed.

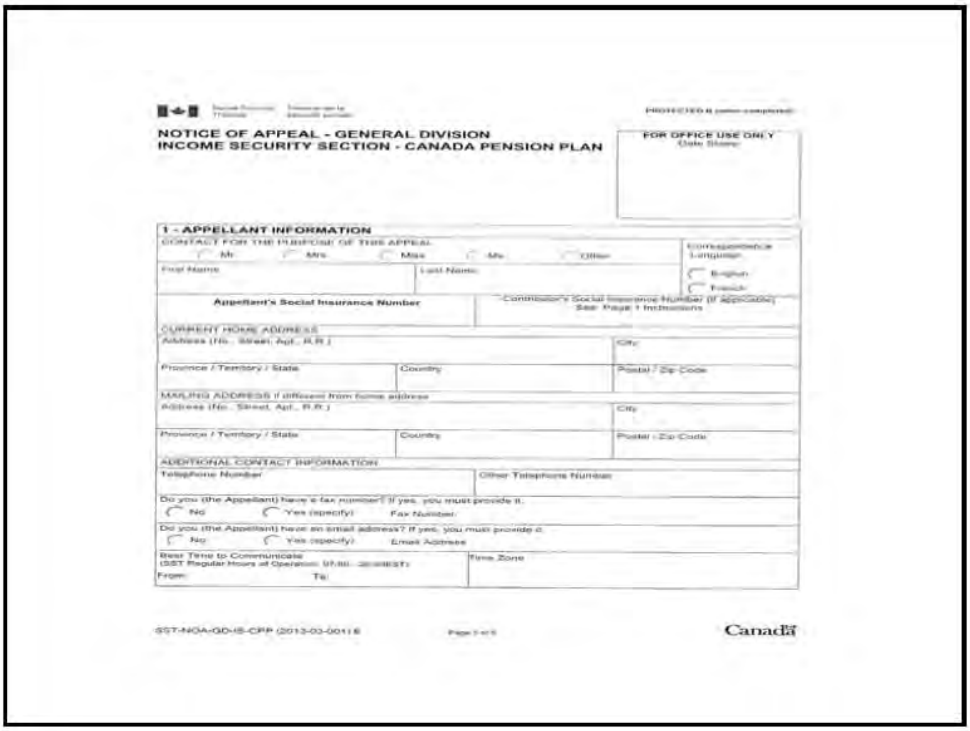
The information you provide will be shared with all the parties to the appeal including HRSDC and may also be shared with HRSDC for the purpose of reporting.

The information you provide may be used and/or disclosed for policy analysis, research and/or evaluation purposes. In order to conduct these activities, various sources of information under the custody and control of HRSDC may be linked. However, these additional uses and/or disclosures of your personal information will never result in an administrative decision being made about you.

Your personal information is administered in accordance with the *Department of Human Resources and Skills Development Act*, the *Canada Pension Plan*, and the *Privacy Act*. You have the right to the protection of, and access to, your personal information. It will be retained in Personal Information Bank(s) under development. Instructions for obtaining this information are outlined in the government publication entitled Info Source, which is available at the following web site address: http://www.infosource.gc.ca.

Info Source may also be accessed on-line at any Service Canada Centre.

SST-NOA-GD-IS-CPP (2013-03-001) E Page 2 of 5



NOTICE OF APPEAL - GENERAL DIVISION
INCOME SECURITY SECTION - CANADA PENSION PLAN

PROTECTED B (when completed)

FOR OFFICE USE ONLY
Date Stamp:

1 - APPELLANT INFORMATION

CONTACT FOR THE PURPOSE OF THIS APPEAL
Mr. Mrs. Miss Ms. Other

Correspondence Language
English
French

First Name | Last Name

Appellant's Social Insurance Number | Commissioner's Social Insurance Number (if applicable) See Page 1 Instructions

CURRENT HOME ADDRESS
Address (No., Street, Apt., R.R.) | City
Province / Territory / State | Country | Postal / Zip Code

MAILING ADDRESS if different from home address
Address (No., Street, Apt., R.R.) | City
Province / Territory / State | Country | Postal / Zip Code

ADDITIONAL CONTACT INFORMATION
Telephone Number | Other Telephone Number

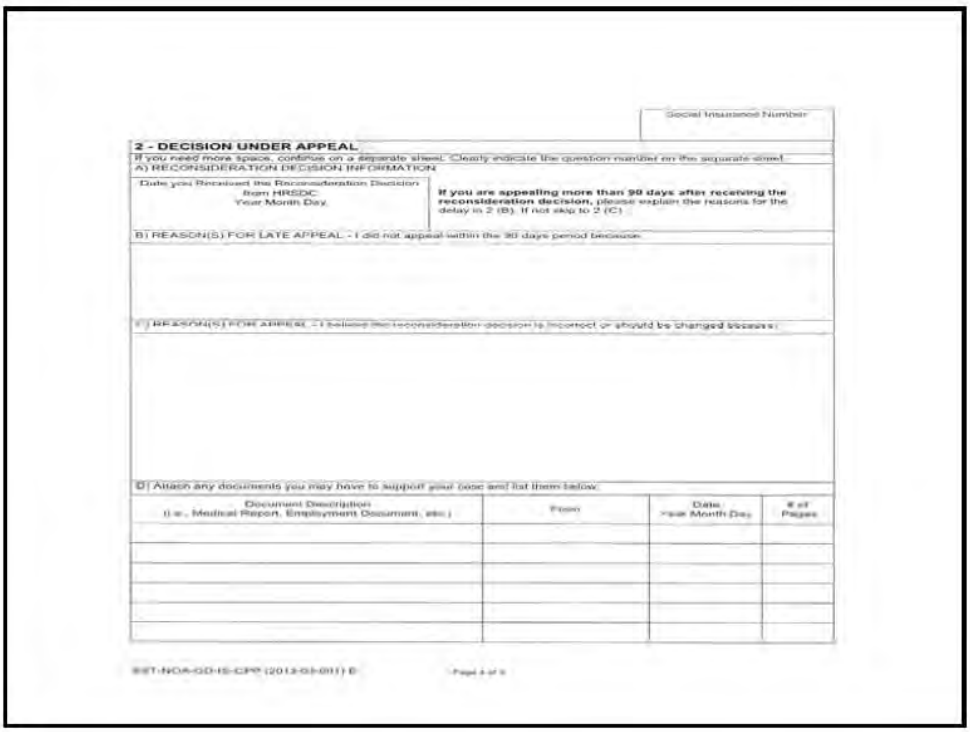
Do you (the Appellant) have a fax number? If yes, you must provide it.
No Yes (specify) Fax Number

Do you (the Appellant) have an email address? If yes, you must provide it.
No Yes (specify) Email Address

Best Time to Communicate
(SST Regular Hours of Operation: 07:00 - 20:00 EST)
From: To: | Time Zone

SST-NOA-GD-IS-CPP (2013-03-0011E) Page 1 of 5

Canada



Social Insurance Number

2 - DECISION UNDER APPEAL

If you need more space, continue on a separate sheet. Clearly indicate the question number on the separate sheet.

A) RECONSIDERATION DECISION INFORMATION

Date you Received the Reconsideration Decision from HRSDC
Year Month Day

If you are appealing more than 90 days after receiving the reconsideration decision, please explain the reasons for the delay in 2 (B). If not skip to 2 (C).

B) REASON(S) FOR LATE APPEAL - I did not appeal within the 90 days period because:

C) REASON(S) FOR APPEAL - I believe the reconsideration decision is incorrect or should be changed because:

D) Attach any documents you may have to support your case and list them below.

Document Description (i.e., Medical Report, Employment Document, etc.)	From	Date Year Month Day	# of Pages

SST-NOA-GD-IS-CPP (2013-03-011) E Page 2 of 5



Social Insurance Number

3 - REPRESENTATIVE INFORMATION

○ I will represent myself ○ I have a representative

If you answered "I have a representative", complete the fields below and the Authorization to Disclose form.

Representative's First Name	Representative's Last Name	Name of Company, Association, or Organization
Representative's Address (No., Street, Apt., R.R)		Suite / Unit Number
City	Province / Territory / State	Country
Postal / Zip Code	Telephone Number	Other Telephone Number

Does your Representative have a fax number? If yes, you must provide it.
○ No ○ Yes (specify) Fax Number:

Does your Representative have an email address? If yes, you must provide it.
○ No ○ Yes (specify) Email Address

4- DECLARATION AND SIGNATURE

PART 1 -TO BE COMPLETED if you do not have a Representative
I hereby appeal the denial of my Canada Pension Plan pension/benefit and declare that to the best of my knowledge and belief, all of the information in this Notice of Appeal is true and complete.

Signature of the Appellant Year Month Day

PART 2 -TO BE COMPLETED BY A WITNESS IF THE APPELLANT COULD NOT COMPLETE THE FORM
I have completed and have read the contents of this Notice of Appeal form to the Appellant, who made his/her mark, under *Signature of the Appellant* in Part 1, in my presence.

Name of the Witness (print)	**Signature of the Witness**	Year Month Day
Witness' Address (No., Street, Apt., R.R)		City
Province / Territory / State	Country	Postal / Zip Code / Telephone Number

PART 3 -TO BE COMPLETED BY A REPRESENTATIVE OF THE APPELLANT if applicable
I hereby appeal the denial of a Canada Pension Plan pension/benefit on behalf of the Appellant and declare that to best of my knowledge and belief, all of the information in this Notice of Appeal is true and complete.
Note: If you are representing an Appellant, complete and submit a signed Authorization to Disclose with this notice of appeal form. The Appellant must sign the Authorization to Disclose.

Signature of the Representative Year Month Day

Disponible également en français

SST-NOA-GD-IS-CPP (2013-03-001) E Page 5 of 5

- Social Security Tribunal website has a new Authorization form: http://www.servicecanada.gc.ca/eng/common/sst-tss/forms-formulaires/SST-ATD.pdf



Social Security Tribunal / Tribunal de la sécurité sociale

PROTECTED B (when completed)

FOR OFFICE USE ONLY
Date Stamp

AUTHORIZATION TO DISCLOSE

We need your consent if you want the Social Security Tribunal (SST) to deal with another person (such as your spouse or common-law partner, other family member, friend, paralegal, or lawyer) who would act as your representative for the purposes of your appeal.

1 - PERSON BEING REPRESENTED

First Name | Last Name | Social Insurance Number

If you are an employer or association, complete the follow

Business Name | Business Number

2 - REPRESENTATIVE INFORMATION Identify the individual you wish to authorize as your representative

Representative's First Name | Representative's Last Name

Name of Representative's Company, Association, or Organization

Representative's Address (No., Street, Apt., P.O.) | Suite / Unit Number

City | Province / Territory / State | Country

Postal / ZIP Code | Telephone Number | Fax Number

Other Telephone Number | E-Mail Address

3 - DECLARATION AND SIGNATURE

I give the Social Security Tribunal permission to disclose to my representative, any and all information, either orally or in writing concerning my appeal under the *Canada Pension Plan Act*, *Employment Insurance Act*, or *Old Age Security Act*.

Appellant Signature | Year Month Day

Representative Signature | Year Month Day

4 - NEXT STEPS

This Authorization to Disclose form is to be completed by an Appellant and submitted to:

Social Security Tribunal
P.O. Box 9812 STN T CSC
Ottawa, Ontario
K1G 6S3

Website: www.canada.gc.ca/sst-tss
E-Mail: info.sst-tss@canada.gc.ca
Telephone: 1-877-227-6572
Fax: 1-855-814-4147
TTY: 1-800-465-7735

Disponible également en français

Page 1 of 2

Canada



The information you provide is collected under the authority of the *Department of Human Resources and Skills Development Act*, *Old Age Security Act*, *Employment Insurance Act*, and *Canada Pension Plan* for authorizing a third party to act on your behalf for the purposes of your appeal.

The Social Insurance Number (SIN) is collected under the authority of the *Department of Human Resources and Skills Development Act*, and the *Social Security Tribunal Regulations* and in accordance with the Treasury Board Secretariat Directive on the SIN. The SIN will be used as a file identifier.

Participation is voluntary. Refusal to provide the specified personal information may prevent the appeal from being properly filed.

The information you provide will be shared with all the parties to the appeal including HRSDC and may also be shared with HRSDC for the purpose of reporting.

The information you provide may be used and/or disclosed for policy analysis, research and/or evaluation purposes. In order to conduct these activities, various sources of information under the custody and control of HRSDC may be linked. However, these additional uses and/or disclosures of your personal information will never result in an administrative decision being made about you.

Your personal information is administered in accordance with the *Department of Human Resources and Skills Development Act*, *Old Age Security Act*, *Employment Insurance Act*, *Canada Pension Plan* and the *Privacy Act*. You have the right to the protection of, and access to, your personal information. It will be retained in Personal Information Bank(s) under Development. Instructions for obtaining this information are outlined in the government publication entitled Info Source, which is available on the Internet web site address: http://www.infosource.gc.ca.

Info Source may also be accessed on-line at any Service Canada Centre.

Page 2 of 2

Once SST has received the appeal

- Determine if the appeal is complete and on time. If there is any missing information it **must** be submitted before the 90 day deadline expires.
- Acknowledge receipt of appeal in writing.
- Request the file from HRSDC.
- Provide copy of the file to either the appellant **or** representative.

Notice of Readiness

- Must be submitted within 365 days of the appeal being filed.
- File does not get referred to a Member until **after** a notice of readiness has been received by all parties or the 365 days has expired.
- Once you have submitted your Notice of Readiness no new written information will be considered unless it is in response to HRSDC's notice of readiness.

- NEW: While the OCRT was a three person panel with the SST only one member will be assigned to a file.
- SST member will review appeal record and either they may:
  - Summarily dismiss;
  - Decide based on the information in the record.
  - Proceed to a hearing.

Summarily Dismissed

- Appeals that have no reasonable chances of success must be summarily dismissed.
- The SST will give notice that the member intends to summarily dismiss.

Hearing

- The form of hearing is decided by the SST member.
  - A hearing now may include: written questions and answers, teleconference, videoconference, or an in person hearing.
- A notice of hearing will be sent to both parties explaining the hearing type and details.
- Hearings are now recorded.

Following a Hearing

- A decision will be mailed with written reasons for the decision.
- It is too soon to know how long this process will take in practice.
- 90 days to file for leave to appeal with the Appeal Division.

Appeal to Appeal Division

- Leave to Appeal is required in most circumstances. The only exception if appealing an appeal that was summarily dismissed.
- Leave to Appeal must be complete and on time.

- Not ‘de novo’ will not consider any additional information that does not exist in the already existing Appeal file. The only exception is if it is an appeal of a decision made by the previously existing Review Tribunal or transferred to the SST from the Pensions Appeals Board.
- Appeal must be based on the following grounds:
  - Failure to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction
  - Erred in law.
  - Based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it.

- Social Security Tribunal website has the notice of appeal form: http://www.servicecanada.gc.ca/eng/common/sst-tss/forms-formulaires/SST-ARLTATTAD.pdf



Social Security Tribunal / Tribunal de la sécurité sociale

PROTECTED B (when completed)

APPLICATION REQUESTING LEAVE TO APPEAL to the SOCIAL SECURITY TRIBUNAL (SST) - APPEAL DIVISION

for applicants requesting leave to appeal the decision made by a Review Tribunal, Board of Referees, or Social Security Tribunal regarding their **Employment Insurance (EI)**, **Canada Pension Plan (CPP), or Old Age Security (OAS)** Pension/Benefit

INSTRUCTIONS FOR SUBMITTING AN APPLICATION

Disponible également en français

BEFORE YOU SUBMIT AN APPLICATION

You must complete ALL mandatory (required) fields.
- The application will not be considered filed until all mandatory information has been provided.
- Applicants are encouraged to use the interactive (electronic) version of the Application Requesting Leave to Appeal form. The interactive version of the form automatically highlights the mandatory fields.

If the SST General Division summarily dismissed your previous appeal, use form: SST-ATATTAD to appeal to the Appeal Division.

1 - APPLICANT INFORMATION (PAGE 3)

Section 1 is to be completed using the Applicant's personal and contact information.

If applying on behalf of the Department of Human Resources and Skills Development Canada (HRSDC) or the Canada Employment Insurance Commission (CEIC), the following fields in Section 1, must be filled:

- ☐ Address
- ☐ City
- ☐ Province/Territory/State
- ☐ Postal/ZIP Code
- ☐ Telephone Number
- ☐ Fax Number
- ☐ Email Address

Otherwise, the following fields, in Section 1, must be filled:

- ☐ Applicant's Full Name
- ☐ Social Insurance or Business Number
- ☐ Address
- ☐ City
- ☐ Province/Territory/State
- ☐ Postal/ZIP Code
- ☐ Telephone Number
- ☐ Fax Number (if applicable)
- ☐ Email Address (if applicable)

2 - REPRESENTATIVE INFORMATION (PAGE 3)

Section 2 is to be completed when the Applicant is other than HRSDC or CEIC and is represented.

The following fields, in Section 2, must be filled:

- ☐ Fill the appropriate circle based on whether the Applicant has a Representative. Only fill one circle.

If the Applicant has a Representative (i.e. "I have a Representative" was filled), an Authorization to Disclose form must be submitted with this Application Requesting Leave to Appeal and the following fields must be filled:

- ☐ Representative's First Name
- ☐ Representative's Last Name
- ☐ Representative's Address
- ☐ City
- ☐ Province/Territory/State
- ☐ Postal/ZIP Code
- ☐ Telephone Number
- ☐ Fax Number (if applicable)
- ☐ Email Address (if applicable)

3 - DECISION UNDER APPEAL (PAGE 4)

Section 3 is to be completed using reasons based on the grounds in s. 58 of the *Department of Human Resources and Skills Development Act*.

58. (1) The only grounds of appeal are that
- (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
- (c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

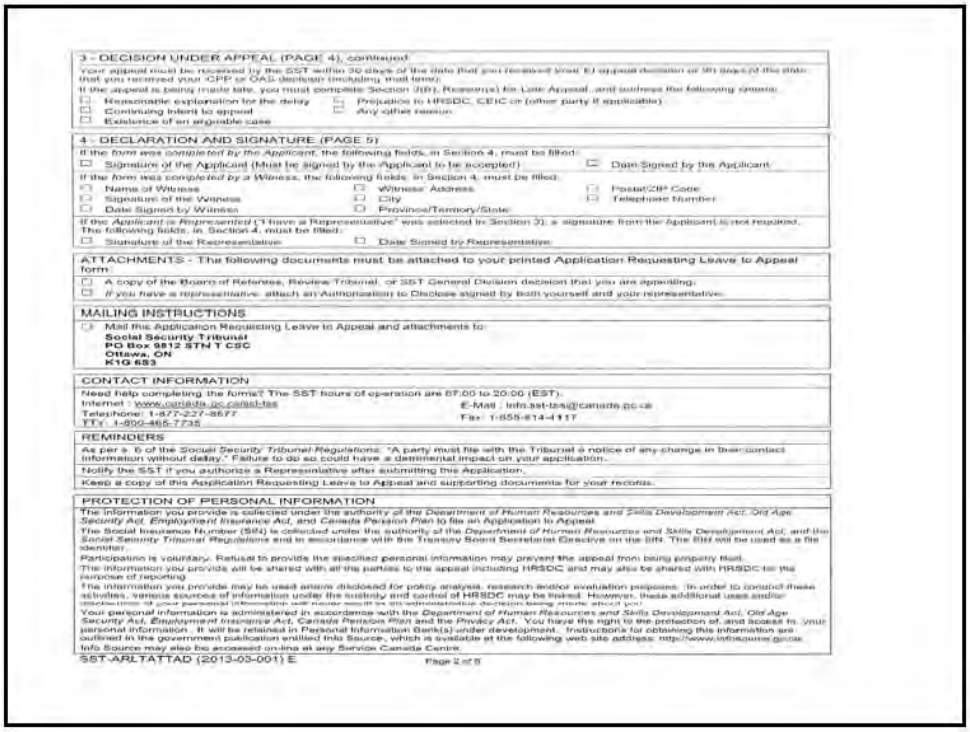
If you need more space, continue on a separate sheet. Clearly indicate the question number on the separate sheet.

Note: Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

The following fields, in Section 3, must be filled: **3(A), 3(C), and 3(D)**

- ☐ 3(A) Date you Received the Decision from Board of Referees, Review Tribunal, or SST General Division
- ☐ 3(B) Reason(s) for Late Appeal (if applicable – see "Decision Under Appeal, continued" on page 2 of Instructions)
- ☐ 3(C) Request for Leave to Appeal
- ☐ 3(D) Reasons for the Appeal based on the grounds in s. 58(1) of the *Department of Human Resources and Skills Development Act*

Canada



3 - DECISION UNDER APPEAL (PAGE 4), continued

Your appeal must be received by the SST within 30 days of the date that you received your EI appeal decision or 90 days of the date that you received your CPP or OAS decision (including mail time).

If the appeal is being made late, you must complete Section 3(B), Reason(s) for Late Appeal, and address the following criteria:

- ☐ Reasonable explanation for the delay
- ☐ Prejudice to HRSDC, CEIC or (other party if applicable)
- ☐ Continuing intent to appeal
- ☐ Any other reason
- ☐ Existence of an arguable case

4 - DECLARATION AND SIGNATURE (PAGE 5)

If the *form was completed by the Applicant*, the following fields, in Section 4, must be filled:

- ☐ Signature of the Applicant (Must be signed by the Applicant to be accepted)
- ☐ Date Signed by the Applicant

If the form was *completed by a Witness*, the following fields, in Section 4, must be filled:

- ☐ Name of Witness
- ☐ Signature of the Witness
- ☐ Date Signed by Witness
- ☐ Witness' Address
- ☐ City
- ☐ Province/Territory/State
- ☐ Postal/ZIP Code
- ☐ Telephone Number

If the *Applicant is Represented* ("I have a Representative" was selected in Section 2), a signature from the Applicant is not required. The following fields, in Section 4, must be filled:

- ☐ Signature of the Representative
- ☐ Date Signed by Representative

ATTACHMENTS - The following documents must be attached to your printed Application Requesting Leave to Appeal form:

- ☐ A copy of the Board of Referees, Review Tribunal, or SST General Division decision that you are appealing.
- ☐ *If you have a representative*, attach an Authorization to Disclose signed by both yourself and your representative.

MAILING INSTRUCTIONS

- ☐ Mail this Application Requesting Leave to Appeal and attachments to:

Social Security Tribunal
PO Box 9812 STN T CSC
Ottawa, ON
K1G 6S3

CONTACT INFORMATION

Need help completing the forms? The SST hours of operation are 07:00 to 20:00 (EST).

Internet : www.canada.gc.ca/sst-tss
Telephone: 1-877-227-8677
TTY: 1-800-465-7735
E-Mail : info.sst-tss@canada.gc.ca
Fax: 1-855-814-4117

REMINDERS

As per s. 6 of the *Social Security Tribunal Regulations*: "A party must file with the Tribunal a notice of any change in their contact information without delay." Failure to do so could have a detrimental impact on your application.

Notify the SST if you authorize a Representative after submitting this Application.

Keep a copy of this Application Requesting Leave to Appeal and supporting documents for your records.

PROTECTION OF PERSONAL INFORMATION

The information you provide is collected under the authority of the *Department of Human Resources and Skills Development Act*, *Old Age Security Act*, *Employment Insurance Act*, and *Canada Pension Plan* to file an Application to Appeal.

The Social Insurance Number (SIN) is collected under the authority of the *Department of Human Resources and Skills Development Act*, and the *Social Security Tribunal Regulations* and in accordance with the Treasury Board Secretariat Directive on the SIN. The SIN will be used as a file identifier.

Participation is voluntary. Refusal to provide the specified personal information may prevent the appeal from being properly filed.

The information you provide will be shared with all the parties to the appeal including HRSDC and may also be shared with HRSDC for the purpose of reporting.

The information you provide may be used and/or disclosed for policy analysis, research and/or evaluation purposes. In order to conduct these activities, various sources of information under the custody and control of HRSDC may be linked. However, these additional uses and/or disclosures of your personal information will never result in an administrative decision being made about you.

Your personal information is administered in accordance with the *Department of Human Resources and Skills Development Act*, *Old Age Security Act*, *Employment Insurance Act*, *Canada Pension Plan* and the *Privacy Act*. You have the right to the protection of, and access to, your personal information. It will be retained in Personal Information Bank(s) under development. Instructions for obtaining this information are outlined in the government publication entitled Info Source, which is available at the following web site address: http://www.infosource.gc.ca. Info Source may also be accessed on-line at any Service Canada Centre.



Social Security Tribunal / Tribunal de la sécurité sociale

PROTECTED B (when completed)

APPLICATION REQUESTING LEAVE TO APPEAL TO THE APPEAL DIVISION

If the SST General Division summarily dismissed your previous appeal, use form: SST-ATTTAD.

FOR OFFICE USE ONLY
Date Stamp

1 - APPLICANT INFORMATION

Applicant's Full Name | Social Insurance or Business Number (if applicable)

CURRENT ADDRESS

Address (No., Street, Apt., R.R.) | City

Province / Territory / State | Country | Postal / Zip Code

ADDITIONAL CONTACT INFORMATION

Telephone Number | Other Telephone Number

Do you (the Applicant) have a fax number? If yes, you must provide it.
No / Yes (specify) Fax Number:

Do you (the Applicant) have an email address? If yes, you must provide it.
No / Yes (specify) Email Address:

2 - REPRESENTATIVE INFORMATION

I will represent myself / I have a representative

If you answered "I have a representative", complete the fields below and the Authorization to Disclose form.

Representative's First Name | Representative's Last Name | Name of Company, Association, or Organization

Representative's Address (No., Street, Apt., R.R.) | Suite / Unit Number

City | Province / Territory / State | Country

Postal / Zip Code | Telephone Number | Other Telephone Number

Does your Representative have a fax number? If yes, you must provide it.
No / Yes (specify) Fax Number:

Does your Representative have an email address? If yes, you must provide it.
No / Yes (specify) Email Address:

SST-ARLTATTAD (2013-03-001) E

Page 3 of 5

Canada

3 - DECISION UNDER APPEAL

If you need more space, continue on a separate sheet. Clearly indicate the question number on the separate sheet.

A) APPEAL DECISION INFORMATION

Date you Received the Attached Decision
Year Month Day

If you are appealing more than 30 days after receiving an EI decision or 90 days after receiving a CPP or OAS decision, please explain the reasons for the delay in 3 (B). If not skip to 3 (C).

B) REASON(S) FOR LATE APPEAL (if applicable - see instructions on page 2)

C) REASON(S) FOR LEAVE TO APPEAL - (see instructions on page 1)

Pursuant to s. 58(2) of the *Department of Human Resources and Skills Development Act*, I believe my Application Requesting Leave to Appeal to the Appeal Division has a reasonable chance for success because:

D) REASON(S) FOR APPEAL - (see instructions on page 1)

Based on the grounds in s. 58(1) of the *Department of Human Resources and Skills Development Act* I am appealing for the following reasons:

SST-ARLTATTAD (2013-03-001) E

Page 4 of 5



4. DECLARATION AND SIGNATURE

PART 1 - TO BE COMPLETED if you do not have a Representative

I hereby appeal the decision of the Review Tribunal, Board of Referees, or Social Security Tribunal and declare that, to the best of my knowledge and belief, all of the information in this Application Requesting Leave to Appeal form is true and complete.

Signature of the Applicant | Year Month Day

PART 2 - TO BE COMPLETED BY A WITNESS IF THE APPLICANT COULD NOT COMPLETE THE FORM

I have completed and have read the contents of this Application to Appeal form to the Applicant, who made his/her mark, under *Signature of the Applicant* in Part 1, in my presence.

Name of the Witness (print) | **Signature of the Witness** | Year Month Day

Witness' Address (No., Street, Apt., P.R.) | City

Province / Territory / State | Country | Postal / Zip Code | Telephone Number

PART 3 - TO BE COMPLETED BY A REPRESENTATIVE OF THE APPLICANT if applicable

I hereby appeal the decision of the Review Tribunal, Board of Referees, or Social Security Tribunal on behalf of the Applicant and declare that to the best of my knowledge and belief, all of the information in the Application Requesting Leave to Appeal is true and complete.
Note: If you are representing an Applicant, complete and submit a signed Authorization to Disclose with this notice of appeal form. The Applicant must sign the Authorization to Disclose.

Signature of the Representative | Year Month Day

SST-ARLTATTAD (2013-03-001) E Page 5 of 5

The Appeals Division has the power to:

- Dismiss an appeal.
- Allow an appeal
  - Give the decision that should have been given.
  - Send appeal back to the General Division.
  - Rescind or vary.

What is the next level of appeal?

- If any party is unhappy with the decision the Appeals Division has made the next level of appeal would be judicial review before the Federal Court of Appeal.

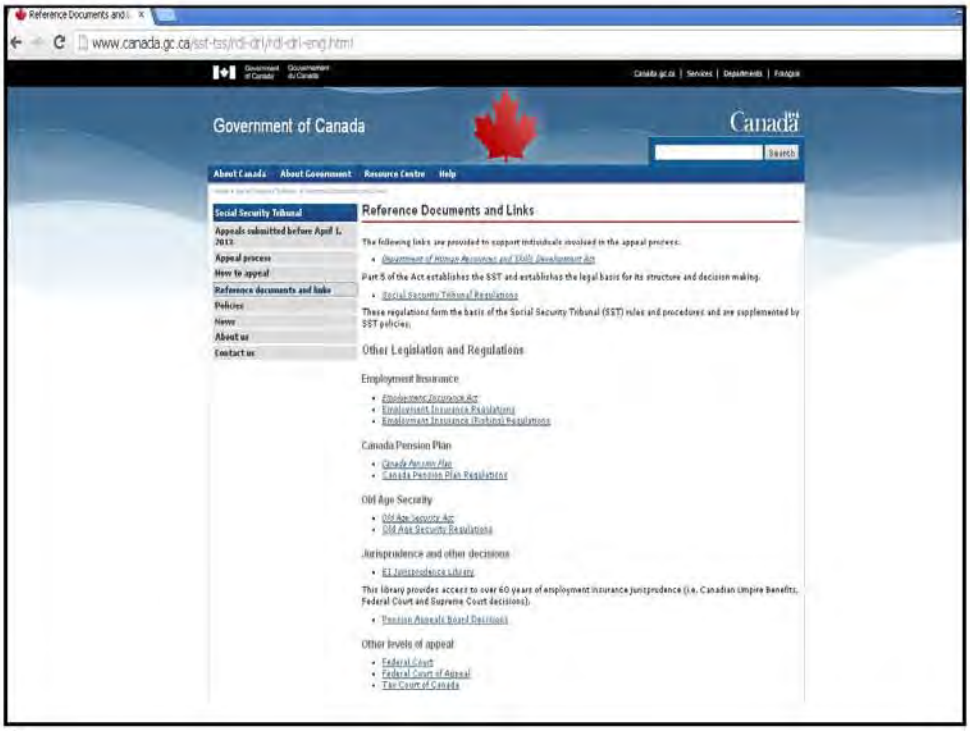
Requests from the SST

- Ensure appeal is complete.
- Fax **or** mail information.
- Advise as soon a possible the number of witnesses and any accommodation the appellant needs.
- Once the SST has been informed that you have taken on a client's case communication is with the representative only.
- Do not tab or bind submissions.
- Looking at electronic ways to exchange more information in the future.

Travel expenses (both divisions)

- The Chair must decide there are special reasons and then they may authorize travel or living expenses.

- Requests to rescind or amend on the basis of new facts is now limited to one request per party and must be requested within 1 year of the decision.


Reference Documents and L
www.canada.gc.ca/sst-tss/rdl-drl/rdl-drl-eng.html
Government of Canada
Canada
About Canada
About Government
Resource Centre
Help
Social Security Tribunal
Appeals submitted before April 1, 2013
Appeal process
How to appeal
Reference documents and links
Policies
News
About us
Contact us
Reference Documents and Links
The following links are provided to support individuals involved in the appeal process:
Part II of the Act establishes the SST and establishes the legal basis for its structure and decision making.
Social Security Tribunal Regulations
These regulations form the basis of the Social Security Tribunal (SST) rules and procedures and are supplemented by SST policies.
Other Legislation and Regulations
Employment Insurance
Employment Insurance Act
Employment Insurance Regulations
Employment Insurance (Fishing) Regulations
Canada Pension Plan
Canada Pension Plan
Canada Pension Plan Regulations
Old Age Security
Old Age Security Act
Old Age Security Regulations
Jurisprudence and other decisions
EI Jurisprudence Library
This library provides access to over 60 years of employment insurance jurisprudence (i.e. Canadian Umpire Benefits, Federal Court and Supreme Court decisions).
Pension Appeals Board Decisions
Other levels of appeal
Federal Court
Federal Court of Appeal
Tax Court of Canada

Social Security Tribunal | Tribunal de la sécurité sociale

PROTECTED B (when completed)

FOR OFFICE USE ONLY
Date Stamp

AUTHORIZATION TO DISCLOSE

We need your consent if you want the Social Security Tribunal (SST) to deal with another person (such as your spouse or common-law partner, other family member, friend, paralegal, or lawyer) who would act as your representative for the purposes of your appeal.

1 - PERSON BEING REPRESENTED

First Name	Last Name	**Social Insurance Number**

If you are an employer or association, complete the below.

Business Name	**Business Number**

2 - REPRESENTATIVE INFORMATION Identify the individual you wish to authorize as your representative

Representative's First Name	Representative's Last Name

Name of Representative's Company, Association, or Organization

Representative's Address (No., Street, Apt., R.R)	Suite / Unit Number

City	Province / Territory / State	Country

Postal / ZIP Code	Telephone Number	Fax Number

Other Telephone Number	E-Mail Address

3 - DECLARATION AND SIGNATURE

I give the Social Security Tribunal permission to disclose to my representative, any and all information, either orally or in writing concerning my appeal under the *Canada Pension Plan Act*, *Employment Insurance Act*, or *Old Age Security Act.*

Appellant Signature	Year Month Day

Representative Signature	Year Month Day

4 - NEXT STEPS

This Authorization to Disclose form is to be completed by an Appellant and submitted to:

Social Security Tribunal
P.O. Box 9812 STN T CSC
Ottawa, Ontario
K1G 6S3

Website: www.canada.gc.ca/sst-tss
E-Mail: info.sst-tss@canada.gc.ca
Telephone: 1-877-227-8577
Fax: 1-855-814-4117
TTY: 1-800-465-7735

Disponible également en français

The information you provide is collected under the authority of the *Department of Human Resources and Skills Development Act, Old Age Security Act, Employment Insurance Act,* and *Canada Pension Plan* for authorizing a third party to act on your behalf for the purposes of your appeal.

The Social Insurance Number (SIN) is collected under the authority of the *Department of Human Resources and Skills Development Act*, and the *Social Security Tribunal Regulations* and in accordance with the Treasury Board Secretariat Directive on the SIN. The SIN will be used as a file identifier.

Participation is voluntary. Refusal to provide the specified personal information may prevent the appeal from being properly filed.
The information you provide will be shared with all the parties to the appeal including HRSDC and may also be shared with HRSDC for the purpose of reporting.

The information you provide may be used and/or disclosed for policy analysis, research and/or evaluation purposes. In order to conduct these activities, various sources of information under the custody and control of HRSDC may be linked. However, these additional uses and/or disclosures of your personal information will never result in an administrative decision being made about you.

Your personal information is administered in accordance with the *Department of Human Resources and Skills Development Act, Old Age Security Act, Employment Insurance Act, Canada Pension Plan* and the *Privacy Act.* You have the right to the protection of, and access to, your personal information. It will be retained in Personal Information Bank(s) under development. Instructions for obtaining this information are outlined in the government publication entitled Info Source, which is available at the following web site address: http://www.infosource.gc.ca.

Info Source may also be accessed on-line at any Service Canada Centre

NOTICE OF APPEAL to the SOCIAL SECURITY TRIBUNAL (SST) - GENERAL DIVISION

for individuals seeking to appeal the reconsideration decision made by Human Resources and Skills Development Canada (HRSDC) regarding their **Canada Pension Plan (CPP)** Pension/Benefit

INSTRUCTIONS FOR SUBMITTING AN APPEAL

Disponible également en français

BEFORE YOU SUBMIT AN APPEAL

You must complete ALL mandatory (required) fields.

- The appeal will not be considered filed until all mandatory information has been provided.
- Appellants are encouraged to use the interactive (electronic) versions of the Notice of Appeal forms. The interactive version of the Notice of Appeal form automatically highlights the mandatory fields.

Note: HRSDC may also be referred to as Service Canada.

1 - APPELLANT INFORMATION (PAGE 3)

Section 1 is to be completed using the Appellant's personal and contact information.

The following fields, in Section 1, are mandatory:

- ☐ First Name
- ☐ Last Name
- ☐ Social Insurance Number (SIN)*
- ☐ Address
- ☐ City
- ☐ Province/Territory/State
- ☐ Postal/ZIP Code
- ☐ Telephone Number
- ☐ Fax Number (if applicable)
- ☐ Email Address (if applicable)

* If the appeal concerns a Survivor, Orphan, Death, or Disabled Contributor's Child Benefit, include the Contributor's SIN.

2 - DECISION UNDER APPEAL (PAGE 4)

Section 2 is to be completed using information about the reconsideration decision and the reason(s) for the appeal.

If you need more space, continue on a separate sheet. Clearly indicate the question number on the separate sheet.

The following fields, in Section 2, are mandatory:

- ☐ 2(A) Date you received the reconsideration decision from HRSDC
- ☐ 2(C) Reason(s) for the Appeal - Tell us why you are appealing the reconsideration decision

Your appeal must be received by the SST within 90 days of the date that you received the reconsideration decision (including mail time).

If the appeal is being made late (more than 90 days after receipt of the reconsideration decision), you must complete Section 2(B), Reason(s) for Late Appeal, and address the following criteria:

- ☐ Reasonable explanation for the delay
- ☐ Continuing intent to appeal
- ☐ Existence of an arguable case
- ☐ Prejudice to HRSDC or (other party if applicable)
- ☐ Any other reason

Space has been provided in 2(D) to record any additional documentation submitted in support of the appeal.

3 - REPRESENTATIVE INFORMATION (PAGE 5)

Section 3 is to be completed based on whether the Appellant is represented.

The following fields, in Section 3, are mandatory:

- ☐ Fill the appropriate circle based on whether the Appellant has a Representative. Only fill one circle.

If the Appellant has a Representative (i.e. "I have a Representative" was filled), an Authorization to Disclose form must be submitted with this Notice of Appeal and the following fields are mandatory:

- ☐ Representative's First Name
- ☐ Representative's Last Name
- ☐ Representative's Address
- ☐ City
- ☐ Province/Territory/State
- ☐ Postal/ZIP Code
- ☐ Telephone Number
- ☐ Fax Number (if applicable)
- ☐ Email Address (if applicable)

4 - DECLARATION AND SIGNATURE (PAGE 5)

If the *form was completed by the Appellant,* the following fields, in Section 4, are mandatory:

- ☐ Signature of the Appellant (Must be signed by the Appellant to be accepted)
- ☐ Date Signed by the Appellant

If the *form was completed by a Witness*, the following fields, in Section 4, are mandatory:

- ☐ Name of Witness
- ☐ Signature of the Witness
- ☐ Date Signed by Witness
- ☐ Witness' Address
- ☐ City
- ☐ Province/Territory/State
- ☐ Postal/ZIP Code
- ☐ Telephone Number

If the *Appellant is Represented* ("I have a Representative" was selected in Section 3), a signature from the Appellant is not required. The following fields, in Section 4, are mandatory:

- ☐ Signature of the Representative
- ☐ Date Signed by Representative

ATTACHMENTS - The following documents must be attached to your printed Notice of Appeal form:

- ☐ A copy of the reconsideration decision that you are appealing.
- ☐ Any documents that you consider will help to support and/or explain your case.
- ☐ *If you have a representative*, attach an Authorization to Disclose signed by both yourself and your representative.
  - The Authorization to Disclose form can be found under Forms on the SST website.

MAILING INSTRUCTIONS

☐ Mail this Notice of Appeal and attachments to:

Social Security Tribunal
Attention: General Division (IS)
PO Box 9812 STN T CSC
Ottawa, ON
K1G 6S3

CONTACT INFORMATION

Need help completing the forms? The SST hours of operation are 07:00 to 20:00 (EST).

Internet : www.canada.gc.ca/sst-tss
Telephone: 1-877-227-8577
TTY: 1-800-465-7735

E-Mail : info.sst-tss@canada.gc.ca
Fax: 1-855-814-4117

REMINDERS

As per s. 6 of the *Social Security Tribunal Regulations*: "A party must file with the Tribunal a notice of any change in their contact information without delay." Failure to do so could have a detrimental impact on your appeal.

Notify the SST if you authorize a Representative after submitting this Notice of Appeal.

Keep a copy of this Notice of Appeal and supporting documents for your records.

PROTECTION OF PERSONAL INFORMATION

The information you provide is collected under the authority of the *Department of Human Resources and Skills Development Act* and the *Canada Pension Plan* to file a Notice of Appeal.

The Social Insurance Number (SIN) is collected under the authority of the *Department of Human Resources and Skills Development Act* and the *Social Security Tribunal Regulations* and in accordance with the Treasury Board Secretariat Directive on the SIN. The SIN will be used as a file identifier.

Participation is voluntary. Refusal to provide the specified personal information may prevent the appeal from being properly filed.

The information you provide will be shared with all the parties to the appeal including HRSDC and may also be shared with HRSDC for the purpose of reporting.

The information you provide may be used and/or disclosed for policy analysis, research and/or evaluation purposes. In order to conduct these activities, various sources of information under the custody and control of HRSDC may be linked. However, these additional uses and/or disclosures of your personal information will never result in an administrative decision being made about you.

Your personal information is administered in accordance with the *Department of Human Resources and Skills Development Act*, the *Canada Pension Plan*, and the *Privacy Act.* You have the right to the protection of, and access to, your personal information. It will be retained in Personal Information Bank(s) under development. Instructions for obtaining this information are outlined in the government publication entitled Info Source, which is available at the following web site address: http://www.infosource.gc.ca.

Info Source may also be accessed on-line at any Service Canada Centre.

NOTICE OF APPEAL - GENERAL DIVISION
INCOME SECURITY SECTION - CANADA PENSION PLAN

FOR OFFICE USE ONLY Date Stamp

1 - APPELLANT INFORMATION

CONTACT FOR THE PURPOSE OF THIS APPEAL ◯ Mr. ◯ Mrs. ◯ Miss ◯ Ms. ◯ Other		Correspondence Language ◯ English ◯ French
First Name	Last Name	

Appellant's Social Insurance Number	Contributor's Social Insurance Number (if applicable) See: Page 1 Instructions

CURRENT HOME ADDRESS		
Address (No., Street, Apt., R.R.)		City
Province / Territory / State	Country	Postal / Zip Code

MAILING ADDRESS if different from home address		
Address (No., Street, Apt., R.R.)		City
Province / Territory / State	Country	Postal / Zip Code

ADDITIONAL CONTACT INFORMATION	
Telephone Number	Other Telephone Number

Do you (the Appellant) have a fax number? If yes, you must provide it.

◯ No ◯ Yes (specify) Fax Number:

Do you (the Appellant) have an email address? If yes, you must provide it.

◯ No ◯ Yes (specify) Email Address

Best Time to Communicate (SST Regular Hours of Operation: 07:00 - 20:00EST) From: To:	Time Zone

Social Insurance Number

2 - DECISION UNDER APPEAL

If you need more space, continue on a separate sheet. Clearly indicate the question number on the separate sheet.

A) RECONSIDERATION DECISION INFORMATION

Date you Received the Reconsideration Decision from HRSDC Year Month Day	**If you are appealing more than 90 days after receiving the reconsideration decision,** please explain the reasons for the delay in 2 (B). If not skip to 2 (C)

B) REASON(S) FOR LATE APPEAL - I did not appeal within the 90 days period because:

C) REASON(S) FOR APPEAL - I believe the reconsideration decision is incorrect or should be changed because:

D) Attach any documents you may have to support your case and list them below.

Document Description (i.e., Medical Report, Employment Document, etc.)	From	Date Year Month Day	# of Pages

Social Insurance Number

3 - REPRESENTATIVE INFORMATION

◯ I will represent myself ◯ I have a representative

If you answered "I have a representative", complete the fields below and the Authorization to Disclose form.

Representative's First Name	Representative's Last Name	Name of Company, Association, or Organization

Representative's Address (No., Street, Apt., R.R)	Suite / Unit Number

City	Province / Territory / State	Country

Postal / Zip Code	Telephone Number	Other Telephone Number

Does your Representative have a fax number? If yes, you must provide it.

◯ No ◯ Yes (specify) Fax Number:

Does your Representative have an email address? If yes, you must provide it.

◯ No ◯ Yes (specify) Email Address

4- DECLARATION AND SIGNATURE

PART 1 -TO BE COMPLETED if you do not have a Representative

I hereby appeal the denial of my Canada Pension Plan pension/benefit and declare that to the best of my knowledge and belief, all of the information in this Notice of Appeal is true and complete.

Signature of the Appellant	Year Month Day

PART 2 -TO BE COMPLETED BY A WITNESS IF THE APPELLANT COULD NOT COMPLETE THE FORM

I have completed and have read the contents of this Notice of Appeal form to the Appellant, who made his/her mark, under *Signature of the Appellant* in Part 1, in my presence.

Name of the Witness (print)	**Signature of the Witness**	Year Month Day

Witness' Address (No., Street, Apt., R.R)	City

Province / Territory / State	Country	Postal / Zip Code	Telephone Number

PART 3 -TO BE COMPLETED BY A REPRESENTATIVE OF THE APPELLANT if applicable

I hereby appeal the denial of a Canada Pension Plan pension/benefit on behalf of the Appellant and declare that to best of my knowledge and belief, all of the information in this Notice of Appeal is true and complete.

Note: If you are representing an Appellant, complete and submit a signed Authorization to Disclose with this notice of appeal form. The Appellant must sign the Authorization to Disclose.

Signature of the Representative	Year Month Day

Disponible également en français

NOTICE OF READINESS

I, _____ (name of the Appellant), confirm that I am ready to proceed with the appeal #_____before the Income Security Section of the Social Security Tribunal.

I have no additional documents or written submissions to file, other than the ones attached to this Notice or already provided to the Tribunal.

I understand that once I have signed this Notice of Readiness, I cannot file additional documents or written submissions with the Tribunal. If another party files additional documents or submissions with the Tribunal after I have signed this Notice, I understand that I would be allowed an opportunity to respond and to file additional documents, with a new Notice of Readiness, within the 365–day time limit provided by the Regulations.

_____
(Print name)

_____
(Signature)

Date :

APPLICATION REQUESTING LEAVE TO APPEAL to the SOCIAL SECURITY TRIBUNAL (SST) - APPEAL DIVISION

for applicants requesting leave to appeal the decision made by a Review Tribunal, Board of Referees, or Social Security Tribunal regarding their **Employment Insurance (EI), Canada Pension Plan (CPP), or Old Age Security (OAS)** Pension/Benefit

INSTRUCTIONS FOR SUBMITTING AN APPLICATION

Disponible également en français

BEFORE YOU SUBMIT AN APPLICATION

You must complete ALL mandatory (required) fields.

- The application will not be considered filed until all mandatory information has been provided.
- Applicants are encouraged to use the interactive (electronic) version of the Application Requesting Leave to Appeal form. The interactive version of the form automatically highlights the mandatory fields.

If the SST General Division summarily dismissed your previous appeal, use form: SST-ATATTAD to appeal to the Appeal Division.

1 - APPLICANT INFORMATION (PAGE 3)

Section 1 is to be completed using the Applicant's personal and contact information.

If applying on behalf of the Department of Human Resources and Skills Development Canada (HRSDC) or the Canada Employment Insurance Commission (CEIC), the following fields in Section 1, must be filled:

- ☐ Address
- ☐ City
- ☐ Province/Territory/State
- ☐ Postal/ZIP Code
- ☐ Telephone Number
- ☐ Fax Number
- ☐ Email Address

Otherwise, the following fields, in Section 1, must be filled:

- ☐ Applicant's Full Name
- ☐ Social Insurance or Business Number
- ☐ Address
- ☐ City
- ☐ Province/Territory/State
- ☐ Postal/ZIP Code
- ☐ Telephone Number
- ☐ Fax Number (if applicable)
- ☐ Email Address (if applicable)

2 - REPRESENTATIVE INFORMATION (PAGE 3)

Section 2 is to be completed when the Applicant is other than HRSDC or CEIC and is represented.

The following fields, in Section 2, must be filled:

- ☐ Fill the appropriate circle based on whether the Applicant has a Representative. Only fill one circle.

If the Applicant has a Representative (i.e. "I have a Representative" was filled), an Authorization to Disclose form must be submitted with this Application Requesting Leave to Appeal and the following fields must be filled:

- ☐ Representative's First Name
- ☐ Representative's Last Name
- ☐ Representative's Address
- ☐ City
- ☐ Province/Territory/State
- ☐ Postal/ZIP Code
- ☐ Telephone Number
- ☐ Fax Number (if applicable)
- ☐ Email Address (if applicable)

3 - DECISION UNDER APPEAL (PAGE 4)

Section 3 is to be completed using reasons based on the grounds in s. 58 of the *Department of Human Resources and Skills Development Act*.

58. (1) The only grounds of appeal are that

(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

If you need more space, continue on a separate sheet. Clearly indicate the question number on the separate sheet.

Note: Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success

The following fields, in Section 3, must be filled: **3(A), 3(C), and 3(D)**

- ☐ 3(A) Date you Received the Decision from Board of Referees, Review Tribunal, or SST General Division
- ☐ 3(B) Reason(s) for Late Appeal (if applicable – see "Decision Under Appeal, continued" on page 2 of instructions)
- ☐ 3(C) Request for Leave to Appeal
- ☐ 3(D) Reasons for the Appeal based on the grounds in s. 58(1) of the *Department of Human Resources and Skills Development Act*

3 - DECISION UNDER APPEAL (PAGE 4), continued

Your appeal must be received by the SST within 30 days of the date that you received your EI appeal decision or 90 days of the date that you received your CPP or OAS decision (including mail time).

If the appeal is being made late, you must complete Section 3(B), Reason(s) for Late Appeal, and address the following criteria:

- ☐ Reasonable explanation for the delay
- ☐ Continuing intent to appeal
- ☐ Existence of an arguable case
- ☐ Prejudice to HRSDC, CEIC or (other party if applicable)
- ☐ Any other reason

4 - DECLARATION AND SIGNATURE (PAGE 5)

If the *form was completed by the Applicant,* the following fields, in Section 4, must be filled:

- ☐ Signature of the Applicant (Must be signed by the Applicant to be accepted)
- ☐ Date Signed by the Applicant

If the *form was completed by a Witness*, the following fields, in Section 4, must be filled:

- ☐ Name of Witness
- ☐ Signature of the Witness
- ☐ Date Signed by Witness
- ☐ Witness' Address
- ☐ City
- ☐ Province/Territory/State
- ☐ Postal/ZIP Code
- ☐ Telephone Number

If the *Applicant is Represented* ("I have a Representative" was selected in Section 3), a signature from the Applicant is not required. The following fields, in Section 4, must be filled:

- ☐ Signature of the Representative
- ☐ Date Signed by Representative

ATTACHMENTS - The following documents must be attached to your printed Application Requesting Leave to Appeal form:

- ☐ A copy of the Board of Referees, Review Tribunal, or SST General Division decision that you are appealing.
- ☐ *If you have a representative*, attach an Authorization to Disclose signed by both yourself and your representative.

MAILING INSTRUCTIONS

- ☐ Mail this Application Requesting Leave to Appeal and attachments to:

Social Security Tribunal
PO Box 9812 STN T CSC
Ottawa, ON
K1G 6S3

CONTACT INFORMATION

Need help completing the forms? The SST hours of operation are 07:00 to 20:00 (EST).

Internet : www.canada.gc.ca/sst-tss
Telephone: 1-877-227-8577
TTY: 1-800-465-7735
E-Mail : info.sst-tss@canada.gc.ca
Fax: 1-855-814-4117

REMINDERS

As per s. 6 of the *Social Security Tribunal Regulations*: "A party must file with the Tribunal a notice of any change in their contact information without delay." Failure to do so could have a detrimental impact on your application.

Notify the SST if you authorize a Representative after submitting this Application.

Keep a copy of this Application Requesting Leave to Appeal and supporting documents for your records.

PROTECTION OF PERSONAL INFORMATION

The information you provide is collected under the authority of the *Department of Human Resources and Skills Development Act, Old Age Security Act, Employment Insurance Act,* and *Canada Pension Plan* to file an Application to Appeal.

The Social Insurance Number (SIN) is collected under the authority of the *Department of Human Resources and Skills Development Act*, and the *Social Security Tribunal Regulations* and in accordance with the Treasury Board Secretariat Directive on the SIN. The SIN will be used as a file identifier.

Participation is voluntary. Refusal to provide the specified personal information may prevent the appeal from being properly filed.

The information you provide will be shared with all the parties to the appeal including HRSDC and may also be shared with HRSDC for the purpose of reporting.

The information you provide may be used and/or disclosed for policy analysis, research and/or evaluation purposes. In order to conduct these activities, various sources of information under the custody and control of HRSDC may be linked. However, these additional uses and/or disclosures of your personal information will never result in an administrative decision being made about you.

Your personal information is administered in accordance with the *Department of Human Resources and Skills Development Act, Old Age Security Act, Employment Insurance Act, Canada Pension Plan* and the *Privacy Act.* You have the right to the protection of, and access to, your personal information. It will be retained in Personal Information Bank(s) under development. Instructions for obtaining this information are outlined in the government publication entitled Info Source, which is available at the following web site address: http://www.infosource.gc.ca.

Info Source may also be accessed on-line at any Service Canada Centre.

APPLICATION REQUESTING LEAVE TO APPEAL TO THE APPEAL DIVISION

If the SST General Division summarily dismissed your previous appeal, use form: SST-ATATTAD.

FOR OFFICE USE ONLY Date Stamp

1 - APPLICANT INFORMATION

Applicant's Full Name	**Social Insurance or Business Number** (if applicable)

CURRENT ADDRESS

Address (No., Street, Apt., R.R.)		City
Province / Territory / State	**Country**	**Postal / Zip Code**

ADDITIONAL CONTACT INFORMATION

Telephone Number	Other Telephone Number

Do you (the Applicant) have a fax number? If yes, you must provide it.

◯ No ◯ Yes (specify) Fax Number:

Do you (the Applicant) have an email address? If yes, you must provide it.

◯ No ◯ Yes (specify) Email Address

2 - REPRESENTATIVE INFORMATION

◯ I will represent myself ◯ I have a representative

If you answered "I have a representative", complete the fields below and the Authorization to Disclose form.

Representative's First Name	Representative's Last Name	Name of Company, Association, or Organization

Representative's Address (No., Street, Apt., R.R)	Suite / Unit Number

City	Province / Territory / State	Country
Postal / Zip Code	**Telephone Number**	**Other Telephone Number**

Does your Representative have a fax number? If yes, you must provide it.

◯ No ◯ Yes (specify) Fax Number:

Does your Representative have an email address? If yes, you must provide it.

◯ No ◯ Yes (specify) Email Address

3 - DECISION UNDER APPEAL

If you need more space, continue on a separate sheet. Clearly indicate the question number on the separate sheet.

A) APPEAL DECISION INFORMATION

Date you Received the Attached Decision Year Month Day	**If you are appealing more than 30 days after receiving an EI decision or 90 days after receiving a CPP or OAS decision,** please explain the reasons for the delay in 3 (B). If not skip to 3 (C)

B) REASON(S) FOR LATE APPEAL (if applicable - see instructions on page 2)

C) REASON(S) FOR LEAVE TO APPEAL - (see instructions on page 1)

Pursuant to s. 58(2) of the *Department of Human Resources and Skills Development Act*, I believe my Application Requesting Leave to Appeal to the Appeal Division has a reasonable chance for success because:

D) REASON(S) FOR APPEAL - (see instructions on page 1)

Based on the grounds in s. 58(1) of the *Department of Human Resources and Skills Development Act* I am appealing for the following reasons:

4- DECLARATION AND SIGNATURE

PART 1 -TO BE COMPLETED if you do not have a Representative

I hereby appeal the decision of the Review Tribunal, Board of Referees, or Social Security Tribunal and declare that, to the best of my knowledge and belief, all of the information in this Application Requesting Leave to Appeal form is true and complete.

Signature of the Applicant	Year Month Day

PART 2 -TO BE COMPLETED BY A WITNESS IF THE APPLICANT COULD NOT COMPLETE THE FORM

I have completed and have read the contents of this Application to Appeal form to the Applicant, who made his/her mark, under *Signature of the Applicant* in Part 1, in my presence.

Name of the Witness (print)	**Signature of the Witness**	Year Month Day

Witness' Address (No., Street, Apt., R.R)	City

Province / Territory / State	Country	Postal / Zip Code	Telephone Number

PART 3 -TO BE COMPLETED BY A REPRESENTATIVE OF THE APPLICANT if applicable

I hereby appeal the decision of the Review Tribunal, Board of Referees, or Social Security Tribunal on behalf of the Applicant and declare that to the best of my knowledge and belief, all of the information in this Application Requesting Leave to Appeal is true and complete.

Note: If you are representing an Applicant, complete and submit a signed Authorization to Disclose with this notice of appeal form. The Applicant must sign the Authorization to Disclose.

Signature of the Representative	Year Month Day

Welfare: Options for helping clients who receive lump sum payments: trusts, RDSPs & other strategies

*Prepared by Alison Ward, Barrister and Solicitor, Community Legal Assistance Society, October 1, 2013

When a client receives a lump sum of money, an advocate's mind may turn automatically to thinking about whether, or how, the client can set up a disability trust or open an Registered Disability Savings Plan ("RDSP").

While disability trusts and RDSPs are valuable tools for many clients, does your particular client need one, or does the welfare legislation offer them other ways to exempt assets that fit well with their priorities? And what if your client is not eligible to have a trust or RDSP? (e.g. they could not get the PWD designation, or qualify for the Disability Tax Credit). What options do those clients have for dealing with lump sums they receive? This handout explores those questions.

Lump sums under the Welfare legislation

Clients may receive lump sums of money from several sources[1]. 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;
- A family law settlement or court order for property division.

How the welfare legislation treats such lump sums will depend on the specific source of the lump sum, the amount of the lump sum, and the type of benefits

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[1] *Note that all clients of the Ministry of Social Development and Social Innovation ("MSDSI") **must** report their receipt of all such funds to MSDSI as soon as possible.* If they do not do so, they risk:

- being assessed overpayments;
- being assessed sanctions for non-reporting; and
- the possibility of criminal prosecution for fraud in relation to welfare benefits; and
- losing the opportunity to structure their situation so that their ongoing benefits from MSDSI are affected as little as possible.

your client receives (in other words, what your client's general asset exemption level is).

Where to start:

MSDSI considers money to be "income" in the month that it is received. In months after that, MSDSI considers the funds to be an "asset."

Where a client receives non-exempt income that is greater than their regular benefit rate, the client will ineligible for regular benefits for one month due to "income in excess."

Where a client receives money that the welfare legislation treats as non-exempt assets, the client will not be eligible for further welfare benefits until their non-exempt assets are below their general asset exemption level. A chart setting out MSDSI's general asset exemption levels is attached as **Appendix One**.

Therefore, if your client receives, or is about to receive, a lump sum of money, the questions an advocate should ask themselves are:

1. How does the welfare legislation treat the lump sum?

    a. Does the welfare legislation exempt the lump sum as income in the month it is received?

    b. Does the welfare legislation exempt the lump sum as an asset?

2. If the lump sum is not exempt, other than creating a trust or RDSP, what options does your client have for managing the excess asset under the welfare legislation?

1. How does the welfare legislation treat the lump sum?

a. Does the welfare legislation exempt the lump sum as income in the month it is received?

The answer to this question depends on the source that your client received (or will receive) the money from.

If the welfare legislation classifies your client's funds as non-exempt income, your client will be ineligible for one month due to income in excess. However, several sources of income are classified as exempt income. You will 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 (for income assistance and PPMB benefits); and in Schedule B to the EAPD Regulation (for PWD benefits);

- 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.

For example, let's say 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, and Martha will not lose her benefits for one month due to excess income. *Nonetheless, Martha must still report to MSDSI that she has received these funds.*

There are a few rules about income exemptions that I think are often forgotten:

- insurance paid as compensation for a destroyed asset is exempt income. This would include, for example, money from ICBC for a car that was written off. This exemption is contained in paragraph d) of the definition of "unearned income" in section 1 of the EA and EAPD Regulations.

- a "one time," or isolated, gift is not considered to be income. Rather MSDSI considers it to be an asset at the time it is received. So, 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 MSDSI. This 'one time" gift rule is based on a 1996 decision of the Supreme Court of BC in Morris v. BC (Income Assistance Tribunal). MDSI's policy on one-time gifts is in the Online Resource, at http://www.gov.bc.ca/meia/online_resource/verification_and_eligibility/assets/policy.html , under "loans, credit and gifts."

- Section 7(c) of the Schedule B to the EA and EAPD Regulations exempts, as unearned income, "a criminal injury compensation award **or other award**, except the amount that would cause the family unit's assets to exceed, at the time the award is received, the limit applicable under section 10 *[asset limits]* of this regulation." This section provides room to argue that an award, such as eviction compensation, or an ICBC settlement, should be considered exempt income if it is below the client's general asset exemption level.

Your client's eligibility for regular benefits after that one month depends on the welfare rules about assets.

b. Does the welfare legislation exempt the lump sum as an asset?

Again, MSDSI considers money to be "income" in the month that it is received. In months after that, MSDSI considers the funds to be an "asset." Assets are classified either as being "exempt," or "non-exempt."

To determine if the funds your client has are exempt assets, you need 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.

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 lose her benefits at all.

TIP: Spending Funds that are exempted by the welfare legislation: record keeping

If your client receives funds that are exempt as assets (like a residential schools settlement), your client 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. In doing this**, the client must keep detailed written records and receipts** so they can prove to MSDSI that any assets that are normally considered non-exempt, were purchased directly with the exempt funds.

For example, let's say some of the exempt funds are used to buy a second vehicle (which is normally considered a non-exempt asset). Unless the client can prove to MSDSI that they purchased the second vehicle using exempt funds from their residential schools settlement, MSDSI may view the second vehicle as an excess asset, and tell the person they are no longer eligible for benefits. Because of this, it may be a good idea for a client to keep exempt funds in a separate bank account, so they can more easily show what the exempt funds are 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."

2. What options does the client for managing a non-exempt (excess) asset under the welfare legislation?

First, let's debunk a common myth about this issue.

Myth: If a client tells an Employment and Assistance Worker ("EAW") that they have received a lump sum of money, it seems 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.

Fact: Any welfare recipient who receives a sum of money that is not exempt as an asset and that is over their general asset exemption limit, has at least three – and may have as many as five - options for managing their assets, in addition to simply living off the funds.

Options:

Options a client *may* have for managing non-exempt assets so as to minimize their impact on their welfare eligibility include **any or all of**:

1. **Using some or all of the funds to pay just debts** (**see tip on record keeping below)*

   "Just debts" means debts that they can prove (in writing) that they validly owe. For example, credit care debts, student loans, inter-personal loans documented by an IOU or promissory note, etc.

   A debt to a family member, or anyone else, which was not properly documented in writing, should NOT be paid. If a client cannot prove to MSDSI that they legally owed someone a debt, and they give money to that other person, it may appear to MSDSI that they are simply giving money away for no good reason, and MSDSI may allege that the person is disposing of assets for inadequate consideration, and is therefore not eligible for benefits (see below).

2. **Using some or all of the funds to buy exempt assets** (**see tip on record keeping below)

   There are 10 categories of exempt assets that someone receiving regular income assistance, PPMB or PWD benefits can purchase.

   Attached as **Appendix Two** is a list of those ten categories. They include prepaid funeral costs, an RESP, a life insurance policy with an uncashed value up to $1500, etc.

   A full list of exempt assets is found in section 11 of the EA Regulation (for income assistance and PPMB); and section 10 of the EAPD Regulation (for PWD benefits). Note that the rules about exempt assets are different for all forms of hardship benefits (regular hardship, PPPB or PWD hardship) See section 6 of Schedule D to the EA and EAPD Regulations.

You must review the complete list of relevant exempt assets with each client who is deciding how they should manage a lump sum that they have received. Some clients may find that their priorities for the money they have received fit well with the available asset exemptions. For example, a parent concerned with providing for a child's education may wish to purchase an RESP, and a house. Someone concerned with providing for themselves and their spouse may decide to pay for pre-paid funeral costs, and a life insurance policy with an uncashed value of up to $1500.

3. Keeping funds up to their general asset exemption level

For example, a single person on income assistance is eligible for benefits again once they have non-exempt assets of up to $1500 left. A chart setting out MSDSI's general asset exemption levels is attached as **Appendix One**.

4. **Putting some or all of the funds in a disability trust** (if they qualify to have a trust)

   Other sections of this panel presentation deal with this option.

5. **Putting some or all of the funds in an RDSP** (if they qualify for the Disability Tax Credit from the Canada Revenue Agency)

   Other sections of this panel presentation deal with this option.

Remember that any combination of these options can be used.

For example, a single person on income assistance who receives $14 000 (and who is not eligible to have a disability trust or RDSP) might choose to:

- use $5 000 of it to pay just debts;
- spend $5000 on an exempt asset such as a car or RESP;
- live off the funds for one month (spending $2 000).

They would then be eligible for income assistance again once their remaining non-exempt assets are $2000 or less. If they buy the car or RESP and pay their debts *in the same month that they receive the funds as income,* they would be ineligible for income assistance benefits for only one month due to income in excess. That is because, in the month following their receipt of the income, they would not have assets in excess of the allowed asset exemption levels. If they person bought the car or RESP and paid their debts in the month *after* they received the funds as income, they would be ineligible for income assistance benefits for two months (i.e. one month for income in excess, and one month for assets in excess).

Tips for clients who pay just debts or buy exempt assets:

Record Keeping

If a person chooses to pay just debts or purchase exempt assets, it is ***essential*** *that they keep clear and thorough records, and copies of all receipts and proofs of payment, so that they can show MSDSI how they spent the funds they received. If they pay debts, they must also be able to show MSDSI documents that prove to MSDSI that they in fact owed the money they paid.*

If a client does not keep careful records and cannot prove to MSDSI how they spent the funds, there is a strong likelihood that MSDSI will 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).*

Disposing of assets for inadequate consideration means giving away assets or selling them for less than they are worth. If MSDSI finds that a client disposed of assets either for inadequate consideration or to make themselves eligible for benefits, MSDSI may either declare the client ineligible for benefits, or reduce their benefits. This is where the EAW's initial $2 000/month "rule" comes from. Under section 31 of the EA Regulation, and section 27 of the EAPD Regulation, MSDSI may declare the client ineligible for benefits for one month for each $2 000 in assets that MSDSI thinks the client disposed of for inadequate consideration, or to reduce their assets.

This is where the importance of careful record keeping and documentation comes into play. If a client can provide documentation to prove that they used a lump sum to buy exempt assets and/or to pay justly owing debts that are equal in value to the lump sum, they have not disposed of assets at all. Instead, they have spent a sum of money to either acquire exempt assets equal in value to what they spent, or to erase a justly owed debt that they were otherwise liable for.

Appendix 1

MSDSI General Assets Limits (as of October 1, 2013)

Income Assistance and PPMB

Single person	$ 2000
Couples or one or two parent families	$ 4000

Disability Assistance**

Single person	$ 5000
Couples or one or two parent families	$10 000

** *The general asset exemption levels for disability assistance apply to:*

a) *Family units in which at least one person has the PWD designation*
b) *Family units in which someone is applying for the PWD designation (either has applied and is waiting for a decision, or MSDSI believes they have a genuine intention to apply for PWD); and*
c) *People residing in a private hospital, special care facility or in a hospitall for extended care (other than an alcohol or drug treatment centre).*

Appendix 2

What exempt assets can a client buy? (other than trusts and RDSPs)

This list applies to people who are receiving regular income assistance, PPMB or PWD benefits. The list is drawn from section 11 of the *EA Regulation*, and section 10 of the *EAPD Regulation*

This list does **not** apply to people receiving hardship benefits of any form (for rules applicable to hardship assistance, see section 6 of Schedule D to the *EA* and *EAPD Regulations*)

- clothing and necessary household equipment;
- a family unit's place of residence;
- a motor vehicle:

    a) If the person or their spouse has the **PWD designation**: there is no limit on the amount of equity in one motor vehicle if it is used for their day to day transportation needs.

    b) If the person receives **income assistance**, or they or their spouse have the **PPMB designation**: one motor vehicle with up to $10 000 of equity in it if it is used for day to day transportation needs. More than $10 000 in equity will be exempt if:

        (i) the motor vehicle has been significantly adapted to accommodate the disability of someone in the person's family unit;

        (ii) the motor vehicle is used to transport a disabled dependent child, or

        (iii) the motor vehicle is used to transport a disabled foster child, if the child is in the care of someone in the persons' family unit.

- prepaid funeral costs;
- a registered education savings plan ("RESP");[i]
- a life insurance policy with a cash surrender value of $1500 or less;
- business tools;
- seed required by a farmer for the next crop-year;
- essential equipment and supplies for farming and commercial fishing;
- fishing craft and fishing gear owned and used by a commercial fisher.

[i] Since 2007, there has been no annual limit for contributions to RESPs and the lifetime limit on the amounts that can be contributed to all RESPs for a beneficiary is $50,000. A person can set up an RESP for themselves, or for a dependent child or spouse in their family unit.

THE REGISTERED DISABILITY SAVINGS PLAN (RDSP) AND LUMP SUM PAYMENTS

What is the RDSP?

The Registered Disability Savings Plan was introduced by the federal government in 2008. It is intended as a long-term savings plan for people with disabilities and their families

What does it do?

With an RDSP you can:

- Make up to a maximum of $200,000 in contributions in a lifetime. You must make these contributions before you turn 60
- Qualify for the Canada Disability Savings **Grant** (CDSG) and get up to $3,500 annually. The CDSG is an income tested grant from the federal government: for the first $500 of contributions, you may receive $1,500 - and for next $1,000 in contributions, you receive $2,000. You can receive a lifetime maximum of $70,000 from this grant until you turn 50
- Qualify for the income-tested Canada Disability Savings **Bond** (CDSB). This is an annual amount of $1,000 up to a lifetime maximum of $20,000 for low-income individuals and families. Again, you cannot receive this bond after age 50. No contribution is required to receive the bond

Important considerations for persons on income and disability assistance

- All the funds in an RDSP are exempt as an asset
- Withdrawals from an RDSP are deemed to be exempt income
- The Ministry acknowledges the RDSP as a way to exempt lump-sum payments

Some Statistics

- About 15% of British Columbians have a disability: that is **700,000** people
- There are about **100,000** clients on provincial disability assistance
- About **13,500** RDSPs have been opened by British Columbians
- **3,685** Endowment 150 grants have been issued by the Vancouver Foundation (these grants are for income assistance recipients who have opened RDSPs)

QUESTION: So if the RDSP is so great, why do so few people have one?

Challenges:

You have to qualify for the Disability Tax Credit (DTC)
Most people on social assistance have never applied for the DTC because they do not have a taxable income. Although there are some similarities, the definition of disability used for the DTC is for most people with disabilities a higher test than the PWD definition of disability. MSDSI has estimated that about 30,000 people on PWD might qualify for the DTC. The government does not compensate doctors for completing the application.
Another consideration is that not only do RDSP holders have to qualify for the DTC but they may also be asked to re-qualify for the DTC at some point in the future. Furthermore, if RDSP holders are no longer eligible for the DTC, they will eventually have to collapse their RDSP

You have to be under the age of 60 to open an RDSP
Someone who is between the age of 50 and 59 is not eligible for the federal grants and bonds but they can open an RDSP

You have to make sure your bank sets up the RDSP in a way that works for you
Most financial institutions consider the RDSP a long-term investment for people with disabilities under 50 and have little or no knowledge about MSDSI income and asset rules. Some banks have imposed their own rules about withdrawals. It is recommended that clients speak to the bank about how they can access their funds before they open the RDSP

If you are under the age of 50, and you want to apply for the grants and bonds, there are penalties if you want to make withdrawals from the RDSP
If a client wants to take advantage of the federal grants and bonds (and why wouldn't they?), then this will affect their access to their money because of the RDSP rules about withdrawals. Starting in 2014, under the Proportional Repayment Rule, for every $1 withdrawn from the RDSP, $3 of any grants or bonds received in the past 10 years must be repaid to the federal government.
It is not mandatory to apply for the federal grants and bonds

Financial literacy and the realities of living on a low income
Many people with disabilities have not even thought of opening an RDSP, assuming they have even heard about it, because saving for the future is not on their radar – they are too busy trying to makes end meet on a day-to-day basis

THE ROLE OF THE ADVOCATE

So here's the situation: Your client has received a lump-sum payment – Is the RDSP a good choice for this person in order to exempt the amount?

Key Considerations:

1. **Speaking to your client about what they want to do with their money**
   If your client is intending to use their money to pay off debt or purchase an exempt asset such as a car, then it may not be a priority to look into ways to exempt the asset over the long term
2. **Review the ways in which they can exempt the lump sum if they want to save their money and continue to receive disability assistance.**
   Besides an RDSP, you can talk about Trusts, or having both an RDSP and a Trust
3. **Remind your client of their income reporting obligation.** If your client has decided to open an RDSP to exempt the lump-sum then they should advise (in writing) the Ministry of the plan when the income is reported

Specifically about RDSP

4. **Age:**
   If your client is over the age 60 then an RDSP is not an option

5. **DTC:**
   Ask your client if they already have the DTC. If they do then that is one less step they have to take

6. **Your client doesn't have the DTC**
   - Assessing the likelihood of whether your client will qualify for the DTC may re relatively easy for clients who are wheelchair users (good), legally blind (good), or have episodic depression (not good). However, there are a wide range of disabling conditions where it will be much more difficult to make a judgement.
   - It should be noted that one can qualify by having a marked restriction in a basic activity of daily living (vision, speaking, hearing, walking, elimination, feeding, dressing, mental functions necessary for everyday life) **or** the cumulative effects of significant restrictions in two or more basic activities of daily living
   - A lot will depend on whether the doctor completing the DTC certificate is supportive

7. **Time**
   It takes time to apply for the DTC – in some cases CRA has taken more than 6 months to make eligibility decisions on applications. If the Ministry has been

advised that the client is in the process of opening an RDSP, they can, initially exempt the lump-sum as an asset for a period of three months. After that, the Ministry can exempt the asset on a month-to-month basis if they believe the client is making reasonable efforts to establish an RDSP – Ministry policy states they can ask for documentation to "prove" they are making reasonable efforts

8. **Is there a PLAN B?**
   If the DTC application is turned down, then there might not be a whole lot of time to do something about it. One option may be to quickly put the money into a trust. An advocate should discuss with the client what they would want to do if they cannot qualify for the DTC at the beginning of the process

9. **Dealing with the banks**
   All the national banks and major credit unions offer RDSPs. Some financial institutions seem to have a better reputation when it comes to being customer friendly – some have staff that designated to deal with RDSPs. Clients should speak to their banks or credit unions about their RDSP policies and how they fit with their financial needs, especially those policies that pertain to withdrawals.

10. **Keep in mind that an RDSP may be more than just a way to exempt an asset**
    For clients under the age of 50 who want to apply for the federal grants and bonds, it is in their best interest to not make any withdrawals from the RDSP for many, many years if they want to reap the full benefit of the federal money. Some people may be willing to forego the grants and bonds because they want to have access to their money whenever they choose. We recommend that this issue be discussed with the client

11. **If all goes well, once the RDSP is set up, remind the client that he should notify the Ministry**

Prepared for the 2013 Provincial Training Conference by
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THE CHALLENGE –WHAT TO DO WITH EXCESS ASSETS

A person with disabilities receiving BC disability benefits (the "client" and the "program") has received or is about to receive money from an inheritance, personal injury settlement, or other source that will raise the client's assets above the maximum amount allowable under the program ($5,000 for a sole client with no dependent children; $10,000 if one or more dependents). So long as the client has "excess assets" he or she will lose disability benefits. What can be done?

The basic idea is to convert the "excess assets" into an asset that is exempt under program rules. The main categories of exempt assets are the following: funds in a trust, funds in Registered Disability Savings Plan ("RDSP"), a motor vehicle, equity in the client's residence, and clothing and household equipment. A complete list of exempt assets is found in section 10(1) of the E&A for PWD Regulation.

This handout looks at the uses of trusts to convert "excess assets" to an "exempt asset". A trust could be used to hold all of the excess assets or it could be used in conjunction with one or more other another exempt assets. For example a portion of the excess assets could be put into a trust, some could be put into an RDSP if the client is eligible for that program, some could be used to replace worn out clothing and household equipment and some could be used to top up the client's bank account towards the amount allowable under the program. While the main focus is on trusts, there are some comments near the end of the handout on the RDSP program and the interplay between RDSP's and trusts.

KEY DEFINITIONS

What is a trust?

In setting up a trust the client gives money to a "trustee" who agrees to hold the money and from time to time pay the money to for the benefit of the client according to the terms of the trust. There may be one trustee or several. The trustee could be a person, a financial institution or a combination and in some cases the client could be one of the trustees.

The Ministry online resource has information about trust at
http://www.gov.bc.ca/meia/online_resource/verification_and_eligibility/trusts/policy.html#5

Types of Trusts: Under the rules of the disability benefits program the important distinction is whether the trust is discretionary or non-discretionary.

Discretionary Trust. Trustee has absolute authority over payments of income & capital. The trustee may consult with the beneficiary but the trustee can say no to any requests from the beneficiary. The beneficiary has no legal entitlement to receive any benefits under the trust except what the trustee decides to provide. In setting up and putting funds into a discretionary trust the client gives up all control of those funds. The trust

must include a "gift over" that names who is to receive any balance in the trust on the death of the client (the residual beneficiary(ies). The estate of the client can't be named as the residual beneficiary.
The ministry does not consider a discretionary trust to be an asset of the beneficiary and there is no limit to the amount that can be held in a discretionary trust provided the beneficiary has no legal right to end the trust and get control of the trust assets by revoking, amending or collapsing the trust.

Non-discretionary trust: This is any trust that is not a discretionary trust. The beneficiary has some control over income or capital or can regain control of the assets. The beneficiary may be a co-trustee, or retain the right to amend, revoke or collapse the trust. A non-discretionary trust is an exempt asset so long as the cumulative capital contributions are less than $200,000.00. (Can apply for higher limit based on expected lifetime disability costs.)

Trust disbursements are payments from the trust to or for the benefit of the beneficiary (the client). They are treated as exempt income if they are used for "disability-related costs", to buy a residence for the client or to contribute to a Registered Education Savings Plan ("RESP") or Registered Disability Savings Plan ("RDSP") for the client.

"Disability-Related Costs"

In the definition of "disability-related costs (E&A for PWD Regulation, s. 12(1)) there is no limit to the amount a client can spend each year on following categories:

- devices or medical aids related to improving the person's health or well-being;
- caregiver services or other services related to the person's disability (The online policy says this term is interpreted broadly and includes many services including home-maker service, social network facilitators, employment services or supports, speech therapy, physiotherapy, occupational therapy, behavioural or communication therapy, applied behavior analysis counseling) ;
- education or training;
- renovations to the person's residence to accommodate the person's disability, and
- necessary maintenance for that residence.

There is a calendar year limit of $8,000/ year for any other item or service that promotes the person's independence (Regulation Sch B s. 7(2.1)) Independence expenses are not defined under the program. The policy manual say this term is interpreted broadly and is determined by the beneficiary or trustee, not ministry staff.

EXAMPLES OF TRUSTS

Non-discretionary trust in the form of a Tax Free Savings Account ("TFSA") with financial institution

TFSA's are a financial instrument delivered by financial institutions under federal rules to encourage savings. Starting in 2009, TFSA contribution room accumulates every year the person is 18 years or older, has a valid Canadian social insurance number and is resident in Canada. In 2013 the cumulative contribution room for a person eligible since 2009 is $25,500 if he or she hasn't made any contributions. This limit will likely increase by $5,500 to $31,000.00 in 2014.

TFSA's also satisfy the definition of a trust. The documentation used by financial institutions to set up a TFSA typically includes an account opening document signed by the client and the financial institution and an additional document usually called a Declaration of Trust by the financial institution. The account opening document includes language to the effect that the client and the financial institution agree to the terms of the Declaration of Trust. Together the account opening document and Declaration of Trust constitute a non-discretionary trust for the purposes of the disability benefit program.

When setting up a non-discretionary trust (TFSA) the client should also open a new personal account in the client's name solely for the purpose of receiving withdrawals from the TFSA. This account will help the client provide records that all of the withdrawals were used solely for disability-related costs. It's important that the balance in this account together with the balances of the client's other accounts (not including the TFSA) do not exceed the asset limit under the disability benefits program ($5,000).

A non-discretionary trust in the form of a TFSA's is an opportunity to use a mainstream financial instrument to achieve the objective of the disability benefits program to enable client to safeguard assets to use for disability-related costs now and in the future.

However, there can be a number of hurdles to overcome in using this type of trust: (1) staff in the financial institution may be concerned that opening the TFSA may cause the client to lose disability benefits. A letter to the financial institution by the advocate explaining that the ministry has accepted TFSA's as a non-discretionary trust and an exempt assets may be helpful. (2) Many ministry staff are unfamiliar with the use of a non-discretionary trust in the form of a TFSA and initially may advise the client that it doesn't qualify as a trust. However, ministry policy is that if a trust is claimed by a client a legal opinion must be sought by the ministry through its Legislation, Litigation and Appeals Branch ("LLAB") before making an eligibility decision. The LLAB has already accepted a number of non-discretionary trusts in the form of a TFSA as exempt assets. Other presenters in this session will provide additional information on assisting the client to open a non-discretionary trust in the form of a TFSA Other material detail use of the non-discretionary trust (TFSA).

Application: A non-discretionary trust (TFSA) is an attractive vehicle in a number of situations:
(1) (a) the amount of excess assets fits within the client's TFSA contribution room; (b) the client is able to look after his or her finances, deal with staff at the bank or credit union and the ministry. The client should also recognize that this is a newer strategy and be willing to deal with some administrative issues along the way.
(2) (a) the amount of excess assets is fits within the TFSA maximum; and (b) the client needs help with finances but has a trusted family member or friend who is able to provide that help. (However, in these circumstances, instead of using the non-discretionary trust (TFSA), the client should consider setting up a discretionary or non-discretionary trust with that friend or family member as trustee but choosing this option would involve additional legal costs.)

Discretionary or Non-Discretionary Trust with a family member or friend as trustee

In setting up these trusts the client and the intended trustee(s) need to work with a lawyer to draft the trust. The lawyer could help the client and the intended trustee(s) decide whether the trust should be discretionary or non-discretionary and what provision to include in the trust. There are legal costs in setting up such a trust so the client and trustee need to consider these costs in relation to the amount to be put into the trust.
Application: This kind of trust is useful in a number of situations:
(1) The amount of excess assets exceeds the client's TFSA contribution room; or
(2) the client and the intended trustee(s) prefer to pay the additional legal fees to set up a trust with the family member or friend as trustee because they think it will work better for the client. For example the client is unable or has no interest in to helping with administration of the trust or is very vulnerable or anxious.

Discretionary or non-Discretionary Trust with the Public Guardian and Trustee ("PGT") as trustee

The PGT is willing to act as trustee of a settlement, inheritance or other sum of money for a person on disability benefits if there is no suitable family member willing to act as trustee and the client understands why the trust is being set up and its basic elements.
There are costs in setting up such a trust including: the legal costs of a lawyer to draft the trust and take instructions from the client and the set up and annual fees of the PGT.
The trust could discretionary or non-discretionary but the PGT will only act as sole trustee.
Trusts with the PGT work best if the PGT makes regular payment to the client who is able to use those payments for disability-related costs on his or her own or with the help of a representative, case manager or service provider involved with the client.

Non-discretionary Trusts for clients who are "patients" under the Patients Property Act

Under the Patients Property Act, a person may become a patient under the Act in two ways: (1) the court declares on medical evidence that the person is incapable of managing his or her affairs, or person or both; or (2) the director of a mental health facility or psychiatric unit signs a certificate that the person is incapable of managing his or her affairs. In the first method, the court also appoints a guardian for the person, called a committee. In the second method the committee is the Public Guardian and Trustee.

The disability benefits program treats the assets of a patient held by a committee as a non-discretionary trust. Under the s. E&A for PWD Regulation, s. 12(5

If a person on disability benefits has a committee and receives additional funds from an inheritance or other source, it's not necessary to set up a trust providing the amounts come within the limits for a non-discretionary trust.

If a person who is unable to manage his or her affairs come into a sum of money and it is not possible for the client or his or her representative to set up a trust, consideration could be given to discussing with the PGT whether the PGT can take charge of the person affairs. However, a trust with the PGT would be preferable to the PGT acting as committee.

TRUSTS SET UP BY OTHERS FOR THE BENEFIT OF THE CLIENT

The above discussion looks at trusts set up by the client for the benefit of the client. Other persons, usually parents or other family members can also set up a trust for the benefit of their son/daughter or family member. There are two main categories depending on when the trust comes into existence: (1) testamentary trusts and inter vivos trusts.

A testamentary trust is set up in a person last will (and "testament"). The trust doesn't come into being until the death of the testator. The wills of parents of persons with disabilities often direct that the share of their estate for their son or daughter with a disability be held in a discretionary trust. This is called a testamentary discretionary trust.

When a client is a beneficiary of the estate of a person who has died, it's important to check whether the will already includes a trust for that person.

An inter vivos trust is a trust that is set up and comes into being during the lifetime of the Settlor. For example parents sometime set up a trust while they are alive to benefit their son or daughter with a disability. These are usually set up as a discretionary trust but they could also be set up as a non-discretionary trust.

RDSP's and TRUSTS

To open a RDSP a person must be less than 60 years of age and qualify for the federal disability tax credit. The criteria are similar but not the same as those for the BC PWD designation. (Key elements of the criteria for each program are summarized below.) Since the RDSP is a very attractive program it's worthwhile for a person with a PWD designation to look carefully at whether his or her circumstances also satisfy the federal tax credit criteria.

If a person has qualified for or expects to qualify for the federal disability tax credit and is under 60 years of age, the RDSP is a very attractive vehicle to receive any lump sum amounts the client may receive that would otherwise be excess assets. There are no costs is setting it up an RDSP and withdrawals are treated as exempt income and do not have to satisfy the definition of disability -related costs that applies to withdrawals from trusts.

However, there are some situations in which are person eligible to open an RDSP account may want to consider opening a trust as well.

(1)If the amount of excess assets is more that the person's RDSP contribution room; or

(2)The person wants to begin using the funds and also wants to take advantage of the grant and bond aspect of the RDSP program. Withdrawing RDSP funds triggers repayment of grant and bond amount received in the previous 10 years. Instead of withdrawing RDSP funds the person could put some of the initial funds into a trust and withdraw funds from the trust for disability-related costs while accruing bond and grant credit in his/her RDSP. However whether this was a worthwhile strategy would depend on whether the person's age, the amount of money involved justified .

If one qualifies under both criteria it's possible to have both an RDSP and a trust.

RDSP - disability tax credit criteria: You are: (a) markedly restricted in a single activity of daily living; (b) significantly restricted in 2 or more activities of daily living including vision; (c) blind; or (d) receiving life giving therapy;

Markedly restricted – all or substantially all the time, you are unable (or it takes you an inordinate amount of time) to perform one or more of the basic activities of daily living even with therapy and the use of appropriate devices and medication.

Significantly restricted: you don't meet the criteria for markedly restricted but your ability to perform an activity of daily living is still substantially restricted all or substantially all of the time; these significant restrictions exist together or substantially all of the time and the cumulative effect is equivalent to being markedly restricted in a single basic activity.

Activities of daily living: speaking, feeding, hearing, dressing, walking, bowel or bladder function, and mental functions necessary for everyday life.

Mental functions necessary for everyday life include: (a) adaptive functioning (for example, abilities related to self-care, health and safety, abilities to initiate and respond to social interaction and common, simple transactions); (b) memory (for example, the ability to remember simple instructions, basic personal information such as name and address ,or material of importance and interest); and (c) problem-solving, goal-setting, and judgement, taken together (for example, the ability to solve problems, set and keep goals, and make appropriate decisions and judgements.

BC PWD criteria: key feature: the person has a severe mental or physical impairment that directly and significantly restricts the person's ability to perform daily living activities to the extent that the person requires help with those activities; (help includes an assistive device or significant help or supervision from another person)

"daily living activities" , (a)… means the following activities: (i) prepare own meals;(ii) manage personal finances;(iii) shop for personal needs; (iv) use public or personal transportation facilities;(v) perform housework to maintain the person's place of residence in acceptable sanitary condition; (vi) move about indoors and outdoors; (vii) perform personal hygiene and self care; (viii) manage personal medication, and (b) in relation to a person who has a severe mental impairment, includes the following activities: (i) make decisions about personal activities, care or finances; (ii) relate to, communicate or interact with others effectively (s 2(1) of the regulation)

FURTHER DISCUSSION

CASE Study (1) Mary Smith is 45 years old. She has a PWD designation because of her schizophrenia which she controls with medication. She lives in an apartment on her own and banks & shops on her own. She is estranged from her family. She is going to receive $18,000 from an ICBC settlement for injuries she suffered when hit by a car crossing a street. She wants to use the money to move to a better place for a few years.

Questions

In assessing whether a non-discretionary trust (TFSA) is a possibility, what information do you think is relevant?

How would increasing the Settlement amount to $40,000 affect your analysis of available options?

What factors are relevant in assessing whether a discretionary or non-discretionary trust with a family member or friend is a possibility?

CASE Study (2) Change the circumstances so that Mary is unable to deal with financial institutions on her own; her record keeping is poor; she lives with her sister who helps her with banking and organizing her life

Is a non-discretionary trust (TFSA) still a possibility?

Is a discretionary or non-discretionary trust with her sister as trustee or co-trustee a possibility?

If she lived on her own in these circumstances without the support or the sister what options may be available?

Advocacy Step-by-Step Instruction: Establishing a Non-Discretionary Trust through a Tax-Free Savings Account

October 2013

Prepared by Stephen Portman,
TAPS Advocate

Introduction:

Assisting a client to establish a TFSA Trust is one way that advocates can help clients to improve their social and financial security. Clients designated as a person with disability (PWD) or clients intending to apply for designation, face strict cash asset levels to maintain eligibility for disability support payments. Without the benefit of a financial vehicle to exempt cash assets many in need are required to deplete their financial resources to a significant degree resulting in hardship to the individual and their families. The following step-by-step instruction guide seeks to provide advocates with the tools that they need to help clients to establish non-discretionary trusts through mainstream financial institutions that offer TFSA accounts that meet the legal definition of a trust for the purposes of exempting cash assets.

Before advocates assist a client to establish a TFSA Trust it is important to understand what exactly a TFSA Trust is from the perspective of the Ministry of Social Development and Social Innovation (MSDSI). In order to effectively assist clients advocates should familiarize themselves with the applicable legislation and ministry policy that relates to disability trusts (See Appendix 1 and 2). MSDSI recognizes a TFSA Trust as a non-discretionary trust for the purposes of Section 12 of the *Employment and Assistance for Persons with Disabilities Regulation.* Assets held in a non-discretionary trust are exempt from determining ongoing eligibility for support payments. Disbursements or expenditures from the TFSA trust are also exempt as long as the funds are used for disability related costs.

In assisting clients through the process of establishing a TFSA Trust there are many hurdles that the client and advocate may face. This includes financial institution staff being concerned that their actions will result in loss of disability benefits to the client and/or ministry staff misinforming clients on the legal standing of a TFSA Account as a trust. In developing the following step-by-step instruction guide I have attempted to mitigate many of the challenges that may arise. It is important for advocates to apply sound judgement in assisting clients to establish TFSA trusts. Every client and circumstance is different and may require different strategies and solutions. Advocates should consult legal supervision whenever they are unsure in their course of action on behalf of a client.

Do not rush into helping a client to determine what the best method is for exempting a lump sum. Advocates and clients alike will often need time to reflect on the circumstances surrounding the receipt of a lump sum in order to make an informed decision.

Summary of the 4 steps

1. **The interview** – Establish whether or not a TFSA Trust is the right option for the client and provide client with information regarding responsibilities
2. **At the Bank** - Instruction on how the client and advocate should approach the financial institution of choice
3. **Follow Up Appointment(s)** – Review of the TFSA Trust documentation to ensure the correct account and information is being used
4. **Disclosure to MSDSI** – Instruction on submission of the TFSA Trust to the ministry

Part 1 - Case Study: Sigurd Larson gets an Inheritance

Sigurd Larsen is designated as a person with disabilities (PWD). As a single PWD he is only allowed to have a maximum of $5000.00 in cash assets and continue to receive monthly disability support. On September 10, 2013, he received a check for $20, 000 as an inheritance that was willed to him by his dearly departed Aunt Gertrude. Sigurd may lose his monthly disability support payments unless he can find a way to exempt a portion of this inheritance. He has decided to seek help from an advocate to deal with his problem. He called Super Awesome Advocacy Society (SAAS) and spoke to an advocate named Sally Turnip. Sally set up an appointment for an interview with Sigurd.

Step 1 - The Interview:

This step is the most involved and time consuming. Advocates who take the time to complete a thorough initial interview will be sure to save time and effort in the long run. In the initial interview with a client, for the purposes of establishing a TFSA trust, there are two objectives that will need to be accomplished: 1) Determine if a TFSA trust is the right decision for the client to exempt their asset, 2) Advise the client of the process for establishing the TFSA trust and the ministry policy that will impact them.

Objective 1: Determining if a TFSA Trust is right for the client

When contacted by a client who either has or will be receiving a lump sum that places them outside of the asset exemption level for PWD support, advocates will need to set up an appointment. At this appointment the advocate will need to get the following information from the client to determine if a TFSA Trust is the right vehicle for exempting a lump sum. The following are key questions that will help the advocate to get this information and make a determination along with the client on what to do.

1. Is the client designated PWD or intending to apply?

   In order to exempt assets through a TFSA Trust and maintain disability support payments the client must be designated as PWD.

   Exception: If a client is intending to apply for PWD the ministry will exempt assets above the PWD asset exemption limit while the client is in the process of applying for designation if the client demonstrates that they are intending to complete the PWD

application and establish either a trust or an RDSP as an exemption vehicle, (See ministry policy on asset limits for persons applying for PWD designation, Appendix 2).

2. How much money will the client be receiving?

   The maximum contribution limit for a TFSA Trust account in 2013 is $25, 500. If the client has not made prior contributions to a TFSA and the amount that they will be receiving is less than $25, 500 then a TFSA Trust account may be a good option. If they will be receiving funds in excess of the maximum TFSA contribution limit then they should consider speaking to a lawyer to establish a trust or consider an RDSP as an alternative.

3. What does the client intend to use the money for?

   The client's intent for the money that they have or will receive is an important component of determining whether or not a TFSA Trust is the right option for asset exemption. Funds from a TFSA Trust account must be used for disability related costs or items that go toward promoting the clients independence. If the client does not intend to use the money for these purposes then a trust may not be a good option. Advocates should take this opportunity to make a rough list of the client's expenses, eg. shelter costs, utilities, phone, car costs. The client needs to be advised that disbursements from a disability trust are not intended for smaller day-to-day purchases but are instead intended for larger expenses that are easily tracked, eg. shelter costs above the shelter allowance, Internet expenses.

4. Is the client capable of sufficiently managing their own financial affairs?

   If the client is unable to independently manage and maintain their own bank account, keep up to date records of expenditures, and/or manage a basic budget, then a TFSA Trust may not be the right choice for them. MSDSI conducts regular annual reviews of client trust accounts to ensure that expenditures are made for the purposes of disability related costs. The client will need to demonstrate a concise record of all expenditures while under review. If the client is reasonably able to independently manage their own financial affairs or has access to some support from friends and family to help manage their finances, then a TFSA Trust account may be a good option.

5. Does the client have access to establishing an account at either a *Vancity* or a *Royal Bank of Canada* (RBC) Branch?

   At the present time, Vancity and RBC are the only financial institutions that carry a declaration of trust (See Appendix 6 and 7) that establishes a TFSA Trust account that has been approved as a non-discretionary trust by MSDSI. If your client does not have access to either institution due to geographical location or other reasons, i.e. insufficient ID, then a TFSA account may not be a good option. It is possible that other financial institutions, not listed in this presentation, offer a TFSA governed by a declaration of

trust that could be approved as a non-discretionary trust by MSDSI. Advocates should seek a legal opinion if choosing to use a financial institution other than Vancity or RBC.

Note: It is fundamentally important to ensure that the client makes the decision to use a TFSA Trust account on their own. Advocates should present the various options that are available to clients for asset exemption and assist the client in pursuing the course of action that the client chooses.

Part 2 - Case Study: Sigurd decides to use a TFSA Trust Account

Sigurd is a 54 year old male who has chronic back pain caused by scoliosis. In addition, he suffers from severe dysthymia. He has always independently managed his own bank account and is proud of the fact that he is able to manage his finances and survive on his budget of $906.42 per month. He currently has a bank account in good standing at Scotia Bank Sigurd's monthly rent is $750.00 per month and he would like to use some of this inheritance so he can offset his shelter costs. There is a Vancity down the block from where he lives and he is very confident that he would be able to independently open and manage an account there. Sigurd would like to use the money to help him pay his shelter costs above the $375.00 that he receives and one day he would like to purchase a car for basic transportation.

Objective 2: Know and advise the client of the process for establishing the TFSA trust and the ministry policy around asset exemption

All clients who decide to establish a TFSA Trust account should be advised of the following information to assist the client in avoiding entanglements with MSDSI and to allow them to benefit from the use of their assets.

The process:

1. Disclosing receipt of income to MSDSI

   Ministry clients are required to disclose receipt of all income to MSDSI for the month within which it is received. For clients intending to establish a TFSA Trust account this will typically result in a one month period of ineligibility for PWD support. During this period the client must ensure that they budget accordingly and take all necessary steps required to manage their financial responsibilities independent of MSDSI. Clients should be able to pay for all personal expenses from funds received in the lump sum.

   Advocates should advise clients to disclose their income to MSDSI by the 5th day of the month following receipt of income. If the client is capable, they need to inform the ministry as soon as possible that they are intending to establish a trust to exempt the funds. Advocates may choose to forward a letter to the ministry advising MSDSI Staff of the client's intent to establish a non-discretionary trust for the purposes of asset exemption (see Appendix 3).

   If an asset passes directly into a trust or RDSP and the client never receives the asset, then the asset is not considered income in the month received. In order to avoid MSDSI

treating the asset as income the client must demonstrate that they did not have direct control over the funds at any point in the transfer. Where a client is establishing a TFSA Trust there is rarely an occasion where they do not have direct control over the funds. This typically results in a one month period of ineligibility for the month within which funds are received.

2. 3 Month Asset Exemption Period and Extensions

The ministry will exempt funds received in a lump sum for a period of 3 months to allow the client time to establish a trust for the purpose of asset exemption. In order to receive this exemption the client must disclose their income to MSDSI and advise the ministry of their intent to establish a trust (see above). The exemption period begins in the month that the funds are received. Advocates should record the date that the 3 month period begins and take steps to ensure that all funds are transferred into the TFSA Trust account and that the account is disclosed to MSDSI before the 3 months are up. MSDSI will extend the 3 months period on a month-by-month basis in cases where the client can provide documentation proving that they are making reasonable efforts to establish a trust and that the delay is beyond their control. A letter from the clients advocate will usually suffice. The client must provide documentation each month for which an extension is requested (See ministry policy on Transferring assets or income into a trust, Appendix 2).

Note: In most cases a TFSA Trust can be established within a relatively short period and extensions are rarely required.

3. Using the TFSA Trust account

Advocates must advise the client of their responsibilities in using the TFSA Trust once it is established. Clients are responsible for making sure that all of the disbursements from the TFSA trust account are used for disability related costs (See glossary for definition of disability related costs). Clients are also responsible for maintaining a record of all disbursements form the account. This can be easily managed by the client opening a second checking account at the financial institution where they establish the TFSA. The client can then transfer all funds from the TFSA Account to the checking account and make all purchases with a debit card to produce a bank record of all transactions (See step 2, "At the Bank"). Clients must ensure that they do not carry a cash balance in their other account(s) that exceeds their allowable asset level.

The best way to ensure that the client understands their trust and how they are allowed to spend funds from the trust is to provide them with a copy of, *Trusts for People Receiving the Persons with Disabilities (PWD) Benefit*, produced by the BC Coalition of Persons with Disabilities (See Appendix 2). In most cases it is advisable to read this document over with the client to ensure that they understand.

Note: Clients are allowed to spend up to $8000.00 per calendar year on items that go toward promoting the persons independence. Independence expenses are not defined

and are therefore at the discretion of the beneficiary and not ministry staff. This can often be a challenging area for clients who are establishing a trust.

End of the Interview

Once it has been determined by both the client and the advocate that a TFSA Trust is the appropriate vehicle for asset exemption and the client understands their responsibilities and how to use the trust it is time to go about establishing it. In order to do this there are some basic preliminary steps to go through before the client leaves the initial interview to set up the Account. The client must be prepared to attend the financial institution and have a clear picture of how to disclose their income to MSDSI.

1. Preparing to go to the Bank

   Once the client determines that they are going to establish a TFSA Trust Account they will then need to determine which financial institution they wish to deal with. If the client cannot or chooses not to use either Vancity or RBC as the financial institution to establish the trust, then the client will need to seek a legal opinion as to whether or not the TFSA account offered by their financial institution of choice will be accepted as a legal trust by MSDSI. Provided the client wishes to use either Vancity or RBC, the advocate should provide the following:

   - Advocate Letter addressed to the financial institution which outlines the clients intent and identifies the specific TFSA account to be established (Appendix 4)
   - A copy of the appropriate Declaration of Trust (Appendix 6 or 7)
   - **Optional** – A signed Release of Information if the client wishes to have the advocate communicate with the institution on their behalf

   It is also a good idea to offer clients access to online resources that provide information on disability trusts and the RDSP:

   - *How to Create a Trust* - http://www.vcpgv.org/uploads/bu/ad/buadXsi4vqyNbPpJTe_X-g/trust.pdf
   - *Trusts for People Receiving the Persons with Disabilities (PWD) Benefit* - http://www.bccpd.bc.ca/docs/hs8.pdf
   - *The RDSP and People Receiving Social Assistance* - *http://www.bccpd.bc.ca/docs/rdspguide2012.pdf*
   - *Disability Assistance and Trusts* - *http://www.eia.gov.bc.ca/publicat/pdf/DisabilitiesTrusts.pdf*

2. Disclosing Income and Intent to MSDSI

   Depending on the client's level of familiarity and comfort with MSDSI Advocates may determine different approaches to assisting the client with disclosure of income. If the client is capable, advise them to disclose the income on their monthly stub and to

contact MSDSI staff to advise of the intent to establish a non-discretionary trust. If the client is not as capable the advocate should gain consent from the client and forward a letter of intent to the MSDSI on the clients behalf.

Remember: Keep record the date the client disclosed of income and informed MSDSI of intent to establish non-discretionary trust.

Last Thing:

Before completion of the initial interview the advocate should book a follow up appointment with the client (See Step 3 - Follow up appointment).

Part 3 - Case Study: Sigurd plans to establish a TFSA and inform the ministry

Sigurd received $20, 000 as an inheritance from the estate of his deceased Aunt Gertrude on September 10, 2013. Sally has advised him to indicate this income on his income assistance stub and deliver it to MSDSI by October 5, 2013. Sally is going to fax a letter to MSDSI to advise the office that Sigurd intends to place the money into a non-discretionary trust (see Appendix 3). Sally further advised him that he will not receive disability support payments for the month of November, paid out on October 23, 2013. This means that Sigurd will need to ensure that he takes the necessary steps to personally pay his rent, bills, and other expenses as he will not receive his full disability support again until, November 20, 2013. Sigurd has to write a check to his landlord, BC Hydro and purchase all of his groceries with the money he received from Aunt Gertrude until November when he will once again be in receipt of disability support.

Sally advised Sigurd on the process for establishing the TFSA Trust account and gave him a helpful fact sheet to review so that he will understand how to manage disbursements from his account (see Appendix 8). He also has been given a letter to bring with him to Vancity to help in setting up the account (see Appendix 4). Sigurd is ready to go to the bank.

STEP 2 – At the Bank

This step is a quick and generally easy process. The client attends the financial institution of their choice and meets with an account manager. At this point the client will provide the account manager with the advocate letter (Appendix 3) which explains the client's purpose for being there. In most cases the account manager will provide the client with the TFSA account application form and corresponding declaration of trust and advise the client to contact the branch to establish the account after they have met with their advocate to review the forms.

If the account manager does not provide the application and declaration to the client the Advocate may need to provide some assistance. In some cases, financial professionals do not understand provincial disability assistance programs and may feel insecure in assisting the client. If this occurs advocates need merely contact the branch and discuss the client's intention and needs. After the financial institution staff are informed that the client is merely going to establish a TFSA they are generally all too happy to assist.

Once the client has the TFSA Trust Application and corresponding Deceleration of Trut then they will then be ready for the next step.

Establishing two Separate Accounts:

It is advisable that clients establish two separate accounts with their financial institution of choice: 1. TFSA trust account, 2. Checking Account. The client can then make all disbursements from the TFSA trust account directly to the checking account. The client will then use a debit card for all purchases resulting in an automatic bank record of all expenditures. When clients have their trust accounts reviewed by MSDSI they can simply request a bank record and provide this to the ministry. This strategy removes much of the stress and uncertainty that clients may experience throughout the MSDSI review. MSDSI Staff typically review all trusts on an annual basis.

Part 4 - Case Study: Sigurd goes to the Bank

Sigurd called Vancity and made an appointment to meet with an account manager named Jeff Suit. When Sigurd arrived at Vancity, Jeff told him that he was concerned that a TFSA Account may not qualify as a trust and that Sigurd might be cut off of benefits from the ministry as his financial assets are too high to continue to receive this support. Sigurd gave Jeff the letter from Sally. Jeff read the letter but had some more questions and so decided to call Sigurd's advocate. After a quick conversation with Sally, Jeff was reassured that Sigurd could open the TFSA Account and still continue to receive benefits. Jeff gave Sigurd a copy of the TFSA Account application and Declaration of Trust (see Appendix 6) that Sally had indicated would be necessary. Sigurd left Vancity and went straight to SAAS to review the documents with Sally.

During the Phone call between Sally and Jeff, Sally mentioned that she serves many clients like Sigurd and that she would like to have someone in the local Vancity branch that she could communicate with in future when clients were in need of establishing similar accounts. Jeff gave Sally his email address and told her that she could contact him any time.

STEP 3 – The Follow-Up Appointment(s)

The purpose of the follow-up appointment(s) is to ensure that the client is opening or has opened the correct account governed by the correct Declaration of Trust. Depending on the advocates familiarity with the local financial institution and with setting up trusts in general there may only be need for one follow up appointment.

At the follow-up appointment(s) the advocate will review the TFSA Account application form and Declaration of Trust that the financial institution provided to the client. If these documents are consistent with the deceleration of trust found in Appendix 6 or 7 then the client is ready to establish the account. Advise the client to return to the financial institution to establish the account and deposit their funds. Once the account is established the client must request and be provided with copies of a *statement of account*, the complete *TFSA Account application, and the Declaration of trust*. These are the documents that must be submitted to MSDSI. The client then returns for a second follow up appointment to provide the forms to the advocate.

The follow up appointment is the ideal time to answer any additional questions that the client may have. This is a good time for advocates to review with clients how trust disbursements work and what the client will need to do in the case that their trust is reviewed by MSDSI.

Part 5 – Case Study: The First Follow up at SAAS

At the follow up appointment Sally asked Sigurd if he had submitted his income assistance stub to the ministry. Sigurd had done this and told Sally that he was making plans to pay for his rent and bills over the next month. Sally then reviewed the documents and noted that they were the correct document to establish the account. Sally then advised Sigurd to return to Vancity to meet with Jeff to establish the account.

Sally reminded Sigurd that he would need to open two accounts; 1. A TFSA Account with the documents that they had reviewed and 2) a Checking account so that Sigurd could manage the disbursements from his TFSA. Sally reminded Sigurd that he would need to bring her a copy of the signed TFSA Application, the Declaration of Trust and a Statement of Accounts so that she could forward these documents to the ministry. Sigurd thanked Sally and returned to Vancity the next day.

At Vancity Jeff established both accounts for Sigurd and gave him copies of the completed documents. Jeff thanked Sigurd for banking with Vancity and told him to give him a call if he needed anything in the future.

Part 6 – Case Study: The Second Follow Up at SAAS

This appointment was quick. Sally reviewed all of the documents with Sigurd. Sally noted that the Statement of Accounts showed that Sigurd had deposited $20, 000 into the TFSA account governed by the correct Deceleration of Trust. Sally further noted that Sigurd had taken 1, 000 out of the TFSA Account and placed it in his new checking account. Sigurd told Sally that he was going to use this money to pay for his day-to-day expenses over the next month. Sally advised Sigurd again that the funds from the trust are to be spent on disability related costs and that Sigurd should make all of his purchases from the checking account with a debit card to make sure that he has a clear and concise record of all expenditures.

Sally told Sigurd that she would fax the completed Trust documents to the ministry and that Sigurd should contact her when he receives a letter from the ministry with respect to his trust. Sigurd thanked Sally, breathed a sigh of relief, and left the SAAS office.

Sally thought to herself that she might not need this second appointment for future clients. Now that she knows Jeff and can communicate directly with him, she can be reasonably assured that her clients will receive the right documentation when they are setting up their TFSA accounts at the local Vancity branch.

STEP 4 – Disclosing the TFSA Trust to the Ministry

When the client has established the TFSA account and deposited the money into the account the accompanying documentation must be disclosed to MSDSI to be reviewed by the Legislation, Litigation and Appeals Branch (LLAB) prior to receiving final approval as a non-discretionary trust.

Once ministry staff are provided with the TFSA trust disclosure (see Appendix 5) by the advocate on behalf of the client, they then complete a Trust Query Form, attach it to the trust documents and forward the package along to LLAB for final approval. This process can take many months for MSDSI to complete.

It is necessary to send the completed documents directly to the client's local MSDSI office and not to LLAB. If the local office is not informed of the pending trust approval and LLAB takes longer then the three month exemption period to approve the trust then the client may be found ineligible for disability support payments. This error can be corrected but will cause unnecessary hardship on the client.

The disclosure can be delivered to the local MSDSI office by in person delivery, post, or fax.

Documents that must be disclosed:

1. Advocate disclosure letter
2. Trust Account Application
3. Statement of Accounts - indicating balances for both the TFSA Trust Account and the checking account if applicable
4. Declaration of Trust
5. Release of Information (Optional)

Once LLAB has approved the TFSA trust they will mail a letter to the client that explains that the TFSA Trust account is considered to be a non-discretionary trust (see Appendix 9). Advocates should advise clients to contact them when this letter is received to close the file and to tie up an loose ends.

Part 7 – Case Study: Sally sends the documents to the ministry

After Sigurd left the office Sally prepared a letter of disclosure to the ministry explaining that the TFSA Account meets the ministry definition of a non-discretionary trust (see Appendix 5).Sally then took copies of all the documentation and prepared a fax cover letter that outlined all of the attachments; 1) Advocate Letter, 2) TFSA Account Application, 3) Declaration of Trust, 4) Statement of Accounts, 5) Release of information. Sally faxed the documents to the local ministry office and kept a copy of the fax confirmation letter along with all of the other documents in Sigurd's file.

Part 8 – Case Study: A job well done

Two months after Sally last saw Sigurd she received a small box of chocolates and an envelope in her mail box at SAAS. When she opened the envelope she saw two things, a card from

Sigurd thanking her for all of her efforts and a letter from the ministry that approved Sigurd's TFSA Account as a non-discretionary trust (see Appendix 9). This truly was a job well done.

Advocate Questions:

1. **What would happen if Sigurd did not report his income to the ministry?**
2. **What happens if the ministry does not approve the trust?**
3. **What happens if frontline ministry staff, tell Sigurd that a TFSA is not a Trust?**
4. **What if there is no local Vancity or RBC Branch?**
5. **Do advocates need to forward a Statement of Accounts to the ministry?**
6. **What happens if the client who wishes to establish a trust receives $35, 000 instead of $20, 000?**

Trust Glossary:

Assets: the financial resources a person or trust has, including cash, bonds, securities, property and/or items of value (i.e. a car)

Asset Limit: the maximum amount of assets a person receiving PWD benefits can have (Cash assets of $5000.00 for a single recipient or $10, 000 for a family unit of 2).

Beneficiary: The person who benefits from the assets in the trust. Can be the client or holder of an approved TFSA Trust Account. The beneficiary is responsible for keeping a record of all disbursements from a non-discretionary trust.

Declaration of Trust: Document that sets out the legal structure of the trust (also referred to as a trust agreement).

Disbursements: payments form a trust.

Discretionary Trust: a trust where the beneficiary does not have control over the money in the trust. The trustees make all of the spending decisions. No limit to the amount of money that can be held in a discretionary trust provided the beneficiary has no legal right to end the trust and gain control of the assets.

Disability Related Costs: disability related costs are considered as exempt for the purposes of calculating disability support amounts. All disbursements from a trust must be used for a disability related cost as defined under s. 12 of the EAPWD Reg or used to promote the persons independence.*

In the definition of "disability-related costs there is no limit to the amount that can be spend each year on following categories:

- devices or medical aids related to improving the person's health or well-being;
- caregiver services or other services related to the person's disability (The online policy says this term is interpreted broadly and includes many services including home-maker service, social network facilitators, employment services or supports, speech therapy, physiotherapy, occupational therapy, behavioural or communication therapy, applied behaviour analysis counselling) ;
- education or training;
- renovations to the person's residence to accommodate the person's disability, and
- necessary maintenance for that residence.

*There is a calendar year limit of $8,000/ year for any other item or service that promotes the person's independence (Regulation Sch B s. 7(2.1)) Independence expenses are not defined under the program. The policy manual say this term is interpreted broadly and is determined by the beneficiary or trustee, not ministry staff.

***Inter vivos* Trust:** a trust fund that comes into effect during the lifetime of the person who established the trust. It is also known as a living trust.

Non-discretionary trust: a trust in which the beneficiary of the trust has some control over income or capital or can regain control of the assets. MSDSI will exempt assets held in a non-discretionary trust so long as the total assets in the trust are less than $200, 000. MSDSI may approve assets above this level if the beneficiary demonstrates that they have life time disability related costs above $200, 000.

Settlor: The persons who establishes a trust. The settlor can be the beneficiary.

Tax Free Savings Account (TFSA): A Tax-Free Savings Account (TFSA) is a flexible, registered, general-purpose savings vehicle that allows Canadians to earn tax-free investment income to more easily meet lifetime savings needs.

Testamentary Trust: a trust that is set up, often within a will, which takes effect upon the death of the settlor

TFSA Trust : technically the same as a TFSA. A form of non-discretionary trust where the financial institution acts as the trustee and the account holder acts as the beneficiary and settlor. Must carry a declaration of trust or trust agreement that establishes the account to meets the legal definition of a trust. As of 2013, carries a maximum cumulative contribution limit of $25, 500 for a person eligible for a TFSA as of 2009.This limit will likely increase by $5, 500 to $31, 000 in 2014.

Trust: a legally binding agreement in which a settlor transfers legal ownership of assets to a trustee to manage and administer for the benefit of the beneficiary.

Trustee: The person or company that manages the trust according to written instruction contained in the trust agreement.

APPENDIX:

- APPENDIX 1 – EAPWD Regulations pertaining to disability trusts
- APPENDIX 2 - MSDSI Policy Guide: Trusts
- APPENDIX 3 – Intent to Establish a Trust (Template Letter)
- APPENDIX 4 – Introduction Letter to Financial Institution (Template Letter)
- APPENDIX 5 – MSDSI Trust Disclosure Letter (Template Letter)
- APPENDIX 6 – Vancity TFSA Application and Trust Agreement
- APPENDIX 7 – RBC TFSA Application and Trust Agreement
- APPENDIX 8 – BCCPD Trust Fact Sheet
- APPENDIX 9 – LLAB Trust Approval Letter

Trust Related Legislation: October 2013

BC Employment and Assistance for Persons with Disabilities Regulation

Limits on income

9 (1) For the purposes of the Act and this regulation, **"income"**, in relation to a family unit, includes an amount garnished, attached, seized, deducted or set off from the income of an applicant, a recipient or a dependant.

(2) A family unit is not eligible for disability assistance if the net income of the family unit determined under Schedule B equals or exceeds the amount of disability assistance determined under Schedule A for a family unit matching that family unit.

Asset limits

10 (1) The following assets are exempt for the purposes of subsection (2):

(2) A family unit is not eligible for disability assistance if any of the following apply:

a) a sole applicant or sole recipient has no dependent children and has assets with a total value of more than $5 000;
(B.C. Reg. 197/2012)

(b) an applicant or recipient has one or more dependants and the family unit has assets with a total value of more than $10 000.
(B.C. Reg. 197/2012)

Assets held in trust for person with disabilities

12 (1) In this section, **"disability-related cost"** means the cost of providing to a person with disabilities or a person receiving accommodation or care in a private hospital or a special care facility, other than a drug or alcohol treatment centre,

(a) devices, or medical aids, related to improving the person's health or well- being,

(b) caregiver services or other services related to the person's disability,

(c) education or training,

(d) any other item or service that promotes the person's independence, and (B.C. Reg. 197/2012)

(e) if a person with disabilities does not reside in a special care facility, a private hospital or an extended care unit in a hospital,

(i) renovations to the person's place of residence necessary to accommodate the needs resulting from the person's disability, and

(ii) necessary maintenance for that place of residence.

(2) If a person referred to in subsection (1) complies with subsection (4), up to $200 000, or a higher limit if authorized by the minister under subsection (3), of the aggregate value of the person's beneficial interest in real or personal property held in one or more trusts, calculated as follows: (B.C. Reg. 197/2012)

(a) the sum of the value of the capital of each trust on the later of April 26, 1996 or the date the trust was created, plus

(b) any capital subsequently contributed to a trust referred to in paragraph (a),

is exempt for the purposes of section 10 (2) *[asset limits]*.

(3) If the minister is satisfied that, because of special circumstances, the lifetime disability-related costs of a person referred to in subsection (2) will amount to more than $200 000, the minister may authorize a higher limit for the person for the purposes of subsection (2). (B.C. Reg. 197/2012)

(4) A person referred to in subsection (2) who has a beneficial interest in one or more trusts must keep records of the following and make the records available for inspection at the request of the minister:

(a) for a trust created before April 26, 1996, the capital of the trust on that date;

(b) for a trust created on or after April 26, 1996, the capital of the trust on the date the trust was created;

(c) the amount of capital contributed in each subsequent year to a trust referred to in paragraph (a) or (b);

(d)all payments made after April 26, 1996 to or on behalf of the person from a trust in which that person has a beneficial interest.

(5) For the purposes of this section, the real or personal property of a "patient", as defined in the *Patients Property Act,* who is a person with disabilities is to be treated as if the real or personal property were held in trust for the patient by the patient's committee.

Schedule B

Exemptions - unearned income

7 (0.1) In this section:
"disability-related cost" means a disability-related cost referred to in paragraph (a), (b), (c) or (e) of the definition of disability–related cost in section 12 (1) *[assets held in trust for person with disabilities]* of this regulation;
(B.C. Reg. 197/2012)

"disability-related cost to promote independence" means a disability-related cost referred to in paragraph (d) of the definition of disability–related cost in section 12 (1) of this regulation;
(B.C. Reg. 197/2012)

"intended registered disability savings plan or trust" , in relation to a person referred to in section 12.1 (2) *[temporary exemption of assets for person with disabilities or person receiving special care]* of this regulation, means an asset, received by the person, to which the exemption under that section applies; (B.C. Reg. 197/2012)

(2.1) The maximum amount of the exemption under subsection (1) (d.3) is $8 000 in a calendar year, calculated as the sum of all payments, structured settlement annuity payments and money that, during the calendar year, are applied exclusively to or used exclusively for disability-related costs to promote independence. (B.C. Reg. 197/2012)

(3) Repealed (B.C. Reg. 83/2012) (B.C. Reg. 197/2012)

APPENDIX 2

Ministry Policy Related to Trusts: October 2013

Available online at:
http://www.gov.bc.ca/meia/online_resource/verification_and_eligibility/trusts/policy.html#2

Trusts

Policy

Eligibility and Trusts

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Client as Trustee

Eligibility and Trusts

July 20, 2011

Among other things, trusts provide a way for some clients and their families to safeguard *assets* for meeting disability-related costs now and in the future while remaining eligible for assistance.

APPENDIX 2

The following client types may transfer certain kinds of *assets (real property or personal property)* into a *discretionary trust* or a *non-discretionary trust*, under certain conditions, without affecting eligibility for assistance:

- Clients who have the *persons with disabilities (PWD) designation*;
- A client who resides in a private hospital or a *special care facility* (other than a drug or alcohol treatment centre);
- Clients or applicants awaiting a PWD adjudication decision or completing a PWD Application form [for more information, see Persons with Disabilities Designation – Designation Application].

Note: Throughout this topic, "client" will refer to both clients and applicants if "client/applicant" is used in the paragraph in which it appears.

Income assistance clients, other than those who reside in a private hospital or a special care facility, could have a discretionary trust that would not be considered an asset in certain narrow circumstances. [For more information, see Policy – Income Assistance Clients and Trusts.]

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Types of Trusts: October 1, 2012

October 1, 2012

A trust is a legal relationship where someone (the trustee) holds the legal interest in (legally owns) money or other *assets* for someone else's benefit (that person is called the "beneficiary"). The legal relationship is often, but not always, described in a written agreement, or in a will. There can be more than one trustee, and multiple beneficiaries, or there may be only one of each.

There are two basic types of trusts: "discretionary" and "non-discretionary." The distinction is important, because they are treated differently under BC Employment and Assistance legislation.

Discretionary trust: a trust in which the trustee has absolute authority over payment of capital and income from the trust. In other words, the trustee has complete authority to decide whether to provide trust funds to the beneficiary, or to spend trust funds on their behalf.

- The ministry generally does not consider a discretionary trust to be an asset, provided the beneficiary has no legal right to end the trust and take the capital. Because such a trust is not considered an asset, there is no limit to the value of assets that can be held in a discretionary trust.
- If the beneficiary has a legal right to collapse the trust and gain control of the assets, the ministry considers the trust to be an asset. Such a trust is considered to be a *collapsible discretionary trust.*

Non-discretionary trust: A trust in which the trustee does not have absolute authority over payments of capital and income from the trust. The beneficiary may have some control, or the trustee may be required to make certain payments.

1. A non-discretionary trust is considered an exempt asset for eligible clients so long as the value of all capital contributions over time does not exceed **$200,000**.
2. Any return on investment generated by the trust can grow the value of the trust beyond $200,000 [see Policy – Return on Investment in a Trust for more information].
3. Capital contributions in excess of $200,000 are not exempt as an asset unless special approval is given by the minister.
4. The minister can approve capital contributions in excess of $200,000 if the minister is satisfied that the lifetime disability-related costs of the beneficiary will exceed $200,000 [see Procedures – Lifetime Maximum].

Note: Trust capital is the total of all contributions made to a trust. Trust income is any return on investment generated from capital contributions within a trust.

An *RDSP* is a registered matched savings plan specific for people with disabilities. An RDSP is not a trust but is an alternative tool for safeguarding and growing assets now and for the future. [see Related Links – Assets and Exemptions]

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Income Assistance Clients and Trusts

July 20, 2011

Income assistance clients, other than those who reside in a private hospital or a *special care facility* (other than a drug or alcohol treatment centre), could have a *discretionary trust* provided they have no way of collapsing the trust and gaining control of the *assets*. This is because a discretionary trust is not considered an asset. However, whether they can have such a trust also depends on how, when, and by whom the trust was set up. For example, these clients may not be eligible for assistance if the trust was set up with capital that was within that client's control, within two years before their date of application for assistance or while in receipt of assistance. Further considerations include the underlying purpose of the contribution to the trust, and the purpose of the trust itself. **A legal opinion must be sought by the ministry through *LLAB* regarding such a contribution to a trust before making an eligibility decision.** [See Procedures]

Examples:

- A third party sets up a discretionary trust using their own resources, naming the client as beneficiary. The client cannot collapse the trust and gain control of the assets. In this case, the existence of the trust alone does not impact the client's eligibility for assistance.

- During the two years prior to applying for *income assistance*, a client receives some property as an inheritance and transfers it to a discretionary trust. The client cannot end this trust and take the capital. Depending on all the circumstances in this case, the client may not be eligible for assistance because of s. 13 of the *EAPWD Act* or s. 14 of the *EA Act*. In some cases it may be determined that the client disposed of *real property* or *personal property* in order to reduce assets by transferring them into a trust.

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How a Trust is Set Up

July 20, 2011

A trust is generally set up by transferring *assets* to someone to hold for the benefit of another person. Similarly, a trust can also be set up by a person declaring assets they own are owned for the benefit of another person. The fundamental concept of a trust is that the legal ownership of the asset (essentially, the authority to manage or dispose of the asset) is separated from the beneficial ownership (the right to benefit from the asset).

There are many ways to set up a trust. Two common trust arrangements are:

- The client/applicant or another party chooses someone to be a trustee, or to be a co-trustee with the client, to manage the trust. The client and the trustee sign a trust document showing all the terms under which the assets have been transferred to the trustee, to be held in trust. This type of trust is an inter vivos trust because the creator of the trust is still alive.
- A person creates a trust in their will. The trust becomes effective when that person dies, because the deceased person's assets are automatically transferred to their executor and trustee, so they can carry out the instructions in the will. Thus, a separate trust agreement is not needed to put this trust into effect. This type of trust is a testamentary trust, because it is created through a person's last will and testament.

A trust document itself is not enough to create a trust. The legal title to the asset in trust must be transferred to the trustee to make the trust effective.

Ministry staff must not provide recommendations or advice regarding whether a trust or other personal arrangement is right for a client/applicant. The ministry cannot give legal or investment advice to clients, and can only provide information regarding how an arrangement a client has already made affects their eligibility. If a trust is claimed by a client, a legal opinion must be sought by the ministry through *LLAB* before making an eligibility decision.

Ministry staff use a Trust Query Cover Form (HR2999) and send any other relevant documents to LLAB to determine whether the trust is valid, whether the trust is to be considered an asset, and if it is exempt.

[For more information, see Resources for Clients – Trust Query Submission Guidelines for Clients and Resources for Staff – Trust Query Submission Guidelines for Staff.]

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Transferring Income or Assets into a Trust: October 1, 2012

October 1, 2012

If an eligible client receives *earned income* or *unearned income* (such as CPP disability payments, money from a trust or inheritance, or investment income from *assets* held outside a trust), it is considered income in the month received even if the income is redirected, or received and transferred, into a trust. Certain income exemptions apply [see Related Links – Income and Exemptions]. Unless deemed by the legislation to be unearned income by definition, transfers of capital (including most gifts) are not treated as income [see Related Links – Assets and Exemptions].

Eligible clients may choose to transfer newly received income or assets to a trust or RDSP to avoid being over the asset limit in subsequent months [see Related Links – Assets and Exemptions]. If under $200,000, the asset(s) can be transferred into a trust. If the value of the asset(s) exceeds $200,000, the client should get legal advice, and they MAY be able to use a trust. For example, a possible concern is disposal of *real property* or *personal property* to reduce assets (section 13 of the *EAPWD Act* and section 12 of the *EA Act*). Whether or not this provision applies will depend on the circumstances of each case.

Ministry staff must not provide recommendations or advice regarding whether a trust or other personal arrangement is right for a client/applicant. The ministry cannot give legal or investment advice to clients, and can only provide information regarding how an arrangement a client has already made affects their eligibility. If a trust is claimed by a client, a legal opinion must be sought by the ministry through *LLAB* before making an eligibility decision.

If an asset passes directly into a trust or RDSP and the client/applicant never receives the asset, then the asset is not considered income in the month received. For example, if a relative chooses in their will to disburse assets directly into a trust for the client, those assets will not be considered income in the month received. Note that this is different than when a client has an entitlement to the asset, but directs the person who has to transfer the asset to the client to instead transfer the asset into trust. An example is where a client is named as a beneficiary in a will, but there is no testamentary trust – the client is simply entitled to receive the inheritance; the client then requests the executor to transfer it into a trust. In such a case, it is the client and not the

transferor who has chosen to transfer the asset in the trust. Accordingly, the ministry treats this situation the same as if the client actually received the asset before it was transferred to the trust.

A legal opinion must be sought by the ministry through LLAB when ministry staff require advice regarding how to categorize a transfer of income or assets and, generally, whenever there may be a trust involved, before making an eligibility decision.

If an eligible client transfers an exempt asset into an exempt trust, for example, a residential property that serves as the client's primary residence, or a transfer from a personal RDSP, the asset remains exempt and does not impact eligibility for assistance. Likewise, funds rolled into an exempt trust from a deceased parent's RRSP or Registered Retirement Income Fund are not considered income in the month received.

If an eligible client does not have an exempt trust or RDSP and the client wishes to transfer an asset to a trust or RDSP, the ministry allows the client up to three months to do so (the first month being the month in which the asset is received). During this time, the ministry will exempt assets intended for the trust or RDSP. If, after three months, the client has not set up a trust or RDSP, the client's circumstances will be reassessed. If the client provides documentation (from a financial institution or lawyer) proving they are making reasonable efforts to establish an RDSP or trust, and the delay is beyond their control, the exemption for the asset may be extended on a month-by-month basis. The client must provide documentation each month for which an extension is requested. The exemption ceases to apply if the ministry becomes aware of information that indicates that a client does not intend to contribute the asset or a portion of the asset to a trust or RDSP.

Expenditures from an asset intended for a trust or RDSP will be exempt only so long as they are spent on "disability-related costs" [see Policy – Trust Payments]. However, if the client does not receive assistance for a month because of excess income in the month received, expenditures from the asset intended for a trust or RDSP are not restricted during this month (short of transactions making s. 13 of the *EAPWD Act* or s. 14 of the *EA Act* applicable).

Assets Reported Late or Discovered by Review or Investigation: Clients found to be ineligible for assistance as a result of reporting assets at a later date, or for failing to report assets (either before or after the client began receiving assistance) which were subsequently discovered as a result of a review or investigation, may reapply for assistance when they no longer have the assets, or when they transfer the assets into a trust [see Policy – Eligibility and Trusts]. If they choose to set up a trust, this must be done **before** they will be eligible for assistance (i.e., unlike clients who report assets, non-reporters are not eligible while they are setting up the trust). In such cases, ministry staff will expedite the review of the trust and the client will remain ineligible for assistance until the trust has been reviewed and determined to be valid and an exempt asset.

Exception:

If an asset described above (over the asset limit that is reported at a later date or following a review or investigation that has uncovered the asset which was not reported) is being held within

an existing trust, the client remains eligible for assistance and the trust should be immediately reviewed.

Amended Trusts: Clients found to be ineligible following a review of a trust may in some cases amend the terms of the trust. Ministry staff cannot advise whether a client can or should amend a trust. If the client chooses to amend a trust, ministry staff will expedite the review of the amended trust, and the client remains ineligible for assistance unless and until the trust has been reviewed and determined to be valid and an exempt asset.

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Trust Payments: October 1, 2012

October 1, 2012

Payments from both *discretionary* and *non-discretionary* trusts are considered *unearned income* subject to exemptions for certain trust payments. Exemptions apply only to *persons with disabilities* (PWD) clients, PWD applicants and clients who reside in a private hospital or a *special care facility* (other than a drug or alcohol treatment centre); there are no trust payment exemptions for other clients or non-PWD members of a family unit. Trust payments are fully exempt for eligible clients when used for:

- Buying a place of residence for the client,
- A contribution to a Registered Education Savings Plan,
- A contribution to an *RDSP*, or

Disability-related costs:

Disability-Related Cost	**Annual Calendar Year Limit**
Devices, or medical aids, related to improving the person's health or well-being [see notes below]	None
Caregiver services or other services related to the person's disability [see notes below]	None
Any other item or service that promotes the person's independence [see notes below]	$8,000
Education or training	None
Renovations or changes to the person's place of residence necessary to accommodate the needs resulting from the person's	None

disability (clients with PWD designation only)	
Necessary maintenance on the person's place of residence (clients with PWD designation only)	None

Notes:

Examples of devices, or medical aids, related to improving the person's health or well-being include but are not limited to:

- High performance wheelchairs for recreational/leisure or sports use
- Vehicle modifications (hand controls, van lifts)
- Lift chairs

"Other services related to the person's disability" is interpreted broadly and includes many services. Examples include but are not limited to:

- Home-maker services
- Community Connectors (social network facilitators)
- Employment services or supports
- Speech therapy
- Physiotherapy
- Occupational therapy
- Behavioural or communication therapy
- Applied behavioural analysis
- Counselling

"Any other item or service that promotes the person's independence" is interpreted broadly and is determined by the beneficiary or trustees, not ministry staff.

If part of the cost of an item or service that promotes a person's independence falls under a different disability-related cost (or exempt trust payment), that portion of the expense should not be included within the $8,000 limit. For example, if a client takes an annual trip that requires a caregiver to accompany them, the client's expenses could be paid for out of the $8,000 limit, but the expenses the client pays for the caregiver, (including the caregiver's travel costs if applicable), are not included within the $8,000 limit.

Generally, *disability assistance* clients are not required to use *assets* from a trust to pay for items that may be provided by the ministry. For example, if a PWD client meets all eligibility criteria to be provided a wheelchair, their trust would not be considered an available resource and they would be eligible to receive the wheelchair. Assets from a trust can be used to pay for upgrades to items beyond what may be provided by the ministry.

If an individual who is not a ministry client with a non-discretionary trust applies for a health supplement under life-threatening health need, they are required to use assets from their trust before being considered for a supplement under life-threatening health need.

Trust payments are separate from *RDSP* payments. RDSPs are not subject to trust payments guidelines.

Note on fees: Trust payments for investment commissions, or administration and legal fees required to operate a trust (for example, tax payments or payments to trustees) are not payments to the beneficiary and do not count towards the $8,000 limit.

Ministry staff have no authority to direct a client or a trustee regarding how they must use a trust, nor may they provide suggestions or advice as to how to use a trust; staff apply the Act, regulations and ministry policy to determine how the client and trustee have used their trust as it relates to determining eligibility for assistance.

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Structured Settlements: October 1, 2012

October 1, 2012

A structured settlement is an agreement to pay damages to a plaintiff in a lawsuit, but by periodic payments rather than as a lump sum. To be considered a structured settlement under this policy, the settlement agreement:

- must have been in relation to a claim for damages in respect of personal injury or death, and
- must require the defendant to make periodic payments directly to the person for a fixed term or the life of the person through the purchase of a single premium annuity contract that is not assignable, commutable or transferable.

If a settlement does not meet all of these criteria, it is not a structured settlement. These annuities are not assets. Some structured settlements require payments to be made into an actual trust, in which case the trust will determine how the arrangement is treated.

Payments received under structured settlements are treated the same as payments from trusts. The same trust payment income exemptions apply, regardless of whether the payment originated in a trust, or came from a structured settlement annuity.

If a client receives a structured settlement and does not have the *persons with disabilities (PWD) designation* or is not a person receiving accommodation or care in a private hospital or a *special care facility*, the underlying annuity will not be considered their asset. However, there are no exemptions for payments under a structured settlement for these clients, so any payments under a structured settlement to a client who is neither a PWD nor a resident in a special care facility will be treated as unearned income.

If the structured settlement is set up to make payments into a trust, the payments may or may not be considered income; a legal opinion is required.

A legal opinion must be sought by the ministry through LLAB when structured settlements are reported, before making an eligibility decision.

Structured Settlement Reporting: Clients who are the beneficiary of structured settlement annuity payments are required to keep records of the following and make the records available for inspection at the request of the minister:

- the settlement agreement, including the table of payments to be made to the person
- documentation showing the ownership of the underlying annuity

Each year the ministry needs the following information:

- all payments made to or on behalf of the person under the structured settlement and what the money was used for

In addition, clients are required to report structured settlement annuity payments on their monthly report, as the payments may affect their eligibility.

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Committees: October 1, 2012

October 1, 2012

A committeeship is an arrangement where the *Public Guardian and Trustee* (PGT), a private individual, or a trust company is granted the authority to manage the affairs of an adult who is incapable of managing his or her own affairs. Under BC Employment and Assistance legislation, a *patient's* own *real property* and *personal property*, which is controlled by a *committee*, is treated by the ministry as if held in trust for the adult; accordingly, it is not required to be held in an actual trust to qualify for an exemption equivalent to a *non-discretionary trust* (generally $200,000). A third party can still set up a trust for a patient. A patient would also generally continue to be the beneficiary of a trust that existed prior to their incapacity. Such actual trusts are considered on their terms, and in light of the patient's inability to manage their affairs.

A legal opinion must be sought by the ministry through LLAB in the case of a committeeship, to confirm the status of the committeeship as well as to determine how to apply the trust asset exemptions before making an eligibility decision. In seeking a legal opinion, it is important to include documentation showing who holds title to the assets in question and, if there is an actual trust, documentation showing that the property is held in trust

and confirming the terms of any trust arrangement. Documentation should also include a copy of the court order or certificate of incapacity creating the committeeship.

The PGT provides assistance to adults who need support for financial and personal decision making. In that role, the PGT acts as the client's representative, no different from any other client advocate, committee or trustee. **As such, a legal opinion must be sought by the ministry through LLAB for all arrangements involving the PGT before making an eligibility decision.**

For more information on documentation required, including for committees involving the PGT, see Resources for Clients – Trust Query Submission Guidelines for Clients, and see Resources for Staff – Trust Query Submission Guidelines for Staff.

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Trust Reporting Requirements

July 20, 2011

Clients are required to report all trust changes and activity that may affect their eligibility on their monthly report (for example, new contributions, income, payments). Clients are not required to regularly report trust balances.

The ministry has the authority to ask for information regarding a trust at any time, and trustees must keep accounts and be prepared to produce documentation on request regarding activity in the trust. Each year the ministry needs all of the following information about a trust:

- how much money was disbursed from the trust to or on behalf of the client
- what this money was used for
- whether any new money was deposited to the trust

[see Resources for Clients – Disability Assistance and Trusts Booklet for tips on how to report this information]

An updated legal opinion must be sought by the ministry through LLAB when a change in trustee or amendment to the terms of the trust is reported, before making an eligibility decision.

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Random Annual Audits

July 20, 2011

Exempt trusts held for clients with the *persons with disabilities designation* or persons in a private hospital or a *special care facility* (other than a drug or alcohol treatment centre) are subject to random annual audits. Audits will match reported trust activities with actual trust documentation to ensure accurate accounting of the trust.

Trustees holding exempt trusts for clients need to keep a record of all activity relating to the trust.

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Return on Investment in a Trust: October 1, 2012

October 1, 2012

Income generated from return on investment within a trust can either be kept in the trust or paid out to the client, depending on how the trust is set up.

If the income is held in the trust, it is **not** considered income to the client but rather remains part of the trust. This is true for both *discretionary trusts* and *non-discretionary trusts*. Only distributions from the trust are attributable to the client as income, and exemptions may apply.

While non-discretionary trusts have a maximum contribution limit, the value of the trust can exceed the contribution limit through return on investment. This means that the trust remains exempt regardless of whether the income generated in it brings the value of the trust over $200,000. Income accrued in a trust is **not** considered to be a capital contribution.

For example, if a client sets up a non-discretionary trust with a $199,000 contribution and income generated on that amount brings the value of the trust to $210,000, the entire value of this trust would still be considered an exempt asset.

If the income is paid out to the client through a trust payment, it does not matter whether the payments are made from capital, income or mixed capital and income. The entire payment is from a trust, and therefore income attributable to the client [see Policy – Trust Payments].

Note on topping a trust back up: If a client contributes $200,000 (or their approved lifetime maximum) to a non-discretionary trust, draws down the value of the trust, and subsequently makes further contributions to it, the additional contribution is not exempt. For example, a client withdraws $10,000 from their trust that they set up with $200,000. After the $10,000 withdrawal, the client contributes $5,000 of fresh capital. In this example, the $5,000 contribution is considered a non-exempt asset since the client has now contributed a total $205,000 to their trust – more than their lifetime maximum.

Note that it is only "new" contributions to the trust that count toward the exemption limit in the calculation; if the trust earns income that is simply kept by the trust and accumulated as trust capital, such capital has not been "contributed" to the trust for the purpose of this calculation.

Note on investment properties: *Real property* may be held within a trust. If the trust owns the property, rental income the property generates is income to the trust, like any other investment income. It is not a capital contribution nor is it the client's income. Assuming the trust is exempt, this income is exempt because it is income earned by the trust, not the client. If the income accumulates, it does not count as a capital contribution by the client.

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Client as Trustee

July 20, 2011

While not a common situation, a client/applicant can be a trustee of a trust where another person is the beneficiary. (A client can also be a co-trustee of a trust where the client is the beneficiary.)

If a client is a trustee of a trust where another person is the beneficiary, the assets in the trust and income generated in the trust are not considered to be the client's asset; however, a number of issues can still arise in this situation. **A legal opinion must be sought by the ministry through LLAB in every case where the client claims they are a trustee, or otherwise claims to be holding property for the benefit of another person, before making an eligibility decision.**

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APPENDIX 3 – Intent to Establish a Trust (Template Letter)

Date:

RE: Mr. John Doe, SIN

Intent to Establish a Trust

ATTN: Ministry of Social Development and Social Innovation

To Whom it May Concern,

Mr. John Doe has requested that I provide the ministry with a brief outline establishing his intentions for the use of his recent income. Mr. Does has recently received $20, 000 in a recent inheritance. It is Mr. Doe's intent to establish a non-discretionary trust with this income and to use the benefits of this trust for disability related costs.

I have advised Mr. Doe that it is ministry policy to exempt assets intended for the establishment of a non-discretionary trust for a period of three calendar months from the date that he receives his inheritance. Please notify me directly if any other course of action is taken so that I may be of assistance to both the ministry and Mr. Doe in correcting any error in understanding.

Yours sincerely,

_____

Stephen Portman
Legal Advocate, TAPS

APPENDIX 4 – Introduction to Financial Institution (Template Letter)

Date:

RE: Client Name - SIN

Dear RBC/Vancity Representative,

Mr. John Doe is currently in receipt/applying for persons with disability (PWD) benefits form the Ministry of Social Development and Social Innovation. Mr. Doe is in need of placing some inheritance monies into a Royal Bank/Vancity Tax Free Savings Account that meets the terms as set out in the attached Declaration of Trust. It is essential that the TFSA that Mr. Doe establishes to deposit this money into is governed by the attached agreement in order to ensure the continuance of his PWD benefits. Please provide Mr. Doe with the necessary application and trust agreement/declaration of trust so that I may review the forms with him prior to establishing the account.

If you have any questions concerning this request please feel free to contact me at (250) 361-3521. Mr. Doe has granted me a release of information to discuss this information with you.

Sincerely,

_____

Stephen Portman
Legal advocate, Together Against Poverty Society

APPENDIX 5 – MSDSI Trust Disclosure (Template Letter)

Date:

RE: John Doe, SIN

Trust Agreement

ATTN: Ministry of Social Development and Social Innovation

To Whom it May Concern,

The following attached documents are in reference to a Tax Free Savings Account (acct # -123456789) established for the account holder, Mr. John Doe, who agrees to be bound by the terms and conditions of this account as set out in the application and the accompanying Trust Agreement. The Trustee, namely the Royal Bank of Canada/Vancity Credit Union, agrees to act as Trustee of the Account in accordance with the terms of the Trust Agreement. This trust relationship is clearly established in the documents that I have attached.

This trust qualifies as a Trust under Section 12 of the *Employment and Assistance for Persons with Disabilities Regulation*. I understand that the Ministry procedure at this point is to refer the Trust to the Legislation, Litigation and Appeals Branch for review and in the meantime to continue to pay Mr. Doe's disability benefits. Please advise me if any other course of action is taken so that we can apply for Reconsideration in the appropriate time period.

Yours sincerely,

Stephen Portman
Legal Advocate, TAPS

Vancity

Tax-Free Savings Account Application

Holder Information

Office Use

Vancity Account Number | Branch Number | Date | UR Number | TFSA Contract Number

First Name | Last Name | Social Insurance Number | Birth Date (MM/DD/YYYY)

Investment Instructions

$ _____ Deposit Amount

☐ Variable Rate Investment Savings

or

☐ Term Deposit

Effective Date | Product Type | Term Length

Successor Holder and Designated Beneficiaries

Please note that the election of a successor Holder and designation of a beneficiary in respect of the Account is subject to the laws of the applicable jurisdiction (province or territory). If the laws of the applicable jurisdiction do not permit such an election or designation, it may be made only in your will. If the laws of the applicable jurisdiction permit such an election or designation in the Account, the following applies:

Successor Holder Election

I elect that my surviving spouse or common-law partner below become the successor Holder in the event of my death before termination of the Account, and confirm that my spouse or common law partner has the unconditional right to revoke any beneficiary designation made by me.

First Name | Initial | Last Name | Relationship to Holder

Designation of Beneficiary(ies)

I designate the person(s) below as beneficiary(ies) to receive, in the event of my death and in the absence of a successor Holder, any property under the Account.

First Name | Initial | Last Name | Relationship to Holder | Proportion of Account

First Name | Initial | Last Name | Relationship to Holder | Proportion of Account

Please note that:

- unless the proportion of the Account property to which each beneficiary is entitled is clearly indicated above, such property will be divided equally among them.
- in the event of the death of a beneficiary, the surviving beneficiary will receive the deceased beneficiary's share.

Undertakings, Acknowledgements, Agreements

- I acknowledge receipt of a copy of the Declaration of Trust governing the said Account, which is printed on the reverse hereof, and agree to be bound by it and the provisions of the *Income Tax Act* (Canada).
- I acknowledge that I must notify the Vancouver City Savings Credit Union should I wish to use my interest or right in the Account as security for a loan or other indebtedness.
- I acknowledge that I may be liable for certain tax consequences should the Account not comply with the requirements of the *Income Tax Act* (Canada).
- I undertake to notify Vancouver City Savings Credit Union should I cease to be a resident of Canada.

Election

I request that Vancouver City Savings Credit Union elect to register this arrangement as a tax free savings account (the "Account") under Section 146 of the *Income Tax Act* (Canada). If the date hereof is prior to 2009, I understand that the TFSA will not be issued, and that I may not make any contributions, until 2009.

X _____ X _____

Holder Signature | Date | Witness/Vancity Staff Signature | Vancity Staff Operator Number

Vancouver City Savings Credit Union, located at 183 Terminal Avenue Vancouver, British Columbia, acknowledges receipt of the contribution(s) noted above and accepts the within application.

Richard Seres

Vancity Signature

The information in this document, including the S. I. N., will be used for record keeping, financial reporting and tax reporting purposes.

Vancouver City Savings Credit Union (the "Trustee") by this Declaration of Trust hereby agrees to act as the trustee of the Vancouver City Savings Credit Union Tax Free Savings Account (the "Account") established by the individual named on the application(the "Application") hereof (the "Holder") on the following terms and conditions:

1. Registration: Subject to the Holder having attained at least 18 years of age, the Trustee will elect, in the form and manner prescribed by the Income Tax Act (Canada) (the "Act"), as amended from time to time, and any applicable provincial income tax legislation (the "Applicable Tax Legislation") relating to tax free savings accounts, to register the arrangement as a tax free savings account under the Social Insurance Number of the Holder. The Holder shall be solely responsible for the acceptability for registration thereof, and the Trustee assumes no responsibility for any revocation of such registration for any reason including, without limitation, the failure of the Holder to comply with any of the conditions necessary for registration of a tax free savings account under the Applicable Tax Legislation. The ultimate responsibility for the administration of the Account however, remains with the Trustee. For greater certainty, unless the Holder has attained at least 18 years of age at the time that this arrangement is entered into, it shall not constitute a qualifying arrangement, as that term is defined in subsection 146.2(1) of the Act, susceptible of being registered as a tax free savings account.
2. Definition of Spouse: Notwithstanding anything to the contrary contained herein or any endorsements forming a part thereof, the term "Spouse", as it is used in this Declaration of Trust or in the Application, means the individual who is considered the Holder's spouse or common law partner but does not include any person who is not recognized as a spouse or common-law partner for the purposes of any provision of the Act respecting a tax free savings account.
3. Definition of Holder: Any reference to "Holder" in this Declaration of Trust or in the Application means the Holder or the Successor Holder.
4. Definition of Successor Holder: Any reference to "Successor Holder" in this Declaration of Trust or in the Application means a survivor, as that term is defined in subsection 146.2(1) of the Act, and who is the Spouse of the Holder immediately before the Holder's death.
5. Purpose of the Account: Contributions to the Account and the income therefrom will be held by the Trustee, subject to the terms hereof, until the arrangement is no longer considered a tax free savings account.
6. Account: The Trustee will establish and maintain the Account for the exclusive benefit of the Holder showing all contributions and transfers to and distributions and transfers from, the Account, the Holder's investments and the income earned from such investments. The Trustee shall provide the Holder with a statement of the Account at least annually as of December 31 each year.
7. Contributions: Only the Holder may make contributions to the Account. Contributions may be made in cash, and in such minimum amounts as may be acceptable to the Trustee as may be directed by the Holder as permitted by the Applicable Tax Legislation. It is the sole responsibility of the Holder to ensure that the contributions do not exceed the amounts permitted under the Applicable Tax Legislation in effect at that time.
8. Investments: Subject to such limitations as the Trustee may impose from time to time, contributions to the Account shall be invested and reinvested as directed by the Holder such investments as the Trustee shall make available from time to time; provided that such investments are qualified investments for trusts governed by tax free savings accounts and not prohibited investments. It is the sole responsibility of the Holder to ensure that such investments are and remain qualified investments and are not and do not become prohibited investments, as those terms are defined in subsection 207.01(1) of the Act. No one other than the Holder and the Trustee shall have rights under the Account relating to the investment and reinvestment of the Account.
9. Tax Receipts: The Trustee will provide the Holder each year with appropriate information slips for income tax purposes and such other information as may be required by Applicable Tax Legislation.
10. Distributions: Subject to such reasonable requirements as the Trustee may impose and to the terms of any investment, the Holder may request in writing that the Trustee pay to the Holder all or a portion of the property of the Account in satisfaction of all or part of the Holder's interest (a "Distribution"), subject to the deduction of all proper charges, fees and expenses, together with such income or other taxes as may be required by applicable laws. Notwithstanding the terms of any investment, or any reasonable limits the Trustee may impose on the frequency of Distributions or any minimum Distribution requirement identified either in the Application or other notice given under the terms of this Declaration of Trust, the Trustee may make Distributions at any time in order to reduce the amount of tax otherwise payable by the Holder as a result of excess contributions made contrary to the Applicable Tax Legislation. No one other than the Holder and the Trustee shall have rights under the Account relating to the amount and timing of Distributions.
11. Transfers Out: The Holder may, upon 90 days written notice to the Trustee, or such shorter period as the Trustee may permit, request that the Trustee transfer all or a portion of the property in the Account to another tax free savings account of the Holder subject to the terms of the any investment. The Holder may, upon 90 days written notice to the Trustee, or such shorter period as the Trustee may permit, request that the Trustee transfer all or a portion of the property in the Account to a tax free savings account of his or her Spouse or former Spouse where the Holder and the Spouse or former Spouse are living separate and apart and the transfer is made under a decree, order or judgment of a competent tribunal, or under a written separation agreement, relating to a division of property between the individuals in settlement of rights arising out of, or on the breakdown of, their marriage or common-law partnership.

    The Trustee shall promptly take all steps necessary to effect such transfer (subject to the deduction of all proper charges, fees and expenses, together with such income and other taxes as may be required by applicable laws) and upon such transfer the Trustee shall have no further liability to the Holder with respect to the property of the Account.
12. Transfers In: The Holder may transfer assets to the Account from another tax free savings account of the Holder or of the Spouse or former Spouse where:

    (a) the Holder and the Spouse or former Spouse are living separate and apart and the transfer is made under a decree, order or judgment of a competent tribunal, or under a written separation agreement, relating to a division of property between the individuals in settlement of rights arising out of, or on the breakdown of, their marriage or common-law partnership; or

    (b) the Holder is the Spouse's survivor and the transfer occurs as a result of an exempt contribution as that term is defined in subsection 207.01(1) of the Act.
13. Death of Holder: In the event of the death of the Holder where the Holder has validly designated the Successor Holder (and the Holder is domiciled in a jurisdiction designated by the Trustee as one in which a holder of a tax free savings account may validly designate a survivor), the Successor Holder shall become the Holder. In the event of the death of the Holder where the Holder has not designated the Successor Holder or where there is no Successor Holder, the Trustee shall, upon receipt of satisfactory proof of the death of the Holder and other such documentation as the Trustee may require and to the deduction of all proper charges, fees and expenses together with such income or other taxes as may be required by applicable laws, pay the proceeds of the Account in a lump sum to the designated beneficiary or the estate of the Holder, as the case may be (where the Holder is domiciled in a jurisdiction designated by the Trustee as one in which a holder of a tax free savings account may validly designate a survivor.)

14. Designation of Beneficiary: If the Holder is domiciled in a jurisdiction designated by the Trustee as one in which a holder of a tax free savings account may validly designate a beneficiary, the Holder may designate one or more beneficiaries to receive the proceeds of the Account in the event of the Holder's death. If any such designated beneficiary is a minor at the time of the death of the Holder then the Trustee is expressly authorized to pay any infant beneficiaries' interest in the Account to his or her legally appointed representative or to the Office of the Public Trustee for the Province of British Columbia (or parallel legislation in any other relevant jurisdiction), at the Trustee's option, on behalf of the infant beneficiary.

    The initial beneficiary will be the Holder's estate or such person or persons named by the Holder as beneficiary or beneficiaries under the Designation of Beneficiary section of the Application. A revocation or alteration of a designation of beneficiary will be effective if it is made by an instrument in writing in a form acceptable to the Trustee and is signed by the Holder or it is contained in a will or other testamentary document. The Holder agrees to deliver to the Trustee all instruments, wills and other testamentary documents which contain any revocation or alteration of a designation of beneficiary, provided however, that:

    (i) the Trustee shall be entitled to make payment at any time after the date of death of the Holder to the beneficiary, having regard only to such instruments that are delivered to the Trustee prior to the Holder's death and wills and other testamentary documents that are delivered to the Trustee prior to the date of such payment, notwithstanding that the Holder fails to deliver such wills and other testamentary documents prior to the Holder's death; and

    (ii) if more than one such instrument, will or other testamentary document has been made and so delivered, the Trustee shall make payment only in accordance with the instrument, will or other testamentary instrument bearing the latest execution.

15. Loans: The Trustee is prohibited from borrowing money or other property for the purposes of the Account.

16. Security: Where the Holder wishes to use his or her interest or right in the Account as security for a loan or other indebtedness, he must first advise the Trustee. Where the Holder uses his or her interest in the Account for such purposes, it is the Holder's responsibility to ensure that the terms and conditions of the indebtedness are terms and conditions that persons dealing at arm's length with each other would have entered into, and it can be reasonably concluded that none of the main purposes for that use is to enable a person, other than the Holder, or a partnership to benefit from the exemption from tax of any amount in respect of this Account.

17. No Advantage to Holder: The Holder or a person with whom the Holder does not deal at arm's length may not receive an advantage, as that term is defined in subsection 207.01 (1) of the Act.

18. Amendments: The Trustee reserves the right to amend this Declaration of Trust at any time, provided that no such amendment shall have the effect of disqualifying the Account as a tax free savings account within the meaning of Applicable Tax Legislation. The Trustee shall give the Holder written notice of any amendment by postage prepaid ordinary mail addressed to the Holder at the address set out in the Trustee's records for the Account and shall be deemed to have been given on the day following the mailing. In the event of changes to Applicable Tax Legislation, the Account will be deemed to have been amended to conform to such changes effective the date such changes come into force.

19. Date of Birth: The Holder's statement of his or her date of birth on the Application shall be deemed to be a certificate by the Holder of that information and an undertaking to provide the Trustee with any further evidence of proof of age that the Trustee may require.

20. Fees: The Trustee shall be entitled to payment out of the property of the Account for its services as a trustee, in accordance with its fee schedule. The Trustee may change its fee schedule from time to time upon giving the Holder notice as stipulated under Section 18.

21. Replacement of Trustee: The Trustee may resign as trustee of the Account on 90 days written notice to the Holder. Upon resignation, the Trustee shall appoint a successor trustee and such appointment shall be in writing and signed by both the resigning Trustee and successor trustee. Subject to the approval of Canada Revenue Agency and any other applicable tax authorities, the successor trustee so appointed shall be vested with the property of the Account and the same powers, rights duties and responsibilities as the resigning Trustee and the resigning Trustee shall execute and deliver to the successor trustee all such conveyances, transfers and assurances as may be necessary for the purposes of assuring the same to the successor trustee.

    Any successor trustee appointed hereunder shall be a corporation resident in Canada that is licensed or otherwise authorized under the laws of Canada or a province therein to carry on in Canada the business of acting as trustee.

22. Governing Law: This Declaration of Trust and the Account shall be governed by the laws of British Columbia and the laws of Canada applicable therein.

Appendix 7

E-FORM 4897 (07/2012)

TAX-FREE SAVINGS ACCOUNT APPLICATION

SUBMITTING BRANCH DOMICILE [redacted]

ACCOUNT TRANSIT [redacted] APPLICATION DATE [redacted] ACCOUNT NUMBER [redacted]

SRF CLIENT NUMBER [redacted]

ACCOUNT HOLDER

ACCOUNT HOLDER'S FIRST NAME [redacted] LAST NAME [redacted] LANGUAGE PREFERENCE [redacted] SOCIAL INSURANCE NUMBER [redacted]

STREET NUMBER & NAME (APT. NO.) [redacted] CITY / TOWN [redacted] BIRTH DATE [redacted]

PROVINCE [redacted] POSTAL CODE [redacted] HOME TELEPHONE NUMBER

To: Royal Bank of Canada (as agent)
Head Office (Toronto, Canada)

I am applying to open a Royal Bank of Canada Tax-Free Savings Account ("the Account"), and request The Royal Trust Company ("Royal Trust") to file an election with the Minister of National Revenue to register this qualifying arrangement as a Tax-Free Savings Account under section 146.2 of the *Income Tax Act* (Canada).

I will notify the Agent, in a form acceptable to the Agent and Royal Trust, should I no longer be resident in Canada. I understand that I may be liable for certain tax consequences arising in connection with a non-compliant qualifying arrangement.

I acknowledge that I must and will notify the Agent should I wish to use my interest or right in the Account as security for a loan or other indebtedness.

I acknowledge and agree to be bound by the terms and conditions of this Account as set out in the application and the Trust Agreement.

Quebec residents only

I have expressly requested that all documents relating to this Account be drawn up in the English language only. J'ai expressément requis que tous les documents relatifs à ce compte soient rédigés en anglais seulement.

DATE [redacted] Account Holder Signature X [redacted]

RBC954092078590991527048 97

Bank Copy (Submit for Retention)

TAX-FREE SAVINGS ACCOUNT APPLICATION

IDENTIFICATION: ON FILE
OCCUPATION: ON FILE
I confirm that this account will not be used by or on behalf of a third party.

APPENDIX TO THE TAX-FREE SAVINGS ACCOUNT APPLICATION

Changes to your Account: We may make changes to the terms of the Trust Agreement and the Schedule of Fees charged at any time in accordance with the terms of the Trust Agreement. If we do, we will let you know before the changes take effect. We will notify you of any increase in Fees or the introduction of new Fees by written notice mailed to you or sent electronically, if you have agreed to this form of delivery, at least 30 days before the effective date of the change.

Complaint or Compliment: If you have a problem or concern, please contact your branch. If it is not resolved, please contact the Client Care Centre by telephone at 1 (800) 769-2540, by email at clientcarecentre@rbc.com or by mail to P.O. Box 1, Royal Bank Plaza, Toronto, Ontario M5J 2J5. For more information, please consult our brochure "How to Make a Complaint", available at any branch or at www.rbc.com/customercare.

Schedule of Fees (TFSA)

1. There is a $50.00 service fee for each transfer of Account Proceeds or Property from the Account to an Institution that is not a RBC member at the time of such transfer.
2. There is a $5.00 service fee for each duplicate account statement request.

This Schedule of Fees is subject to change.

® Registered trademark of Royal Bank of Canada.

Accepted by Royal Bank of Canada as Agent for The Royal Trust Company by:

DATE

X

AUTHORIZED SIGNATURE
SARAH YUEN, (250) 356-4630

RBC Dominion Securities Tax- Free Savings Account

Trust Agreement

1. **Definitions.** Whenever used in this Trust Agreement or the Application, any capitalized terms shall have the meanings given to them below:

"Account" means the tax free savings account established for the Original Holder;

"Agent" means RBC Dominion Securities Inc. and its successors and assigns;

"Applicable Laws" means the Tax Act and such other laws of Canada and of the provinces and territories applicable hereto;

"Application" means the Original Holder's application to the Agent to establish the Account;

"Contribution" means a contribution of cash, in whatever currency held within the Account or any Qualified Investment,

"Distribution" means a payment out of or under the Account in satisfaction of all or part of the Holder's interest therein in a currency agreed upon between the Trustee and the Holder; failing which agreement, the currency of which shall be Canadian dollars;

"Estate Documents" means proof of the Holder's death and such other documents including Letters Probate of the Holder's will as may be required by the Trustee in its sole discretion in connection with the transmission of the Property on the Holder's death;

"Estate Representative" means an executor, an administrator, an administrator with the will annexed, a liquidator, or an estate trustee with a will or without a will, whether one or more than one is so appointed;

"Expenses" means all costs, charges, fees, commissions, investment management fees, brokerage fees, legal expenses and out-of-pocket expenses (together with any goods and services tax or other Taxes applicable to such expenses) incurred from time to time in relation to the Account;

"Former Spouse" means the individual who is considered by the Applicable Laws to be the Holder's former Spouse;

"Holder" means the Original Holder or the Survivor;

"Non-Qualified Investment" means an investment which is not a Qualified Investment;

"Original Holder" means the individual who enters into the arrangement with the Trustee which arrangement is to be registered as a TFSA;

"Proceeds" means the Property, less any applicable Expenses and Taxes;

"Prohibited Investment" means Property (other than prescribed excluded Property as that term is defined in the Tax Act) that is:

(a) a debt of the Holder;

(b) a share of the capital stock of, an interest in or a debt of:

(i) a corporation, partnership or trust in which the Holder has a significant interest;

(ii) a person or partnership that does not deal at arm's length with the Holder or with a person or partnership described in subparagraph (i);

(c) an interest in, or right to acquire, a share, interest or debt described in paragraph (a) or (b); or

(d) prescribed property (as that term is defined in the Tax Act);

"Property" means any property, including the income on it, the proceeds from it and any cash, in whatever currency held within the Account, held in the Account from time to time;

"Qualified Investment" means any investment which is a qualified investment for a TFSA according to the Tax Act;

"Spouse" means the individual who is considered by the Tax Act to be the Holder's spouse or common-law partner;

"Survivor" means the individual who, immediately before the death of the Original Holder, was the Spouse of the Original Holder;

"Tax Act" means *Income Tax Act* (Canada);

"Taxes" means any and all taxes, assessments, interest and penalties which may be required under the Applicable Laws;

"TFSA" means a tax free savings account, which is a "qualifying arrangement" (as that term is defined in the Tax Act) the issuer of which has elected, in the form and manner prescribed by the Tax Act, to register as a TFSA; and

"Trustee" means The Royal Trust Company in its capacity as trustee and issuer of the arrangement governed by this Trust Agreement, and its successors and assigns.

2. **Acceptance of Trust.** The Trustee agrees to act as trustee of the Account, which is to be maintained for the exclusive benefit of the Holder, and to administer the Property in accordance with the terms of this Trust Agreement.

3. **Appointment of Agent.** The Trustee has appointed RBC Dominion Securities Inc. (the "Agent") as its agent to perform certain duties relating to the operation of the Account.

The Trustee acknowledges and confirms that ultimate responsibility for the administration of the Account remains with the Trustee.

4. **Registration.** Subject to the Original Holder having attained at least 18 years of age, the Trustee agrees to elect, in the manner and form prescribed by the Tax Act, to register the arrangement governed by this Trust Agreement as a TFSA under the social insurance number of the Original Holder. For greater certainty, unless the original Holder has attained at least 18 years of age at the time that this arrangement is entered into, it shall not constitute a qualifying arrangement, as that term is defined in subsection 146.2(1) of the Tax Act, susceptible of being registered as a tax free savings account.

5. **Account.** The Agent shall maintain an account for the Holder which will record particulars of all Contributions, investments, Distributions and transactions under the Account in the currency in which such Contributions, investments, Distributions and transactions occured, and shall mail to the Holder, at least annually, a statement of account.

6. **Contributions.** Only the Holder may make Contributions to the Account, in such amounts as are permitted under the Tax Act, in such property as may be permitted in the sole discretion of the Trustee. It shall be the sole responsibility of the Holder to ensure that the amounts of Contributions are within the limits permitted under Tax Act.

7. **Distributions to Reduce Tax.** Notwithstanding any limit on the frequency of Distributions or any minimum Distribution requirement identified in the Application or other notice given under the terms of this Trust Agreement, any Distributions may be made at any time to reduce the amount of Taxes otherwise payable by the Holder as a result of excess Contributions made contrary to the Tax Act.

8. **Tax Information.** The Trustee shall provide the Holder with appropriate information slips for income tax purposes and such other information as may be required under the Applicable Laws.

9. **Delegation by Trustee.** The Holder expressly authorizes the Trustee to delegate to the Agent the performance of the following duties of the Trustee:

   (a) receiving Contributions;

   (b) receiving transfers of Property;

   (c) investing and reinvesting the Property as directed by the Holder;

   (d) registering and holding the Property in the Trustee's name, the Agent's name, in the name of their respective nominees or in bearer form as determined by the Agent from time to time;

   (e) maintaining records, including information concerning the Survivor and the designation of beneficiaries, where applicable;

(f) providing to the Holder statements of account at least annually;

(g) preparing all government filings and forms;

(h) making Distributions pursuant to the provisions hereof; and

(i) such other duties and obligations of the Trustee as the Trustee in its sole discretion may from time to time determine.

The Holder acknowledges that, to the extent the Trustee delegates any such duties, the Trustee shall thereby be discharged from performing such duties, subject to paragraph 3.

10. **Investment of the Property.** The Property shall be invested and reinvested on the directions of the Holder (or the Holder's agent) without being limited to investments authorized by law for trustees. The Trustee, in its sole discretion, may require the Holder to provide such documentation in respect of any investment or proposed investment as the Trustee deems necessary in the circumstances. The Trustee reserves the right to decline to make any particular investment if the proposed investment and related documentation do not comply with the Trustee's requirements at that time. Subject to the appointment of an agent as contemplated in paragraph 12, no one other than the Holder and the Trustee shall have rights under the Account relating to the investment and reinvestment of the Property.

11. **Segregated Funds.** Segregated funds forming part of the Property will be held in nominee name. The Holder agrees to designate the Trustee as the beneficiary under any segregated fund held in the Account. Upon the death of the Original Holder, the proceeds of the segregated funds paid shall form part of the Property to be dealt with according to the terms of this Trust Agreement.

12. **Choice of Investments.** Without restricting the generality of the foregoing, it shall be the sole responsibility of the Holder to:

(a) select the investments with respect to the Property and to determine whether any such investment is or remains a Qualified Investment and is not and continues not to be a Prohibited Investment, and

(b) determine whether any such investment would result in the imposition of any penalty under the Tax Act and whether any investments should be purchased, sold or retained by the Trustee, and give such instructions as are needed.

The Holder shall have the right to appoint an agent, including the Agent as his or her agent, for the purpose of giving investment directions as provided in this paragraph and paragraph 10.

13. **No Advantage.** No advantage may be extended to the Holder or to a person with whom the Holder does not deal at arm's length. Advantage means:

(a) any benefit, loan or indebtedness that is conditional on the existence of the Account other than:

(i) a benefit derived from the provision of administrative or investment services in respect of the Account,

(ii) a loan or indebtedness (including the use of the Account as security for a loan or an indebtedness) the terms and conditions of which are terms and conditions that persons dealing at arm's length with each other would have entered into, and

(iii) a Distribution; and

(b) an increase in the total fair market value of the Property if it is reasonable to consider, having regard to all circumstances, that the increase is attributable, directly or indirectly, to a transaction or series thereof as is described in the definition of "advantage' in the Tax Act; and

(c) a prescribed benefit (as that term is defined in the Tax Act).

14. **Uninvested Cash.** Uninvested cash, in whatever currency held within the Account, will be placed on deposit with the Trustee or an affiliate of the Trustee and held in the same currency as received from the Agent, provided that such currency is a currency that has been agreed from time to time by the Trustee and Agent, and repaid in the same currency. The interest on such cash balances payable to the Account will be determined by the Agent from time to time in its sole discretion with no obligation to pay a minimum amount or rate. The Trustee will pay interest to the Agent, in the same currency as the uninvested cash was received, as referred to above, for distribution to the Account and the Agent shall credit the Account with appropriate interest. The Trustee shall have no liability for such payment of interest once it is paid to the Agent for distribution.

15. **Right of Offset.** The Trustee and the Agent shall have no right of offset with respect to the Property in connection with any obligation or debt owed by the Holder to the Trustee or the Agent, other than the Expenses payable by the terms of this Trust Agreement.

16. **Pledging.** Where the Holder wishes to use his or her interest or right in the Account as security for a loan or other indebtedness, he or she must first advise the Trustee. Where the Holder uses his or her interest or right in the Account as security for a loan or indebtedness, it shall be the sole responsibility of the Holder to ensure:

(a) that the terms and conditions of the loan or other indebtedness are terms and conditions that persons dealing at arm's length with each other would have entered into; and

(b) that it can be reasonably be concluded that none of the main purposes for that use is to enable a person (other than the Holder) or a partnership to benefit from the exemption from Taxes of any amount of the Account.

The Trustee shall be entitled to rely on the information provided by the Holder, liquidate Property as it deems appropriate with respect to the pledge, and fully recover any legal costs it incurs in this regard as Expenses, and shall be fully discharged with respect to any such liquidation and payment to the creditor of the loan or other indebtedness.

17. **Cash Deficits.** If the Account has a cash deficit in one or more currencies held within the Account, the Holder authorizes the Trustee or the Agent to determine which Property to select and to sell such Property to cover such cash deficit. The Trustee is prohibited from borrowing money or other property for the purposes of the Account.

18. **Interest Charged.** Interest charges, owing on any cash deficit in one or more currencies held within the Account, are calculated and payable monthly, in the same currency or currencies that is or are in deficit, based on an annual interest rate (divided by 365, or 366 in a leap year) and the average daily cash deficit or deficits during the calculation period. Any unpaid interest will be included in the calculation of the daily average cash deficit for the applicable currency. The rate of interest payable on a cash deficit will be determined by the Agent from time to time in its sole discretion. The rate of interest and method of calculation is available upon request to the Agent and will be the rate shown on the Annuitant's statement in respect of the Account.

19. **Distributions.** Subject to any limit on the frequency of Distributions or to any minimum Distribution requirement identified in the Application or other notice given under the terms of this Trust Agreement, and to the deduction of all Expenses and Taxes, the Holder may, at any time and upon 60 days' written notice or such shorter period as the Agent in its sole discretion permits, request that the Agent liquidate part or all of the Property and pay to the Holder an amount, in a currency agreed upon between the Trustee and the Holder, failing which agreement, the currency of which shall be Canadian dollars, from the Property not exceeding the value held under the Account immediately before the time of payment. No one other than the Holder and the Trustee shall have rights under the Account relating to the amount and timing of Distributions.

20. **Designation of Beneficiary.** Where the Holder is domiciled in a jurisdiction where the Applicable Laws permit the valid designation of a beneficiary and where the Holder has not designated the Survivor or there is no Survivor, the Original Holder may designate a beneficiary to receive the Proceeds on the Original Holder's death. A beneficiary designation may only be made, changed or revoked for the purposes of the Account by the Original Holder in a format required by the Agent for this purpose. Such designation must adequately identify the Account and be delivered to the Agent prior to any payment by the Agent. The Original Holder acknowledges that it is his or her sole responsibility to ensure the designation is valid under the Applicable Laws.

21. **Death of Original Holder (Where There Is a Survivor).** Upon the death of the Original Holder where there is a Survivor, the Holder is domiciled in a jurisdiction where the Applicable Laws permit the valid designation of a survivor, and the Survivor has been designated for purposes of the Account, and upon the receipt of Estate Documents by the

Agent which are satisfactory to the Trustee, the Survivor shall become the Holder, subject to any pledging under paragraph 16.

22. **Death of Original Holder (All Other Cases).** Upon the death of the Original Holder, where there is no Survivor or the Survivor has not been designated for purposes of the Account, and upon the receipt of Estate Documents by the Agent which are satisfactory to the Trustee, and subject to paragraph 16:

(a) if the Original Holder has designated a beneficiary in accordance with paragraph 19, the Proceeds will be paid to the designated beneficiary, subject to the Applicable Laws The Trustee and the Agent will be fully discharged by such payment, even though any beneficiary designation made by the Original Holder may be invalid as a testamentary instrument; and

(b) if the Original Holder's designated beneficiary had died before the Original Holder or if the Original Holder has not designated a beneficiary, the Trustee will pay the Proceeds to the Original Holder's estate.

Where multiple beneficiaries have been designated and the Holder has not indicated how the Proceeds are to be shared among them, or if there is such an indication but the shares do not add up to 100%, then the Proceeds shall be divided equally among the beneficiaries designated. If any designated beneficiary predeceases the Holder or dies at the same time as the Holder or in circumstances rendering it impossible to determine which of the Holder or beneficiary died first, then the remaining beneficiary(ies) is(are) entitled to receive the Proceeds in accordance with the Holder's wishes. If the Holder has not indicated how the Proceeds are to be shared among the designated beneficiaries, or if there is such an indication but the shares do not add up to 100% of the Proceeds, then the Proceeds allocated to the deceased person(s) will be divided equally among the surviving designated beneficiary(ies). For greater certainty, the share of a deceased person will go in equal portions to the surviving designated beneficiary(ies).

23. **Release of Information.** The Trustee and the Agent each are authorized to release any information about the Account and the Proceeds, after the Holder's death, if the Holder has pledged his or her interest or right in the Account as security for a loan or other indebtedness or where there is to be a transfer to the Spouse's TFSA pursuant to paragraph 30, to either the Holder's Estate Representative, the creditor or the Spouse, as the Trustee deems advisable.

24. **Payment into Court.** If there is a dispute about who is legally authorized to apply for and accept receipt of the Proceeds on death of the Holder, the Trustee and the Agent are entitled to either apply to the court for directions or pay the Proceeds into court, which payment shall be in Canadian dollars, and, in either case, fully recover any legal costs it incurs in this regard as Expenses from the Account.

25. **Limitation of Liability.** The Trustee shall not be liable for any loss suffered by the Account, by the Holder or by any Survivor or beneficiary designated for purposes of the Account as a result of the purchase, sale or retention of any investment including any loss

resulting from the Trustee acting on the direction of the agent appointed by the Holder to provide investment direction.

26. **Indemnity.** The Holder agrees to indemnify the Trustee for all Expenses, Taxes and compensation incurred or owing in connection with the Account to the extent that such Expenses, Taxes or compensation cannot be paid out of the Property.

27. **Self-Dealing.** The Trustee's services are not exclusive and, subject to the limitations otherwise provided in this Trust Agreement on the powers of the Trustee, the Trustee may, for any purpose, and is hereby expressly authorized from time to time in its sole discretion to, appoint, employ, invest in, contract or deal with any individual, firm, partnership, association, trust or body corporate, with which it may be directly or indirectly interested or affiliated with, whether on its own account or on the account of another (in a fiduciary capacity or otherwise), and to profit therefrom, without being liable to account therefore and without being in breach of this Trust Agreement.

28. **Compensation, Taxes and Expenses.** The Trustee and Agent will be entitled to such reasonable fees and other charges as each may establish from time to time for services rendered in connection with the Account. All such fees and other charges (together with any goods and services tax or other Taxes applicable thereto) will, unless first paid directly to the Agent, be charged against and deducted from the Property in such manner as the Agent or Trustee determines. All Expenses incurred and Taxes payable shall be paid from the Account.

For greater certainty, in the event of any executions of third party demands or claims against the Account, both the Trustee and the Agent are entitled to fully recover any Expenses incurred by them in this regard as Expenses and all such payments made under this Paragraph shall be in Canadian dollars, with the conversion to occur on the date of payment.

29. **Sale of Property.** The Trustee and Agent may sell Property in their respective sole discretion for the purposes of paying Expenses, Taxes, compensation and loans or other indebtedness under paragraph 16 including, for greater certainty, their own compensation.

30. **Transfers to the Account.** Any property may be transferred to the Account from another TFSA of the Holder, or of the Spouse or Former Spouse where:

(a) the Holder and the Spouse or Former Spouse are living separate and apart and the transfer is made under a decree, order or judgment of a competent tribunal or under a written separation agreement, relating to the division of property between the Holder and the Spouse or Former Spouse in settlement of rights, arising out of, or on the breakdown of, their marriage or common-law partnership; or

(a) the Holder is the Spouse's survivor and the transfer occurs as a result of an exempt contribution (as that term is defined in the Tax Act).

31. **Transfers out of the Account.** Upon delivery to the Agent of a written direction from the Holder in a form satisfactory to the Trustee, the Trustee shall transfer all or a portion of the Property as is specified in the written direction:

(a) to another TFSA of the Holder; or

(b) to a TFSA of the Spouse or Former Spouse where the Holder and the Spouse or Former Spouse are living separate and apart and the transfer is made under a decree, order or judgment of a competent tribunal or under a written separation agreement, relating to the division of property between the Holder and the Spouse or Former Spouse in settlement of rights, arising out of, or on the breakdown of, their marriage or common-law partnership.

32. **Changes to Trust Agreement.** The Trustee may change this Trust Agreement periodically. The Holder will be notified on how to obtain an amended copy of the Trust Agreement reflecting any such change and will be deemed to have accepted such changes. No change to this Trust Agreement (including a change calling for the Trustee's resignation as trustee or the termination of the trust created by this Trust Agreement) will be retroactive or result in the Account not being acceptable as a TFSA under the Applicable Laws.

33. Replacement of Trustee.

(a) The Trustee may resign by giving such written notice to the Agent as may be required from time to time under the terms of an agreement entered into between the Agent and the Trustee. The Holder will be given at least 30 days prior notice of such resignation. On the effective date of such resignation, the Trustee will be discharged from all further duties, responsibilities, and liabilities under this Trust Agreement, except those incurred before the effective date. The Trustee will transfer all Property, together with all information required to continue the administration of the Property as a tax free savings account under the Applicable Laws, to a successor trustee.

(b) The Trustee has agreed to resign upon it being provided with notice in writing by the Agent if the Trustee is satisfied that the successor trustee nominated by the Agent will properly assume and fulfill the Trustee's duties and liabilities hereunder in respect of the administration of the Account.

(c) In either event, the Agent shall forthwith nominate a person to replace the Trustee and the resignation of the Trustee shall not take effect until its replacement has been so nominated by the Agent and appointed as successor by the Trustee and approved by Canada Revenue Agency or its successor. Failing the nomination of a replacement by the Agent within 30 days after receipt by it of a notice of resignation, the Trustee shall be entitled to appoint a person as its own replacement.

(d) Upon any such appointment and resignation of the Trustee, the person so appointed as replacement trustee shall, without further act or formality, be and

become the Trustee hereunder. Such replacement trustee shall, without any conveyance or transfer, be vested with the same power, rights, duties and responsibilities as the Trustee and with the assets of the Account as if the replacement trustee had been the original Trustee. The Trustee shall execute and deliver to the replacement trustee all such conveyances, transfers and further assurances as may be necessary or advisable to give effect to the appointment of the replacement trustee.

(e) Any person appointed as a replacement trustee shall be a corporation resident in Canada that is licensed or otherwise authorized under the laws of Canada or a province to carry on in Canada the business of offering to the public its services as trustee.

Any trust company resulting from the merger or amalgamation of the Trustee with one or more trust companies and any trust company that succeeds to substantially all of the trust business of the Trustee shall thereupon become the successor to the Trustee without further act or formality. In all such cases, Canada Revenue Agency or its successor shall be notified.

34. **Assignment by Agent.** The Agent may assign its rights and obligations hereunder to any other corporation resident in Canada authorized to assume and discharge the obligations of the Agent hereunder and under the Applicable Laws.

35. **Notice.** Any notice given by the Holder to the Agent shall be sufficiently given if delivered electronically to the Agent upon the Holder's receipt of an acknowledgement and response to same or personally to the office of the Agent where the Account is administered, or if mailed, postage prepaid and addressed to the Agent at such office, and shall be considered to have been given on the day that the notice is actually delivered or received by the Agent.

Any notice, statement, receipt or other communication given by the Trustee or the Agent to the Holder shall be sufficiently given if delivered electronically or personally to the Holder, or if mailed, postage prepaid and addressed to the Holder at the address shown on the Application or at the Holder's last address given to the Trustee or the Agent, and any such notice, statement, receipt or other communication shall be considered to have been given at the time of delivery to the Holder electronically or personally or, if mailed, on the fifth day after mailing to the Holder.

36. **Date of Birth.** The Holder's statement of his or her date of birth in the Application shall be deemed to be a certification as to the Holder's age, on which the Trustee and the Agent may rely, and an undertaking to provide any further evidence of proof of age as may be required by the Agent.

37. **Contribution While Holder is a Minor.** Where the Holder makes a Contribution to the Account prior to the Holder having attained the age of majority in accordance with the Applicable Laws, the Holder will execute a ratification of the Application and all

transactions made by the Holder in respect of the Account prior to reaching the age of majority.

38. **SIN and Address of Holder.** The Trustee shall be entitled to rely upon the Agent's records as to the social insurance number, and to the current address of the Holder as establishing his or her residency and domicile for the operation of the Account and its devolution on the death of the Holder subject to any written notice to the contrary respecting the Holder's domicile on death.

39. **Heirs, Representatives and Assigns.** The terms of this Trust Agreement shall be binding upon the heirs, Estate Representatives, attorneys, committees, guardians of property, other legal and personal representatives, and assigns of the Holder and upon the respective successors and assigns of the Trustee and the Agent and their directors, officers, employees, and agents, as well as their respective estates, Estate Representatives, heirs, attorneys, committees, guardians of property, other legal and personal representatives, and assigns.

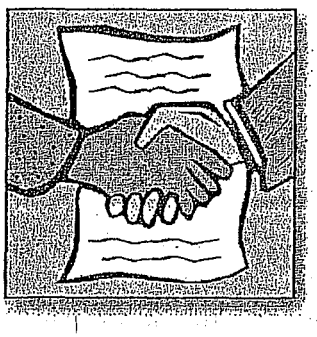
40. **Language.** The Holder has expressly requested that this Trust Agreement and all related documents, including notices, be in the English language. Le titulaire a expressément demandé que cette Convention de fiducie et tous documents y afférents, y compris tout avis, soient rédigés en langue anglaise. (Quebec only/Québec seulement)

41. **Interpretation.** Unless the context requires otherwise, any terms or provisions importing the plural shall include the singular and vice versa.

42. **Governing Law.** This Trust Agreement and the Account shall be governed by and construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein.

The Holder expressly agrees that any action arising out of or relating to this Trust Agreement or the Account shall be filed only in a court located in Canada and the Holder irrevocably consents and submits to the personal jurisdiction of such court for the purposes of litigating of any such action.

Appendix 8



ADVOCACY ACCESS

HELPSHEET

BC DISABILITY BENEFITS

8

DECEMBER 2012

Trusts for People Receiving the Persons with Disabilities (PWD) Benefit

This Help Sheet funded by the Legal Services Society of BC, Human Resources and Skills Development Canada: Homelessness Partnering Strategy and the Health Sciences Association of British Columbia.

The BC Coalition of People with Disabilities has prepared this Help Sheet to help you understand about trusts. If you receive the Persons with Disabilities (PWD) benefit, have disability status, or live in a special care facility, you may be allowed to set money aside in a trust and still receive PWD benefits.

A trust is set up by a legal document that has to follow strict guidelines. You will need to submit the trust document to the Ministry of Social Development (MSD). As soon as it is drawn up, the Ministry's legal advisors will tell you whether the trust fits its guidelines. This process can take a few weeks.

This Help Sheet explains what a trust agreement is and outlines some of the MSD rules on trusts. It does not tell you how to set a trust up–you should have a lawyer do that for you. Some community organizations may also be able to help. Please see below for details.

Definition of a trust

A trust is a way to set money aside through a special legal agreement. It is not the same as a regular savings account or term deposit. This agreement allows a person (the trustee) to hold money or other assets for you (the beneficiary). The trustee must follow certain rules about how the money is spent.



Advocacy Access is a program of BC Coalition of People with Disabilities
Ask about other Help Sheets in this series. All our publications are available at www.bccpd.bc.ca.
Information in this Help Sheet is based on the legislation that was current at the time of writing. The legislation and policy may be subject to change. Please check the date on this Help Sheet.

HSB | Nov. 23/12

Why you may consider setting up a trust

You should consider setting up a trust if you are going to receive a lump sum of money that is over your asset limit. To be eligible for PWD benefits, you may only have a certain amount of assets. For example, if you are a single person with no children, you cannot have more than $5,000. This is called an asset limit.

PWD recipients who are over their asset limit:

- must go off monthly benefits until they are within their asset limit, or
- may put the money into an exempt asset such as a trust, use it for certain things related to their disability and still receive monthly benefits.

We recommend that you look into setting up a trust before you actually receive the money. The sooner a lump sum is placed in a trust, the less likely it is to affect your monthly benefits. Ministry regulations require you to declare income shortly after you receive it and it may be decided that you are ineligible for a benefit cheque for one month. After the first month, a lump sum may be considered an asset and if the trust is in place by then your monthly entitlement should not be in question. See "Having your trust recognized by MSD."

How trusts work

Trusts have beneficiaries and trustees. You are the beneficiary–the person who receives money from the trust.

The trustee is the person who manages or helps to manage the trust. The trustee arranges for money to go from the trust to you, the beneficiary. There may be more than one trustee.

You can choose your trustee. It should be someone who knows you well and understands your needs. You may also be named as a co-trustee for your trust. This means that you manage your trust with another trustee.

Once the trust is established, money can be added to it. Under MSD regulations, PWD recipients may have one of the following types of trusts:

- **Discretionary trust** - you do not have control over the money in the trust. The trustee makes all spending decisions. There is no limit to the amount of money that can be placed in a discretionary trust.
- **Non-discretionary trust** - you have control over the money in the trust through the trustee. The trustee makes all expenditures based on your requests. You may



also act as a co-trustee. There is a $200,000 life-time limit to the money you can put in a non-discretionary trust. The MSD may permit you to put in more by special approval only.

Using the trust money

There are restrictions on what you can use your trust money for, without affecting your monthly disability benefits. If there is any doubt about what category a planned expense falls into, you can check with an advocate before you draw money from the trust. To maintain your disability benefits, you may only spend trust money on the following:

- Caregiver services
- Education or training
- Home renovations necessary because of your disability
- Home maintenance repairs
- Medical aids
- Independent living: up to $8,000.00 per year for any other item or cost that will help you live more independently.

You will be required to provide MSD with information at least once a year on how the trust money has been spent. MSD can ask for verification of any payment or disbursement of funds so it is crucial that you and your trustee keep accurate up-to-date records of all your expenditures.

Setting the trust up: next steps

As we noted above, you should have a lawyer or professional with legal knowlege set up your trust. This person should not only understand trust law, but also be familiar with the Ministry's regulations and policy regarding trusts. This will cost money, but you should be able to arrange for it to come out of your lump sum payment.

Other people can set up a trust for you. A common way is for family members to create a trust provision in their will. This means that a trust will come into effect when the family member dies. If your family or friends are planning to establish a trust for you, make sure they understand that MSD has rules about how it must be set up.

Two community organizations that may provide information about trusts to you or your family are:

Coast Foundation

- assists people who have mental health disabilities to set up trusts.
  Ph: Trust Coordinator at 604-872-3502

Plan Lifetime Advocacy Network

- provides information about trusts and a referral service to lawyers who know about setting up a trust for people receiving PWD.
  Ph: 604-439-9566

Having your trust recognized by MSD

Once your trust document has been drawn up, MSD has to approve it. Give your local office a copy and MSD will forward it to Victoria for a legal opinion. This process will help MSD decide whether or not your trust has been set up properly. A decision can take several weeks.

If you have not already set up a trust, and you receive a lump-sum payment, we recommend that you tell MSD you plan to set up a trust when you receive the funds. MSD will exempt these assets for 3 months to give you time to set up your trust and get MSD approval. If it takes longer than 3 months, you will need to keep in touch with MSD and they will review the situation on a month-to-month basis.

Appealing

You have the right to appeal if the Ministry reduces or cuts off your benefits because it does not accept the terms of your trust. However, it is probably better to talk to your lawyer about changing your trust so that it meets MSD's rules.

You may also appeal MSD denials related to how you spend your trust money. If you want to appeal, you must notify the Ministry within 20 business days of receiving notification that your expenditures have not been approved. Contact MSD and ask for a Request for Reconsideration form. If possible, contact an advocate for help with your appeal.

Other Resources

For more information on trusts, contact the Voice of the Cerebral Palsied of Greater Vancouver (VCP) for a copy of their booklet, "How to Create a Trust: A Resource Guide for People Receiving 'Persons with Disabilities' Benefits and their Families."
Ph: 604-874-1741, Email: vcpgv@vcn.bc.ca. You can also access the guide by going to: www.vcpgv.org/trust.html.

For the Ministry's brochure on trusts, "Disability Assistance and Trusts," contact your local MSD office or go to: www.eia.gov.bc.ca/publicat/bcea/trusts.htm.



An Alternative to Trusts

Another way to exempt assets is to put money into a Registered Disability Savings Plan (RDSP). However, keep in mind that your age and eligibility requirements, such as the Disability Tax Credit, may determine whether you can open an RDSP. For more information on the RDSP, see Help Sheet 14, Registered Disability Savings Plan and the Disability Tax Credit. BCCPD also has several free RDSP resource online at www.bccpd.bc.ca/rdsp.htm.

Prepared by Advocacy Access
A program of BC Coalition of People with Disabilities

204-456 W. Broadway, Vancouver, BC V5Y 1R3 • tel: 604.872.1278 • fax 604.875.9227
tty 604.875.8835 • toll free 1.800.663.1278 • www.bccpd.bc.ca

This Help Sheet is funded by the Legal Services Society of BC, Human Resources and Skills Development Canada: Homelessness Partnering Strategy and the Health Sciences Association of British Columbia.

Appendix 9

BRITISH COLUMBIA
The Best Place on Earth

Ministry of
Social Development

Dear

We are writing to advise you of the ministry's decision following review of your trust arrangement.

The ministry has determined that your Tax Free Savings Account (TFSA) is set up by a Declaration of Trust. Under the terms of the trust, you can compel the plan trustee to withdraw funds for you at any time. As a result, the TFSA is considered to be a non-discretionary trust.

This means that the ministry will treat this trust property as your asset. Nevertheless, the trust property will be an exempt asset as long as the aggregate value of all trust property contributed to the trust is no more than $200,000 in value.

All payments made from the trust to or on behalf of you will be your unearned income, except for payments that are exempt because they are for "disability-related costs" as defined in the regulation.

Please also note that you must advise the ministry of any additional money or other assets placed in the trust, and of any changes made to the trust or the trustee.

You may find it helpful to review the general information in the booklet "Disability Assistance and Trusts" available at Employment & Assistance Centres or http://www.mhr.gov.bc.ca/publicat/pdf/DisabilitiesTrusts.pdf.

The ministry cannot provide specific advice about how best to arrange your affairs. If you have any questions in that regard, or if you have questions about the legal implications of the ministry decision, it is your responsibility to seek independent legal advice.

Sincerely,

for Donna Thompson
Manager, Litigation

Ministry of Social Development
MSD-MCFD Legislation, Litigation and Appeals Branch
PO Box 9743 Stn Prov Govt
Victoria BC V8W 9S3
Telephone: 250-356-5642
Facsimile: 250-356-8182

TAB 9: Other

- **Legal Issues Affecting Seniors (Day 1) (repeated)**
  - Seniors Advocacy: an introduction

Separating sheet

  - Powerpoint

Orange sheet

- **Update on Wills and Estates Legislation (Day 2)**
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Orange sheet

- **Immigration Hot Topics (Day 3)**
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Seniors Advocacy – an introduction to 'elder law' issues

Legal Advocates Conference – Oct 2013

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1. OLDER ADULTS

Older adult(s) (or "senior(s)" – not "old folk(s)," not "the elderly") are increasing in number as the 'baby boomers' age. Over the coming years, the number of seniors in BC will nearly double to become almost 25% of the population. The fastest growing segment of the population is 85+. Immigrants compose a relatively large (28%) proportion of seniors.

According to geriatrician Robert Moulias, in industrialized countries only a small minority (about ten percent) of people in later life are "the rich, young-like" (such as the recently retired). Disabled seniors or dependent frail older persons are also a minority but larger in size. "The large majority of the 60-100 year olds are neither young nor physically nor mentally dependent." About 93% of seniors will live out their lives at home, likely with some support, rather than in a care facility.

Most of low-income seniors' money is spent on: housing; food; transportation; and, health related costs. Many older adults are working longer to help pay for these expenses. The elderly poor are generally widowed, and living alone – widowhood is a significant transition point for older women. Meyer-Harrington notes that to be old, female and poor is a "triple jeopardy." Understanding the role of and the intersection of gender with aging is essential. Seventy per cent of low income women 65+ have two or more chronic conditions – they are more likely to die prematurely.

Vulnerability

There are three main risk factors that contribute to vulnerability in older adults: health status; cognitive ability; and, social network. The oldest adults (85+) have greatest vulnerabilities to exploitation by institutions and individuals due to the worsening of health and cognitive abilities and the reduction in social support over time. Other sub groups have equal or arguably more risk of exploitation because of dual/multiple identifications with other oppressed groups including: low socioeconomic status; ethnic background; and, rural living.

Older adults are often economically vulnerable because their cost of care often exceeds their income. In particular, chronic illness increases an older adult's dependency and cost of living. The impairments caused by chronic illness and the need for long term care increases directly with age – they say for many the last 10 years of life are spent in illness.

Poverty among seniors is often an accumulation of disadvantages over their lifetime, race and gender differences, and structural issues. The *Special Senate Committee on Aging* noted that many seniors can't understand the complex programs available for them, and others are penalized due to interactions between federal and provincial programs. Access to services and benefits are a major challenge for low income seniors.

United Way - Seniors Vulnerability Report

The United Way published a report in 2011 on the vulnerability of seniors in the Greater Vancouver area and the Sea-to-Sky corridor. It found that vulnerabilities are most concentrated in certain groups of 65+ seniors. Groups most affected include:

- The "oldest old" women (85+);
- Unattached, single-income seniors;
- Visible minority seniors;
- Aboriginal seniors;
- Recent immigrant seniors;

- Seniors without a certificate, degree, or diploma; and,
- Seniors with mobility limitations and/or chronic illnesses.

It identified nine 'dimensions of vulnerability' for these populations:

1. Economic insecurity
2. Social isolation
3. Inadequate and unaffordable housing
4. Poor mental and physical health
5. Inaccessible transportation and built environments
6. Food insecurity
7. Physical mobility limitations
8. Marginalized identities and cultures
9. Barriers to multi-lingual communication and lack of multi-lingual services

Autonomy vs Dependence

Vulnerable older adults may need protection, but protection is often antithetical to autonomy – the more we help older adults the more we take away their autonomy. There is a need to balance the right to be autonomous while protecting the vulnerable elderly. But older adults should also be free whenever possible to expose themselves to risk, just as younger adults can. The Fraser Health Authority has develop a guideline on "*Supporting Residents to Live at Risk in Residential Care*."

To reduce elderly people's dependency we must recognize and expand their rights. Legal advocates, who should by training be sensitive to the balancing of competing values, have a major role to play in the sorting out of the proper mix of protection and autonomy.

Third Parties

One area where the tension between autonomy and dependence comes into play is when dealing with interested third parties who come to an appointment – family members, friends, neighbours. They may be very involved in helping the older adult with important matters. They might even have arranged the appointment for assistance. A useful American Bar Association pamphlet (Why Am I Left In The Waiting Room - Understanding the 4 C's of Elder Law Ethics) explains to 'friends' and relatives why a legal worker needs to meet with the older adult alone if at all possible to properly address what are called "the four C's of elder law ethics:"

1. **Client ID** (who is the client – what are instructions)
2. **Conflicts of Interest** (only one client if possible)
3. **Confidentiality** (and protection of privilege)
4. **Competency** (assessing capacity)

It can be useful for a legal services organization to develop a 'third party protocol' setting out the limited circumstances when a third party is included in interviews, and when the third party might be the 'client' rather than the older adult, or a joint client.

Barriers to Accessing Justice

Older adults accessing justice encounter various barriers:

- May be unaware of their rights, especially in area of rights of residents of seniors housing;
- Many areas of law are complex – thick statutes, overlapping jurisdictions
- Physical barriers, lack of accessible transportation or services;
- For those living in care homes – the staff (who may be the problem) may be only link to outside world;
- Fixed income and limited coverage by BC legal aid;
- Court proceedings often lengthy
- Not a strong 'elder law' bar
- If a legal process pits an older adult against their care provider or family member, they will be reluctant to file complaints, as they must continue to depend on this care provider into the future, or they may want to keep 'peace in the family.'

Working with Older Clients

A thorough initial interview is fundamental to the development of a plan for effective advocacy with an older adult. For example, the information gleaned from a thorough interview allows the legal advocate to assess any financial or housing choices in terms of that client's likely future. Medical information including medical history may be important, especially if legal capacity may be an issue.
Some practical concerns:

- Early morning appointments vs the 'sundown effect'
- House calls
- Good, indirect lighting
- Some elderly are suspicious of lawyers
- Some elderly may be confused or paranoid which may be the direct result of medication

Legal advocates must be cognizant of the stress of working with elderly clients who, perhaps more than others, may:

- fear their own mortality
- feel anger
- regret their experiences and behavior, or
- regret the behaviour of their own children.

Timeliness

It is important to be timely in working on seniors matters. Timely access is important to older adults with precarious or deteriorating health. Procedural processes that result in delays can work to systemically disadvantage older adults and may effectively negate their rights, including lengthy reviews or appeals. On the other hand, many seniors are systemically disadvantaged by the short time frames in areas such as RTA evictions.

Death can make an elderly person's problem moot. So it is urgent to get to elderly clients cases – don't let them be 'dog files.' Older adult or their concerned friend/family member who seeks legal assistance usually need help now, not in the distance future or when it is convenient for the legal worker.

2. AGEISM

Ageism is defined as the *process* of systematic stereotyping and discrimination against older people because of age, with a distinct valuing of younger age groups. Ageism allows people to covertly justify certain discriminatory behaviours, and tolerate activities towards older adults that would be considered unacceptable if experienced by other adults. *[First coined by Robert Butler in 1969].*

Age discrimination is the act of treating someone differently and poorly, or harassing or insulting someone, because of their age. Age discrimination may also happen when a rule, condition, policy or practice that is the same for everyone has an unfair effect ("disparate impact") on a person because of their age.

Ageism has been called a 'pervasive and sinister' plague in Canada – in a recent poll eight in 10 agree that older seniors are seen as less important - and more likely to be ignored - than younger generations. One-third of Canadians admit they've treated someone differently because of their age, and 63 per cent of seniors over 65 say this has happened to them.

Examples

Examples of 'ageism' in daily life:

- Telling jokes and giving birthday cards that make fun of old people

- Seniors are treated as invisible, rejected as unattractive
- Only 2% of TV characters are 65 yrs or older (although they make up 12% of population)
- Older adults are ignored or not taken seriously
- Talked down to and patronized
- Treated with less dignity and respect
- Assumptions – can't hear, can't understand
- Denied employment, promotion, position of leadership
- Refused loan, rental housing, medical treatment
- Preyed on by vandals, thieves, fraudsters and scam artists

Ageism and Resource Distribution

Ageism and age discrimination are often harder to address than other forms of discrimination as older adults' needs easily become subsumed to the needs of other age groups or to the administrative needs for efficiency or cost cutting. Given pressure for scarce resources and given similar need, the fact that one is older often becomes the justification for not receiving a benefit or service or not being treated as a sufficiently high priority. In any 'cost-benefit analysis' based on remaining years or future productivity, older adults are always at a disadvantage. *[Law Commission of Ontario]*

Ageism and Health Care

Ageism is reflected in the health care system by the lack of, or absence of health services for older adults. Decisions are often made about providing health services based on age ("age rationing"). Health care providers often presume to make decisions about the quality of older people's lives. Seniors often feel forced to make care decisions. There is gender bias or paternalism in deciding on surgeries – more radical mastectomies, less reconstructive surgery. Seniors are often omitted from the pool of subjects for clinical drug trials – even though these drugs may have a different effect on older adults.

There is less treatment for mental health issues for older adults. They receive 15% of mental health care, compared to 80% for those 20-64. Instead there is often over medication [prescribing anxiety meds doubles over the age of 65, hypnotic medication use more than triples]. **NOTE** – 40% of all emergency department visits by older adults are medication related.

3. SENIORS AND AGE DISCRIMINATION

BC Human Rights Code (the "Code")

The ***Code*** applies to all businesses, agencies, and services in B.C., except those regulated by the federal government. It protects older adults from discrimination in **public situations**, which include schools, workplaces, universities, hospitals, medical clinics, stores, restaurants, provincial and local government offices, and transit services. It also protects older adults against discrimination in printed publications and in areas such as employment and tenancy.

Employment

Mandatory retirement has been abolished in BC since January, 2008. An employer cannot refuse to interview, hire, promote or decide to fire an employee because of their age (19 and over). An employer cannot make age an issue or advertise for a certain age when hiring. An ad must not say "young people wanted." An employer cannot refuse an older applicant because "the job requires a lot of energy and enthusiasm and the company is looking for someone with career potential." During the hiring process,

an employer cannot ask anything that could reveal age, other than whether they are of legal working age. After hiring, an employer might legitimately need to know the employee's age for a purpose like enrolment in a pension or benefits plan.

There may be some jobs with age limits because of the duties or needs of work or because of safety issues or dangers. These true demands of a job are called "bona fide occupational requirements." The employer must be able to show that the reasons for the age limits are acceptable under the **Code**. A firefighter in BC is presently fighting his fire department's mandatory retirement at age 60, which is claimed to be a bona fide occupational requirement."

Employers' pension plans can make distinctions based on age. They can set early and standard retirement ages, but cannot force an employee to retire. These age distinctions allow programs to keep operating. Group or employee insurance plans, whether self-funded by employers or provided by a third party, can also make distinctions based on age.

Tenancies

Generally, landlords cannot deny someone the right to occupy space as a tenant because of age. Landlords cannot evict tenants because of their age, and cannot use age as a term or condition of a tenancy agreement.

With some exceptions, the **Code** does not apply to "55+ housing" – landlords can restrict rentals to persons 55 years and over in seniors' buildings. After someone moves in, the **Code** will apply.
NOTE - Landlords can restrict rentals based on age in a rental unit or house where the person renting will share the use of sleeping, bathroom or cooking facilities with the landlord.
NOTE – the **Code** also does not protect against age discrimination in the purchase or sale of property.

Retail & Public Services

A person or business that provides services to the public cannot discriminate against someone because of their age when providing:

- short-term accommodation, such as a hotel room;
- public services, such as health care, restaurant or retail services;
- government services or transit; and
- other public facilities, such as recreation centres.

Working on Accommodation

As you probably know, people when claiming a benefit or entitlement, are entitled to have their difference accommodated, to the point of undue hardship, under the **Code**. Traditionally, accommodating a "difference" was seen as a joint process – the person claiming the differential treatment helps the other party understand how they can be accommodated to access and benefit from the entitlement. With older adults, a challenge is that the health care and housing systems are very complex. The older adult may not know what resources are available, and may not be able to identify ways they can be accommodated.

Treatment of Age Discrimination Cases

It has been noted:
"Age cases tend to be treated differently than other discrimination cases...The most notable difference from a human rights perspective is the lack of a sense of moral opprobrium linked to age discrimination which in comparable circumstances would generate outrage if the ground of discrimination were say race, sex or disability." *[Ontario Human Rights Tribunal]*

4. INCOME SECURITY

Overall, thanks to income security programs, today's seniors, while not affluent, are financially secure. But there are vulnerable groups:

- Recent immigrants
- Unattached older adults (single, widowed, divorced or separated);
- Aboriginal seniors
- Those with <10 yrs. in the labour force
- Those who worked in 'precarious' work their working life – no pension, little or no savings

Federal Income Security Programs

The federal government manages two major public pension ('income security') programs through Service Canada:

- **Old Age Security** (OAS), based on years of living in Canada, and
- **Canada Pension Plan** (CPP), based on years of working in Canada and the amount paid into the plan.

OAS benefits represent about 14% of pre-retirement earnings for someone earning at the average wage, while CPP provides about 25%. It is generally considered that retirement income should replace about 60% to 70% of pre-retirement earnings for retirees to maintain their standard of living in retirement.

Old Age Security Pension (OAS)

OAS is considered "the basic building block of Canada's retirement income system." *[Can. Centre for Policy Alternatives].* Older adults build on this foundation with CPP pension, savings (RRSPs; TFSA), private pension plans, or GIS and SAFER supplements [see below re SAFER program].

OAS is a flat monthly benefit that goes to everyone who applies. There is no requirement to stop working to receive OAS. You must be a citizen or legal resident of Canada who has lived in the country for 10 or more years as an adult (after turning 18). With 10 years residency you get the minimum pro-rated entitlement, with 10-39 years in Canada a prorated amount, and with 40+ years you receive the full OAS entitlement (presently $540.12/mo.)

NOTE – even if an older adult doesn't meet the residency requirement, they may still qualify for a pension since Canada has social security agreements with many countries.

Older adults should apply for OAS six months before they turn 65, or when they receive the OAS application form. If they apply late, they are entitled to a maximum 11 months of retro, plus the month in which they receive the application, provided all conditions of eligibility are met.

If the older adult was not born in Canada or has not lived continuously in Canada since age 18, they must submit proof of legal status in Canada such as citizenship or immigration papers. Also, they must submit a statement of all the dates they arrived in Canada and departed Canada from age 18 to present. They may be asked to provide documents to substantiate this. Putting together a complete statement of travels, and adequate documentation, can be a significant challenge for older immigrants. For help in making an application, they should contact their local Service Canada office, or agencies that help seniors in their community.

Claw-back

Pensioners with an individual net income above $70,954 for 2013 must repay part or all of the maximum OAS amount. For each $1 above this amount, OAS is reduced by 15¢ The repayment amounts are normally deducted from their monthly payments before they are issued. The full OAS pension is eliminated when a pensioner's net income is $114,793 or above.

Guaranteed Income Supplement (GIS)

GIS is an additional income-tested monthly benefit paid to those who receive OAS and have little or no other income. Income from OAS is taxable; GIS supplement is not taxable. Older adults must apply to receive GIS – then it will renew each year assuming they file an annual Income Tax return. Sponsored immigrants are not eligible for GIS during their sponsorship period up to a maximum of 10 years – subject to exceptions. In 2011, 34% of all OAS beneficiaries received some GIS. According to one estimate, OAS and GIS combined make up 36% of the average income of seniors. For low-income seniors, it's between 66% - 75%.

Allowance & Allowance for the Survivor

The *Allowance* is extra money for couples who live on only one OAS/GIS pension in the household, and the other spouse is not receiving OAS/GIS as they are under 65 (between 60-64). If the pensioner spouse dies while the other spouse is still between 60-64, this surviving spouse might be eligible for the *Allowance for the Survivor*. **NOTE** – if this other spouse remarries or lives in a common- law relationship for at least one year, their *Allowance* or *Allowance for the Survivor* will end.

Old Age Security Benefit Payment Amounts July -September 2013		
Type of benefit	Average amount (March 2013)	Maximum amount
Old Age Security pension	$515.97	$549.89
Guaranteed Income Supplement (GIS)		
Single	$499.54	$745.62
Spouse/common law partner of someone who:		
does not receive an OAS pension	$474.59	$745.62
receives an OAS pension	$317.09	$494.40
is an Allowance recipient	$410.17	$494.40
Allowance	$425.33	$1,044.29
Allowance for the Survivor	$626.72	$1,169.14

OAS benefit amounts are reviewed in January, April, July and October to reflect increases in the cost of living as measured by the Consumer Price Index (CPI).

Canada Pension Plan (CPP)

There are three kinds of benefits available from the Canada Pension Plan:

- Retirement pension;
- Survivor benefits which includes a one-time death benefit (intended for funeral expenses), the Survivor pension and the Children's Benefit.

- CPP-D - disability benefit which includes benefits for disabled contributors and for their dependent children

Our focus will be on the CPP retirement pension, which provides income to working Canadians after they retire. The amount of CPP pension income they receive depends on the amount they (and their employer – unless self-employed) paid into the fund from their wages over the years they worked in Canada. An older adult can receive CPP pension if they have contributed and:

- they are 60-64 years old and have stopped working or have a low income, or
- they are 65 years or older.

If they start collecting at 60 yrs. – their rate then remains the same after they turn 65. If a contributor chooses to work past 65, they can apply and be receiving CPP benefits at the same time as their salary. They can also choose to continue paying premiums into CPP up until age 70; this will increase the amount they receive in retirement benefits. Older adults must apply for CPP pension. CPP benefits are taxable income.

CPP pension rights are not affected if an older adult has changed jobs or moved from one province to another. An older adult can apply for and receive their CPP benefits from anywhere in the world. **NOTE** – there are special rules for Quebec.

Survivor Benefits

Paid to the person who, at the time of death of the CPP pensioner, is the legal spouse or common-law partner of the deceased. If they are a separated legal spouse and there is no cohabiting common-law partner, they still may qualify for this benefit.

Child-Rearing Dropout Protection

An older adult may qualify for increased benefits if they have contributed to CPP over their working life but they had to 'drop out' of the labour force to raise children born after December 31, 1958. **NOTE** – They must request this 'child-rearing dropout protection' when they apply for CPP benefits as this is not applied automatically.

Veterans Affairs Canada (VAC)

Veterans Affairs Canada provides a variety of services and benefits for eligible Veterans, their families and caregivers, both at home and in community facilities. These include disability benefits, financial assistance for low-income Veterans and their families, health care, respite care, palliative care, special equipment, and support for home adaptations for Veterans with special needs. VAC can also help bring together services offered by the community and the province to meet the needs of Veterans, and their families and caregivers. For more information, call Veterans Affairs Canada or visit their web site.

EI & Seniors

A discussion of EI benefits is beyond the scope of this course. We will mention that older adults who are still working, or wanting to work, are eligible for EI benefits. They must meet the qualifying and entitlement conditions.

The receipt of pension income does not prevent an older adult from receiving EI benefits. If they return to work and accumulate enough insurable hours and meet the entitlement conditions to set up a claim, most 'pension' income will not be deducted from their EI benefits. EI makes a distinction between pension income "resulting from any employment" (e.g. – CPP, employer's pension plan) and other pension income (e.g. - 'personal pensions' such as RRSPs or RRIFs, Survivor's Pensions, Veteran's Affairs pensions).

Those 'resulting from employment' are considered 'earnings' and are deductible. If a person re-qualifies for EI benefits after the date on which payment of the pension begins, all or part of the pension is not considered to be earnings. The interaction between EI benefits and pension income is a complicated area and each case should be carefully reviewed.

International benefits

If an older adult has lived and worked in another country, they may be eligible for social security benefits, either from that country or from Canada. For information on how to apply for international benefits, contact the International Benefits Program [see Resources, below].

Provincial Programs For Seniors

Seniors Supplement

The Senior's Supplement is a monthly payment from the provincial government to low-income seniors who need a "top-up" to bring their OAS, GIS or federal Allowance incomes up to BC welfare levels. It is automatic if they qualify – they don't need to apply. The Supplement is also automatically paid to people aged 60 to 64 who receive an Allowance and are married to an OAS pensioner. The Senior's Supplement is available under BC's Employment and Assistance Regulation.

Shelter Aid For Elderly Renters (SAFER)

SAFER provides monthly cash payments to eligible BC residents. They must be 60+ and pay more than 30% of gross (before tax) monthly household income towards the rent. This includes the cost of pad rental for a manufactured home (trailer) owned and occupied. Those living in subsidized housing, equity co-ops, or receiving regular social assistance or PWD are not eligible.

Seniors and Social Assistance

Older adults who are ineligible for OAS or GIS, and need money for food, housing, clothing and other basic needs, may be eligible for provincial welfare. They may also be eligible if they are over 65 and on OAS/GIS but are supporting a spouse and/or dependent children who do not receive any benefits and have very low incomes. If ineligible for welfare (no status) they may be eligible for hardship assistance. Between age 60-64 older adults on welfare are expected to do a job search and to apply for early CPP pension.

Enhanced Medical Coverage

Older adults receiving welfare may qualify for enhanced medical coverage from the Ministry of Health Services. Enhanced coverage includes:

- Medical Service Plan coverage;
- PharmaCare
- MSD-sponsored health assistance such as: orthodontia, medical supplies, medical equipment, extended therapies, orthotics, and medical transportation.

Basic Medical Coverage

Older adults who have moved from provincial assistance to federal income security may still be entitled to some basic coverage:

- Medical Services Plan,
- PharmaCare,
- basic dental, optical, and,
- other approved medical supports.

Appeals

OAS/CPP/EI

Appeals of denial of OAS, CPP or EI go to the new Social Security Tribunal (SST), which started operation in April, 2013. In all cases the appellant must have first requested a 'reconsideration' from the respective Ministry involved. The possible steps of an appeal are:

Reconsideration ➲ SST General Division ➲ SST Appeal Division[with leave] ➲ **Federal Court** [judicial review]

The General and Appeal Divisions each have an *EI Section* and an *Income Security (CPP/OAS) Section*. Appeals of EI decisions are to be filed within 30 days after decision was communicated to appellant, CPP/OAS appeals are to be filed within 90 days. Tribunal members hear appeals in both General and Appeal Divisions by teleconference or videoconference facilities whenever possible. Participation in these 'virtual' hearings, and electronic document filing and communications to and from the Tribunal will present a challenge to older adults (and perhaps even their advocates!). There is no further appeal from the Social Security Tribunal. Review is limited to a 'judicial review' of SST decisions to the Federal Court of Appeal. Judicial review is beyond the scope of this presentation.

Provincial Benefits

Appeals of provincial social assistance go to the Employment and Assistance Appeal Board (EAAT). Discussion of EAAT appeals is beyond the scope of this presentation.

5. SENIORS HOUSING

Introduction

There are various housing programs available for seniors – from help living at home ('aging in place') to various forms of supportive living. A possible path for a senior in terms of their housing might be:

Independent living ➲ Supportive Housing ➲Assisted Living ➲ Care Facility ➲ Hospital/Hospice

Independent Living

Most seniors want and will live independently in the community. It is estimated that 93% of BC seniors will live out their lives in an independent living or 'assisted living' arrangement. There are many places that provide independent living opportunities, such as:

- low-income housing
- over-55 apartments, and
- retirement communities.

The older adult must be able to live alone (function without assistance in all daily routines, from meal preparation to taking their own medication to doing their own laundry) and without needing medical care on an ongoing basis.

Home Care/Community Care/Respite Care/Palliative Care

Home and community care services provide a range of health care and support services for seniors with acute, chronic, palliative or rehabilitative health care needs, to assist them in living independently. It also includes support programs for their caregivers. In 2009/10, the health authorities provided home support to more than 24,500 people.

There are four broad goals for these types of care programs:

1. **Maintenance and Prevention** – help people with health and/or functional deficits in the home setting maintain their ability to live independently (in many cases – prevent health and functional breakdowns and eventual institutionalization)
2. **Long Term Care Substitution** – to meet the needs of those who would otherwise require institutionalization.
3. **Acute Care Substitution** – to meet the needs of people who would otherwise have to remain in, or enter, acute care facilities (e.g. – early hospital discharge to recover at home)
4. **Palliative Care** – to meet the needs of older adults who chose to die at home.

Home care

Home care can include:

- **Nursing care** in your own home;
- **Meals** delivery;
- Rehabilitation therapy to
- **Home support workers** to help with personal care such as bathing, dressing, or grooming;

Community Care

Community care includes:

- **Adult day centres -** which bring people together for health, social, and recreational activities;
- **Assessment and treatment centres** – determining health problems and treatment options.

Respite Care:

Respite care gives family caregivers or friends who are providing care some time off. A respite care worker may come into the home or the person who needs care may be asked to enter a care home for a short time.

Palliative Care

In this context, round the clock care for older adults who are terminally ill and who want to be at home. Involves relieving, eliminating and/or controlling symptoms so those facing death, and their loved ones, can devote their energies to embracing the time they have together.

Seniors Supportive Housing

Provides specially modified rental homes in selected subsidized housing developments (50% of income), primarily to low-income seniors who need some assistance in order to continue to live independently. Support services include:

- one meal per day,
- 24-hour response,
- light housekeeping, and
- social and recreational activities.

Assisted Living

Housing for seniors who want to live independently and need some assistance with daily activities, but don't want or need 24 hour care. It is seen as falling between home care and residential care on the spectrum of seniors' care services. There is generally a common dining room and recreational space. Three key components of assisted living residences:

1. Housing,
2. Hospitality services, and
3. Personal Assistance Services [up to 2 listed services in the Regulations (**NOTE** - 3 or more listed services makes it a Care Facility)]

NOTE - The housing portion of assisted living is not covered by the *Residential Tenancy Act* – if you are given notice or evicted, you will not be able to dispute to the Residential Tenancy Branch. The Ombudsperson has called this a 'protection gap.'

Cost of Assisted Living

Subsidized residents pay a maximum of 70 per cent of their after-tax income. As of March 2010, this amount ranged from $801 to $3,860 per month, and averaged $1,224 per month. People who experience serious financial hardship as a result of paying the monthly rate can apply to their health authority for a hardship waiver. Non-subsidized residents typically pay between $1,500 and $5,000 per month.

As of March 2011, there were 194 registered assisted living residences in British Columbia, containing a total of 6,832 units, the majority of them single occupancy. Of this total, 4,380 units were subsidized and 2,452 were not.

Residential Care Facilities

Residential care is provided in three types of facilities: community care facilities (71%), and extended care hospitals and private hospitals (29%). These care facilities provide 24-hour professional nursing care and supervision, and are intended for seniors and people with disabilities who have complex care needs and can no longer be cared for in their own homes. The average monthly cost of a care bed is estimated at approximately $6000.00. As of September 2011, there were 26,491 publicly subsidized residential care beds. People in subsidized residential care pay up to 80 per cent of their after-tax income, provided that they have at least $325 remaining from their income each month. The residential care fee paid by individuals is referred to as a "co-payment" and ranges from $898 to $2,932 per month.

Residential care services include:

- professional nursing care;
- an assisted meal service;
- medication supervision;
- personal assistance with daily activities, such as bathing, dressing or grooming; and
- a planned program of social and recreational activities.

Case managers interview prospective residents and determine the nature, intensity and duration of services that would best meet resident's needs and arrange their services (a "care plan"). A Care Plan can include plans for:

- adequate nutrition monitoring medication,
- bills being paid and banking is done,
- rehabilitation,
- medication review.

Resident's Bill of Rights

The *Resident's Bill of Rights* applies broadly to all facilities that provide residential care to adults: long term care facilities, mental health and substance use care facilities, community living homes and hospices, as well as private hospitals and extended care facilities. Rights include rights to health, safety and dignity; rights to participation and freedom of expression; and, rights to transparency and accountability. Facilities are required to post a copy in a prominent location, and operators are required to comply with its provisions. Patient Care Quality Offices track complaints about non-compliance and file quarterly reports with the Ministry.

Public Hospitals

Seniors may initially be hospitalized in a public hospital for an 'acute care' condition - then they need the support of a care facility ('chronic care'). But there are likely no spaces available. These patients are then referred to by the hospital as requiring an "*alternative level of care*" (ALC). They are also referred to disparagingly as "bed blockers."

The most common reasons for ALC admissions:

- palliative care (33%),
- waiting for admission to another adequate facility (27%), and
- physical therapy (11%)

The approximate cost per day of an ALC patient is $550.00. Compare this to the approximate cost in a Long Term Care Facility of approximately $84/day. Cost is about 6X less! But in discharging a relatively low-cost ALC patient and admitting a relatively high-cost acute care patient ($900/day), there is a financial disincentive for hospitals to lower ALC utilization. Who are the ones doing the 'bed blocking?'

Hospices

A hospice is a residential home-like setting where supportive and professional care services are provided to British Columbians of any age who are in the end stages of a terminal illness or preparing for death. Services provided in a hospice may include:

- medical and nursing care;
- advance care planning;
- pain and symptom management; and
- psychosocial, spiritual and bereavement support.

COMPLAINTS

BC Housing

For seniors living in BC housing units, and recipients of SAFER (in areas where the complaint process is not defined by SAFER legislation), there is a two-step complaint process. Complaints are first made to the appropriate manager. If not satisfied, a formal review by the BC Housing Complaint Resolution Committee may be requested by completing the Complaint Resolution form.

Assisted Living

Complaints about assisted living residences go to the Assisted Living Registry (health and safety issues). Complaints about subsidized care received go to the Patient Care Quality Office. Assisted Living residences are required by the Ministry and Assisted Living Registry to inform residents, staff and visitors about how to make a complaint, including:

- how to make an internal complaint at the residence;
- how to make a complaint to the **Assisted Living Registry** (health & safety complaints);
- how to make a complaint to the Health Authority's **Patient Care Quality Office** (complaints about care); and,
- ensuring the complaint process and contact information for the Office of the Assisted Living Registrar and the Health Authority Patient Care Quality Office is readily accessible.

Residential Care

Complaints about care facilities should first go the facility itself (Manager of Care or Executive Director). Unresolved complaints go to the licensing office for licensed care facilities, or the Patient Care Quality

Office for the region for other facilities. **NOTE –** *if you are not sure which office to use, the Patient Care Quality Office will take your complaint and direct it to the Licensing Officer if need be.*

NOTE- a PovnetU course, Seniors Residential Care Advocacy, deals in depth with how to address issues or complaints with care facilities, including involving family and resident councils, and so we will not go into this in any detail here.

6. DEMENTIA AND LEGAL CAPACITY

Terminology

For our purposes, we will be using the following inter-changeably:

- capacity/incapacity
- capability/incapability
- competence/incompetence

Definitions of *capacity* vary across jurisdictions and have evolved over the years. It is now generally understood as the ability:

- to understand the information you need to make a decision

AND

- to appreciate the consequences of making a decision.

In this sense capacity is about a person's decision-making *process*, and it is neutral as to the *outcome* of that process. Therefore, all adults *retain the right to make unwise or risky decisions*, where they make these choices with capacity. This is regardless of age, disability or illness—even in the context of abuse. There is no illness that, of itself, will lead to a finding of incapacity. Diminished capacity can arise as a result of:

- Mental illness
- Lack of mental development due to a birth defect
- Brain damage at some point after birth
- Extreme physical impediments which prevent communication and understanding

We will be most concerned with brain damage due to dementia. Older adults suffer more often from loss of mental capacity than any other age group because they are susceptible to dementia [see below].
There is no such concept as 'total' or 'global' legal incapacity resulting from mental disability.
"Incompetence is not to be understood in any global sense, but rather as reflecting incapacities with respect to specific decisions or areas of decision." [emphasis added] (*Ont. Enquiry on Mental Competency – Professor David Weisstub).*

Deciding whether someone has capacity or is incapacitated is a legal determination, not a medical determination. A doctor's assessment or opinion can assist us, but it is up to the lawyer or legal advocate to determine capacity. As a legal advocate for older adults, it is important to assess whether there is incapacity, and whether it is a temporary situation (e.g. – acute medical condition, mitigating factors such as grieving, depression). Two main issues for advocates are:

1. Does the client have the capacity to retain us for our services?
2. Does the client have the capacity to complete the legal transaction?

Capacity Tests

There are different standards or tests of legal capacity for different transactions or situations. Most standards are found in the common law – decisions decided over the years. There are a few statutory standards or tests for capacity – for making Enduring Powers of Attorney and Representation Agreements. The **BC Law Institute** is studying the need for more statutory standards, to bring more clarity to this area.

Dementia

Dementia describes a group of brain disorders that cause memory loss and a decline in mental function over time. This results in mild to severe cognitive impairment - depends on number and location of brain cells destroyed or lost. Dementia should be understood and appreciated as a terminal illness, not just a by-product of aging.

Dementia results in short-term memory loss coupled with poor judgment and reasoning. Symptoms include becoming lost in familiar places, difficulty using or understanding words, and difficulty performing routine tasks that require organization (e.g., balancing a cheque book, making a grocery list, shopping). There is a 'dementia doubling rule':

Age	Risk of Dementia
<65	1%
65-69	2%
70-74	4%
75-79	8%
80-84	16%
85-89	32%

NOTE – so even up to 84 years of age, only 16% of the population have a risk of dementia.

Conditions Often Confused with Dementia

Condition	Description	Symptoms
Depression	a medical illness that causes a persistent feeling of sadness and loss of interest – a common condition for people living with abuse	☐ emotional withdrawal ☐ confusion ☐ agitation
Delirium	Sudden temporary state of mental confusion and fluctuating consciousness - Results from: high fever, intoxication, shock, malnutrition, dehydration ,	☐ anxiety ☐ disorientation ☐ hallucinations ☐ delusions, and ☐ incoherent speech.

	high/low blood sugar or even things such as bladder or urinary tract infections	
Abuse of Drugs/Alcohol	Abuse or misuse of **prescription drugs** or alcohol	☐ Delerium can be resut ☐ See above symptoms
Aphasia	mild to severe language impairment caused by injury to the brain (e.g., stroke, head trauma, tumor, infection).	☐ difficulty speaking ☐ difficulty understanding ☐ difficulty reading ☐ difficulty writing
Paranoia	Irrational behaviour that may be due to: ☐ Social isolation (e.g. psychotic depression). ☐ A type of dementia (Lewy body). ☐ Progressive sensory decline (e.g., hearing and sight impairment).	☐ Irrationally suspicious ☐ confusion ☐ agitation
Other Disabling Conditions	☐ Cerebral Palsy (CP) ☐ Multiple Sclerosis (MS) ☐ Parkinson's Disease ☐ Lou Gehrig Disease (ALS)	

The 4 D's

We talk about the 4 D's in this area – dementia, depression, delirium and drugs. Any of the first three D's can overlap, and the fourth D, drugs, can be a factor in any of the other three conditions.

Executive Functioning

The frontal lobe of the brain is responsible for what is called 'executive functioning' - intelligence, judgment and behavior. This includes such things as impulse control, abstract thinking and planning. Executive dysfunction is a symptom of dementia. Executive dysfunction can turn an abstainer into a heavy drinker, or a prudent person into a gambler or target for lottery scams etc. Some elder abuse is attributed to a loss of impulse control and judgment caused by dementia.

In some cases there is little damage to other parts of the brain other than the frontal lobe, and this can make identifying/assessing incapacity involving executive dysfunction very challenging. The older adult may present as well dressed, articulate, with good recall – seem perfectly fine. BUT – the older adult may be doing things that waste money or put them in danger - is this in their nature, or has it been caused by incapacity? It may not reflect their values, but have their values changed over time? People do sometimes decide to 'live a little' after a life of prudence. Or is this change the result of dementia?

ABA Handbook – Assessment of Older Adults with Diminished Capacity

The American Bar Association and the American Psychological Association have collaborated on an excellent handbook for assessing older adults who might have diminished capacity. It has a recommended procedure for conducting an assessment and a suggested capacity worksheet. It suggests ways to enhance capacity where possible – there may be what they call 'mitigating factors' such as stress, grief, depression, (recent events affecting stability of the older adult); medical factors; time of day

variability ('sundown effect'); hearing and vision loss; and, educational/cultural/ethnic barriers. Finally, the handbook discusses when and how to refer for medical assessments, and how to use and understand capacity assessment reports from specialists.

Observational Tips

When observing an older client, it is important to focus on their decisional abilities, not their cooperativeness or affability. Watch out for what has been called "confabulation" – filling in the gap with stories. Watch out for your own 'tells' – inadvertent prompts by you for positive/negative answer – "you didn't mean to do this, did you? " as you shake your head no. Pay attention to changes over time; history is important if you are able to find it out. Consider whether other factors could explain the behavior. Check your assumptions Beware of 'ableism' and 'ageism' stereotypes. Just because someone has:

- a diagnosis of a mental illness;
- dementia;
- Alzheimer's Disease or related disorder;
- a negative assessment; or even
- a 'Committeeship' Order

does not automatically mean that they lack decisional capacity.[From Judith Wahl of the Advocacy Centre for the Elderly.]

Gradual Counselling

The ABA Handbook recommends using 'gradual counseling' when working with an adult with diminished capacity. This involves:

- Identifying goals
- Stating the problem
- Ascertaining values
- Comparing options to goals
- Giving feedback

This would be an iterative process to ensure the older adult is making a decision in line with their goals and values.

Undue Influence

Part of the assessment of capacity is determining whether an older adult may be subject to 'undue influence' by others. The **BC Law Institute** has prepared a guide book for lawyers and notaries writing last wills for clients ("*Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide*"). It includes a checklist of recommended practices and procedures, which can be useful in any situation where undue influence is suspected. It also includes a checklist of 'red flags.' We recommend using the recommended practices and the 'red flags' checklist whenever you suspect there may be undue influence from a family member with a potential conflict of interest, a new 'best friend', etc.

Re:act Capability and Consent Tool

This presentation has dealt with capacity in the context of a solicitor-client relations. For issues of capability and consent regarding health care, finances, facility placement and psychiatric treatment, see the *Capability and Consent Tool* from **re:act**, Vancouver Coastal Health. Includes nine pages of charts with the following columns for each type of issue: Decision/Need; Hierarchy of Decision Makers, Relevant Statute; Incapability Criteria; Incapability Assessor/Witness; and, Limits/Conditions.

7. ADVANCE PLANNING

Advance planning can mean many things. Advance planning can mean advance ***care*** planning – how will decisions be made concerning health care when the older adult is no longer able to speak for themselves? Advance planning also includes advance ***financial/legal*** planning regarding financial/legal/property matters – who will manage an older adult's financial and legal affairs when the older adult is no longer capable? Finally, advance planning could also include '***estate planning***' for after the older adult is dead and gone – Wills, trusts, probate, etc. We will be discussing advance care planning and advance financial planning (powers of attorney, joint accounts), but we will not be discussing estate planning in this presentation. Before we discuss advance care planning, we need to review a bit about health care consent.

Health Care Consent

The three general rules regarding health care consent are:

1. Adults can only be given health care with their consent
2. Adults are presumed to be capable of giving consent.
3. Adult must be approached first for a decision about health care

With appropriate communication, and ncessary information and support, most adults can make their own treatment decisions and give informed consent.

Consent is *not required* for preliminary examinations such as triage or assessment, when urgent or emergency health care is required, adult is incapable, and there is no committee, representative, advance directive or TSDM available. Consent is also *not required* for involuntary psychiatric treatment is needed under the *Mental Health Act*. Consent is *not possible* when the adult is unconscious, mentally incapable, or, otherwise unable to give consent.

Substitute Decision Making

Substitute decision making applies when consent in not possible. The law recognizes the roles of family and friends who are able and willing to make health care decisions for the adult when consent is not possible. The law sets out a hierarchy of 'substitute decision makers' in this order:

- '**Committee** of the Person' – a court appointed adult guardian
- '**Representative**'- person named by the older adult in a Representation Agreement
- **Advance Directive** – the older adult speaking through a document prepared by the older adult setting out their wishes regarding care and end-of-life decisions
- **Temporary Substitute Decision Maker** ("TSDM") – family member or friend located by medical staff to make decision when required

Committees

The legal term for an adult guardian in BC is `*Committee*` (pronounced kaw-mit-**tee**), appointed under the *Patients' Property Act.* There are two kinds of Committee:

- ***Committee of the Estate*** – deals with legal, financial, property decisions
- ***Committee of the Person*** – deals with personal care and medical matters

There are also two different ways that your affairs can be taken over by a Committee:

- a **Court Order** – signed by a Judge after a hearing where the Judge reviews opinions of two doctors
- a **Certificate of Incapability** – signed by a Psychiatrist, a Director of a Designated Mental Health Facility or a Designated Health Authority staff in the community.

When a health professional determines that a patient is not mentally capable and there appears to be no legal plan in place, the health professional might arrange for a *Certificate of Incapability* to be signed. This *Certificate of Incapability* under the *Patients Property Act* results in the Public Guardian and Trustee (PGT) being the older adult's 'public committee' – but only for their estate. Only a Judge can appoint a Committee of the Person, by Court Order. [NOTE - the Ombudsperson was extremely critical of this process for appointing the PGT under a Certificate of Incapability, in a report entitled "No Longer Your Decision."]

A Committee of the Person is the highest ranking substitute decision maker regarding health decisions and, unless restricted by the court order making the appointment, can give or refuse or withdraw consent to any health care to which the adult could give or refuse consent when capable, except non-therapeutic sterilization and psychiatric treatment. A Committee of the Person is guided by the best interests of the adult and their family. A Committee should do what the adult would have wanted if they were capable. While you don't choose who your Committee of the Person will be, many people sign a Nomination of Committee form, which gives the Judge information about who you would prefer to be your Committee, and the Judge may follow this unless there are reasons not to.

Representative under a Representation Agreement

This is the fundamental tool of advance care planning. A Representation Agreement is a written agreement between an adult and one or more Representatives authorizing the Representatives to make decisions or do things on behalf of the adult in relation to his or her personal care and health care. There are two kinds of Representation Agreements, named after the section in the *Representation Agreement Act* where they are referred to.

A Section 7 ('standard powers') RA provides for:	A Section 9 (enhanced powers) RA provides for:
☐ Minor/major health care ☐ Personal Care ☐ Routine financial management ☐ Obtaining legal services and instructing counsel [NOTE: not end-of-life matters]	☐ Minor/major health care + more ☐ Personal Care + more ☐ End-of-life decisions [NOTE: not financial or legal matters]

'Routine financial management' includes most day-to-day financial matters, but does not include more complicated financial matters such loans, line of credit, credit cards, mortgages, dealing with real estate, etc. See the definition in the Regulation to the *Representation Agreement Act* setting out what is and is not included in 'routine financial management.'

NOTE – even if a person is not capable of managing their own finances, they still may be legally capable of granting a section 7 *Representation Agreement* with routine financial management powers to someone else. This can be very useful solution when an older adult is starting to become incapacitated, and has not done any advance financial planning. Refer to section 8 the *Representation Agreement Act* for the test for capacity.

Advance Directives

An *Advance Directive* (called a 'living will' in some places) is a document stating how you want medical decisions to be made if you lose the ability to make them for yourself, including and especially 'end-of-life' decisions. The directives can be general in their direction, or they can give specific directions about various medical procedures, including whether life-prolonging treatment (e.g. *CPR*, *intubation*, *tube-feeding*) should be given in certain circumstances (for instance, if there is a diagnosis of *persistent vegetative state*, or when it is clear the end is near). An Advance Directive that complies with BC law

must be followed by the health care provider when it is clear it addresses the particular health care decision needed at the time (with limited exceptions).

The health care provider can decide not to follow it if they reasonably believe:

- since the Advance Directive was made and while the adult was capable, the adult's **wishes, values or beliefs** in relation to a health care decision significantly changed, and the change is not reflected in the Advance Directive, or
- since the Advance Directive was made, there have been **significant changes in medical knowledge, practice or technology** that might substantially benefit the adult in relation to health care for which the adult has given or refused consent in an advance directive (unless the Advance Directive says to follow instructions therein despite these changes).

Temporary Substitute Decision Maker (TSDM)

If there is no Committee of the Person, no Representative under a Representation Agreement, and no Advance Directive, then a health care provider must look for a 'temporary substitute decision maker.' There is a hierarchy of 'temporary substitute decision makers' to be approached in order:

- spouse
- child
- parent
- brother or sister
- grandparent
- grandchild
- anyone else related by birth or adoption to the adult
- a close friend of the adult
- a person immediately related to the adult by marriage

To qualify to give, refuse or revoke substitute consent to health care for an adult, a person must:

- be at least 19 years of age,
- have been in contact with the adult during the preceding 12 months,
- have no dispute with the adult,
- be capable of giving, refusing or revoking substitute consent, and
- be willing to comply with the duties of a TSDM

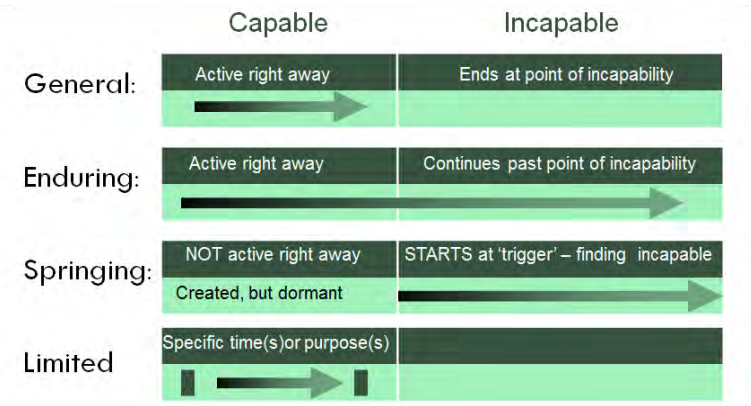
This temporary substitute decision maker is temporary – for each new medical procedure or decision the health practitioner must again look to the list and find the highest ranking person available at that time.

Power of Attorney

A Power of Attorney is a legal instrument giving power from one (competent) adult (known as the "donor") to another (competent) adult (the "attorney") to do certain things or take actions on the donor's behalf regarding financial and legal matters. There is a 7 part statutory test of capability for a Power of Attorney. There are four types of Power of Attorney:

1. **General** – now fairly rare – ends on incapability
2. **Limited** – less common – like general, but for specific purpose(s) and/or limited periods of time
3. **Enduring** – common – active now if necessary and continues into incapability
4. **Springing** – common – not active until incapability (or other 'trigger') and with capability trigger, ends if the donor regains capability

NOTE - These categories are not mutually exclusive – an EPOA or Springing POA can be limited



Rogue Attorney

Older adults have to be very cautious about who they choose as their attorney. They must trust the person implicitly. A power of attorney is a very powerful document – it has been called a "license to steal." Many older adults have literally been bankrupted by an attorney who has gone 'rogue.' Often times the attorney will justify taking funds as this being money they are entitled to anyway once their parent is gone.

Bank Power of Attorney Form

Older adults have to be cautious about signing bank form of power of attorney, or multiple powers of attorney. A standard clause in most power of attorney forms is that it officially revokes any prior powers of attorney. This may not be what is intended. A carefully planned Enduring Power of Attorney may be wiped out by a standard form from the bank.

Joint Bank Accounts

Joint bank accounts are often set up for convenience – when an older adult is having difficulty getting to the bank. They are also often set up to avoid probate fees – like jointly owned property [see below] they pass 'outside of the will' (not part of the estate). The intention may be that the surviving child will become entitled to all the money remaining in the bank account at the time of death ('right of survivorship').

Older adults often enter into joint accounts without understanding the legal or financial implications such a decision will have – both during their lifetime and after death. Joint bank accounts are easy to abuse – each account holder has access to 100% of the money at any time – another "license to steal."

The law also says when an adult child is put onto a joint bank account by the older adult, the default legal determination (called a 'rebuttable legal presumption') is that the intention was to create a 'resulting trust' – when the older adult dies, the surviving adult child is said to be holding the bank account in trust for the estate. They lose entitlement to the money. There needs to be much more consumer information (and training of bank staff) on the implications of joint bank accounts and 'right of survivorship.'

Joint Property Ownership

As with joint bank accounts, joint property ownership is often done for convenience, or to avoid probate fees. An older adult may put a caregiver on title and allow them to move in exchange for a promise of ongoing care. A principal residence can be passed along to child without property transfer tax and the property passes outside of the Will without probate fees (but there are tax consequences – capital gains taxes are payable, and there is a loss of the principal residence exemption for the portion transferred to the child).

Although a jointly owned property cannot be sold as easily as a joint bank account can be cleaned out, it is possible. If the other owner has a court judgment against them, or goes bankrupt, this can have serious implications for the older adult. A child's spouse could claim an interest in the property on separation. The child could mortgage or otherwise encumber their interest. There needs to be much more consumer information (and training of notaries and bank staff) on the implications of joint property ownership.

8. ELDER ABUSE – IDENTIFYING AND RESPONDING

Definition

Elder abuse has been defined as "*...a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person*[1]."

Note that this arises out of the context of an existing relationship of trust, relationships where there is an element of reliance, or someone within in a circle of closeness. Not all abuse is elder abuse. Elder abuse is different from situations where two people are in conflict with each other, may do things to hurt each other, and where fights can escalate to violence. It is elder abuse when there is an imbalance of power, when one person uses their power or influence to take advantage of, or to control, the older adult.

Types & Indicators

Type	Description	Indicators
Physical Abuse	Any act of violence causing injury or physical discomfort, including sexual assault.	▪ Unexplained injuries in areas normally covered (bruises, burns or bites). ▪ Untreated medical problems. ▪ History of "accidents". ▪ Signs of over or under medication. ▪ Dehydration.
Psychological Abuse	Any action or comment causing emotional anguish, fear or diminished self-esteem or dignity (e.g. threats to do harm, unwanted institutionalization, harassment, abandonment, imposed isolation, removal of decisions making choices).	▪ Fear, anxiety, depression, withdrawal, cowering. ▪ Reluctance to talk openly. ▪ Fearful interaction with caregiver, caregiver speaking on behalf of person and not allowing privacy.
Financial Abuse	Theft or exploitation of a person's money, property or assets (e.g. fraud, forgery, misuse of Power of Attorney or joint bank account).	▪ Standard of living not in keeping with income or assets. ▪ Theft of property. ▪ Unusual or inappropriate activity in bank accounts, forged signatures on cheques. ▪ Forcing a person to sign over property or execute a will. ▪ Overcharging for services or products, overdue bills.
Neglect	Inability to provide basic or personal care needs (e.g. food, water, required medications, shelter, hygiene, clothing, physical aids, hearing aids, eye glasses, dentures, exercise and social interaction, lack of attention, abandonment, undue confinement, inadequate safety precautions, withholding medical services or treatment).	▪ Unkempt appearance, inappropriate or dirty clothing ▪ signs of infrequent bathing ▪ Living conditions unhealthy, dangerous and/or in disrepair. ▪ Lack of social contact. ▪ bedsores, skin disorders, untreated injuries or medical problem

[1] World Health Organization – Toronto Declaration

Type	Description	Indicators
	▪ **Active Neglect**: intentional failure of a caregiver to fulfill their care-giving responsibilities. ▪ **Passive Neglect**: unintentional failure of a caregiver to fulfill their care-giving responsibilities.	▪ No regular medical appointments
Self Neglect	Although not a form of elder abuse, it is the person's inability to provide for their own essential needs.	▪ Unkempt appearance, inappropriate or dirty clothing, signs of infrequent bathing. ▪ Living conditions unhealthy, dangerous and/or in disrepair. ▪ Lack of social contact. ▪ No regular medical appointments
Institutional Abuse	Any physical, sexual, psychological, financial abuse or neglect occurring within a facility involving active victimization, withholding or denial of individual care needs, failure to respect individual's rights, overmedication, misuse of chemical or physical restraints and/or failure to carry out reasonable requests.	▪ Any or all of the above

Prevalence

There is little is known about the prevalence of physical elder abuse — estimates are that about 50% of physical abuse of seniors occurs in a spousal relationship . Often this is where there has been a history of domestic violence that has often gone on for 25 years or more. Acts of abuse tend to escalate – a continuum from infantilizing and indignities to gross neglect to malicious assaults that lead to death.

Financial abuse of seniors has been called "the crime of the 21st Century." One out of 12 (8%) seniors in B.C. have been financially abused – losing an average of $20,000! Women make up 92% of older adults who have experienced financial abuse.



Profiles – Victims and Abusers

Abusers	Victims
ABUSERS may: • resent expectations to provide care or support; • be dependent on the senior for assistance, housing or money; • have substance abuse problems; • have a history of mental illness or emotional problems; or • just seem normal.	VICTIMS may: • be socially isolated; • be under the control or influence of the abuser; • have some degree of physical impairment or incapability; • be physically frail, but mentally capable; • be widowed or living alone; or • not appear to be vulnerable in any way.

Family Pressures and Financial Abuse[2]

Older adults with some money or equity in a house will often be pressured by family members for:

- Emergency loans
- Places to live when they are out of job
- Help paying for higher education (university)
- Assisting with major purchases (e.g. - a car)
- Making down payments for a home
- Co-signing or serving as guarantor for loans
- Using house title as collateral
- Taking out a 'reverse mortgage' to provide funds
- Help avoiding bankruptcy (adult son/daughter) at the point of losing business, home

Undocumented Loans

Many of these family loans are undocumented, and the borrower may later claim it was a 'gift.' Luckily the law has a 'legal presumption' that these types of advancements from an older adult to an adult child are considered a loan rather than a gift, unless the adult child can show proof otherwise (e.g. – money was in a birthday card). For advancements to a minor child (under 19 yrs.) the presumption is reversed, it is presumed to be a gift unless it can be shown to be a loan.

Powers of Attorney & Joint Bank Accounts

Powers of attorney can be seen as part of the solution for an older adult who is unable to manage their funds, but they can also be part of the problem. The most common form of financial elder abuse is a 'rogue' power of attorney – these documents have been called "a license to steal." The attorney can literally bankrupt the older adult.

Similarly, setting up a joint bank account with someone may be seen as part of a solution, to help with banking chores and paying bills. Or it may create another "a license to steal" – each signer on the account is entitled to 100% of the money at any time.

As mentioned before, there is a 'legal presumption' that an adult child put on a joint bank account of an older adult has been put on for convenience and is a 'trustee' for the older adult's money ("resulting trust") and not entitled to it themselves. When the older adult dies, the money would be part of the

[2] *Adapted from: Charmaine Spencer, Diminishing Returns (1995)*

estate, rather than automatically going to the adult child (most joint accounts have 'right of survivorship' – all of the remaining funds automatically the property of the surviving account holder).

Responding to Abuse and Neglect

Emergencies

The first consideration is always of course whether the older adult is in immediate danger – in which case 911 should be called.

Designated Agencies (DA's)

If it is not an emergency but the adult is being physically abused, neglected or is self-neglected, a referral may be made to a local *Designated Agency*("DA") under the *Adult Guardianship Act*. The Health Authorities are all DA's for their areas of the province. Providence Health is the DA for Catholic hospitals in Vancouver. Community Living BC is the DA for their residents. The *Public Guardian and Trustee* can be contacted for an investigation and assessment if it is believed that the adult is incapable.

DA's are legally mandated to look into reports of adult abuse and neglect that they receive or become aware of involving adults having difficulty managing their affairs. DA's can offer available and appropriate support and assistance. They are required to report criminal offences against an adult to the police. For adults who cannot get assistance on their own, DA's can also use legal tools under the *Adult Guardianship Act* to protect the adult, which include 3 ways of gaining access (emergency access without a warrant) and restraining orders. The DA can apply for civil no-contact and support orders.
If the older adult is refusing support but is assessed by the PGT as mentally incapable of making this decision, the DA can apply to court for a *Support and Assistance Plan*. This may include admission to a care facility, 'services of PGT' or restraining order, etc.

Community Response Networks (CRN's)

CRNs are groups of local people and organizations who work together to ensure an appropriate and coordinated response to adult abuse, neglect and self-neglect in their community. CRNs around the province are reaching out to their communities to establish a network of community agencies, local businesses and government agencies (DA's), to provide help for adults experiencing or at risk of experiencing abuse, neglect and self-neglect.

Victim Services Worker (community and police based)

Victim Service Workers offer victims of crime practical support and information. They assist victims and those supporting them to obtain info about status of police investigation or other criminal justice process. They can communicate information about the particular needs or vulnerabilities of an older adult to police or Crown Counsel.

BC Centre for Elder Advocacy and Support (BCCEAS)

BCCEAS provides education and workshops on financial literacy and elder abuse prevention, along with more general information about abuse and neglect of seniors. It operates the Seniors Abuse and Information Line (SAIL) Telephone 7 days/wk, 8 AM-8PM. A legal advocate with BCCEAS assists with income security programs, residential tenancy matters, and debt issues for older adults. The lawyers of BCCEAS's Elder Law Clinic provide advice and representation on elder abuse, capacity and guardianship issues, residential care facility issues, and age discrimination. Their Victim Services Program provides information, support and referrals fo adults 50+ who are victims of abuse.

Safety Plan

A safety plan for an older adult may include a change to an element of their environment or their relationship which could result in the elimination of the role of the abuser or context of the abuse.

Consider:

- Home visits, telephone contact, contact with other family and friends, regular appointments
- Secure assets (e.g. hide emergency money somewhere outside home.)
- Give copies of important documents and keys to trusted friends or family members
- Plan escape by packing a bag of extra clothing, medicine and personal aids (glasses, hearing aids)
- Keep phone numbers of friends, relatives, shelters or other trusted individuals handy.

Responding to Financial Abuse

There are some obvious responses to financial abuse and the older adult is capable – for a rogue power of attorney, the power of attorney can be revoked, and another attorney appointed in their place. A joint bank account can be closed. Theft can be reported to the police. Vancouver and New Westminster police have special elder abuse units.

Managing Finances – Capable Adult

For someone who is competent, but still needs help to carry out certain tasks such as signing documents or handling banking, you might consider the following options:

- a family member, friend or trusted other may become the person's Representative under a section 7 Representation Agreement with routine financial management powers;
- a family member, friend or trusted other may become the person's Attorney under an Enduring Power of Attorney;
- for uncomplicated financial situations, a family member, friend or trusted other may become the person's 'pension trustee' - a pension trustee can manage monies paid through OAS/GIS/CPP only (NOTE –an agency or organization can become pension trustee) ;
- local financial agencies and institutions, trust companies or accounting or law firms may provide advice and assistance;
- a customer service representative at the person's bank or financial institution may be consulted with to see what assistance they may be able to provide (i.e., telephone banking, direct deposits); and,
- other local community support services such as Seniors Tax Clinics and Credit Counseling Service [www.nomoredebts.org].

NOTE – even if a person is not capable of managing their own finances, they still may be legally capable of granting a section 7 *Representation Agreement* with routine financial management powers to someone else. Refer to section 8 the *Representation Agreement Act* for the test for capacity [www.bclaws.ca].
NOTE – The federal Income Security Programs can look into misappropriation and theft of OAS/GIS/CPP monies (including stopping or redirecting payment of benefits).

Managing Finances – Incapable Adult

For abuse of a power of attorney or representation agreement, referrals can be made to *Assessment and Investigation Services* (AIS) at the PGT. If the incapable adult's assets are at risk, the PGT can freeze assets until it is clearer what the adult's situation is, and can conduct an investigation. The PGT may take over the older adult's finances ('public committee') if no one else available or a concerned family member or friend may be appointed 'private committee' by a court order.

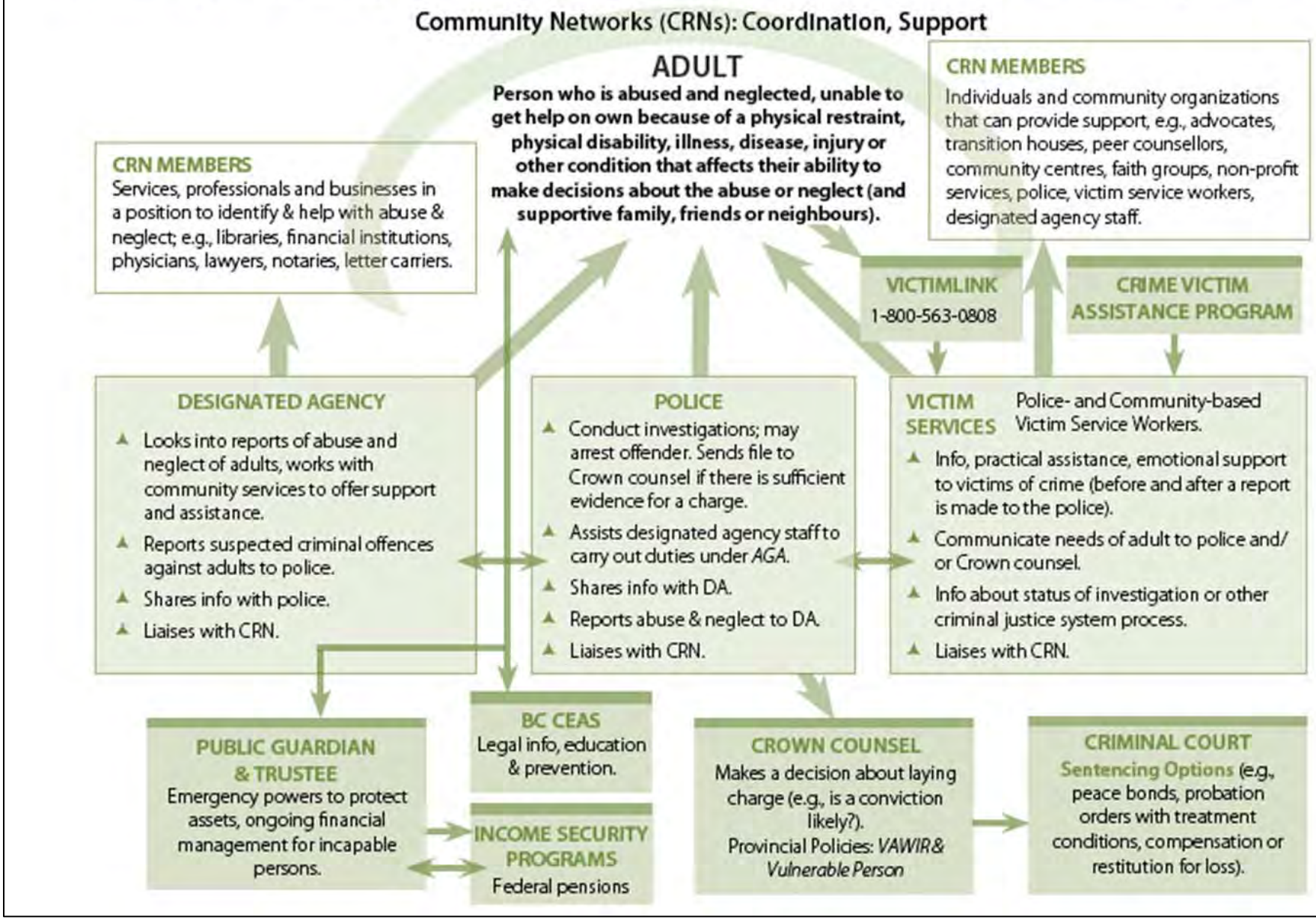
What to Do in Abuse Situations

Acknowledge - Suspicion of abuse may develop over time. Accumulate/document evidence.
Barriers - Fear of retaliation, withdrawal of caregiver support and breach of confidentiality
Urgency - Assess immediate needs and potential risk of physical harm.
Screen - Assess person's physical, emotional and mental capacity to help themselves.
Empower - Inform person of their rights, resources and assist with establishing a safety plan.
Refer - Offer support or consultation from other resources – CRN, BCCEAS, DA's, etc.

Seniors Housing Options Grid – Seniors Services Society

INDEPENDENT LIVING					RESIDENTIAL CARE	
93% of BC's seniors will live out their lives in an independent living arrangement. This housing classification includes living independently, in a supportive housing or in assisted living. Most independent living arrangements for the purposes of consumer protection are covered under the *Residential Tenancy Act* (RTA) or your tenancy agreement. Assisted Living facilities must be registered with the Assisted Living Registrar.					7% of BC's seniors will require the 24hour/day care services of licensed care facilities governed by the *Community Care Facility Act*.	
INDEPENDENT HOUSING		**SUPPORTIVE HOUSING**	**ASSISTED LIVING**		**RESIDENTIAL CARE**	
Housing where there usually are no on-site supports, in which case services may be delivered to your home. Some Subsidized Independent Housing buildings may include intermittent supports such as: • Meals • Social and recreational activities		Housing with a combination of on-site support services. **Services may include:** • Housing keeping • Emergency response • Meals **NOTE** - There are very few public supportive housing units, *access to those units are through referral from your local health authority.*	Provides housing, hospitality and personalized assistance services for adults who can live independently, but require regular assistance with daily activities. **Services may include**: • Help with bathing, grooming, dressing and mobility • Meals • Housekeeping, laundry • social and recreational opportunities		Residential care is for people who need 24-hour professional nursing care and can no longer be supported in their own homes. **Services may Include:** • assistance with meals • medication supervision • personal assistance with daily activities • a planned program of social and recreational activities • respite	
Public	**Private**	**Private**	**Public**	**Private**	**Public**	**Private**
OPTIONS INCLUDE: **Rental housing:** • subsidized rent geared to income or low fixed rent	**OPTIONS INCLUDE:** **Rental housing:** • private market rental • private market rental geared to older tenants • co-ops • single room occupancy hotel's (SRO). **Purchased housing** • Strata-titled retirement communities, equity co-ops and co-housing, life lease.	No referral required. Rates vary, rent portion may qualify for SAFER **INCLUDES:** **Congregate Style** Larger scale apartment style **Abbeyfield Style** Smaller scale housing option. Usually 8-10 seniors living together in a home with their own bedroom and ensuite bathroom, shared meals and congregate areas.	**Requires referral through your local health unit.** *Cost is 70% of after tax income.*	To apply contact the building directly. *Rates vary from $1400-6000/m.* **May contain some publicly funded units.**	Clients with the highest need and urgency have priority for the first available, appropriate bed, as determined by BC's Residential Access Policy. **Requires referral through your local health unit.**	May provide all levels of care including residential care. **To apply contact the building directly**. Rates vary from $3500- 6000/m.

Community and Justice System Working Together As Partners Under Adult Guardianship Act (AGA)



Resources Toolkit – Seniors Advocacy

1. **411 Seniors Centre Information & Referral Support**
   http://411seniors.bc.ca/?page_id=16
   This website contains information on advocacy services for seniors.
2. **American Bar Association** –
   - Why Am I Left in the Waiting Room – Understanding the 4 C's of Elder Law Ethics [*a useful discussion of how legal workers need to meet with the older client alone if possible]*
   - **ABA Handbook -** Assessment of Older Adults with Diminished Capacity [useful handbook on how to assess legal capacity]
3. **Alzheimer Society** http://www.alzheimer.ca
4. **Assisted Living Registry**
   - Assisted Living Complaints [useful webpage summarizing complaining about
   - Assisted Living Substantiated Complaints :
     - by community
     - by health authority.
   - Find Assisted Living – by community
5. **Attorney General** – Incapacity Planning - webpage has downloadable pdf forms for basic Enduring Power of Attorney, and s. 7 & s. 9 Representation Agreements
6. **BC Centre for Elder Advocacy and Support (BCCEAS)** http://bcceas.ca/ BCCEAS services include a legal advocacy program, elder law clinic, victim advocacy program, education and outreach.
   - Recognizing and Responding to Abuse and Neglect [a useful reference chart for identifying and responding to elder abuse – including interview strategy, possible interventions, safety plan and help numbers]
   - List of Acronyms – various acronyms we use in seniors advocacy – one pager
   - Seniors Benefits and Programs [summary of federal, provincial and municipal benefits and programs for seniors]
7. **BC Community Response Networks** - BC Community Response Networks
   - CRN by Community
8. **BC Housing** BC Housing Registry
   - Senior Housing Programs:
     - Home Adaptations For Independence
     - Shelter Aid For Elderly Renters (SAFER)
     - Assisted Living
     - Seniors' Supportive Housing
     - Seniors' Rental Housing
     - Subsidized Housing
     - Complaint Form
9. **BC Human Rights Tribunal** Guides and Information Sheets
10. **BC Human Rights Coalition** – Pamphlets, Manuals and other Online Educational Resources
11. **BC Law Institute** –
    - Assisted Living Reform Project
    - Rationalizing and Harmonization of BC Common-Law Tests of Capacity
    - Undue Influence Guide
12. **BC Ombudsperson** – Seniors Care Investigation
    - Best of Care – part 1
    - Best of Care – part 2
    - FACT Sheet
    - Home and Community Care Backgrounder
    - Home Support Backgrounder
    - Assisted Living Backgrounder
    - Residential Care Backgrounder

- No Longer Your Decision – a review of the process for appointing the PGT to manage the financial affairs of incapable adults

13. **Benefits Finder** Canada Benefits [an online survey tool - develops a customized list of federal and provincial programs based on the answers . It puts together useful pages setting out the various benefits programs, both federal and provincial. The sections of the benefits include links to the application forms]
14. **Canada Revenue Agency** Canada Revenue Agency - Seniors [a webpage that sets out information about income taxes for older adults, about non-resident seniors, and about other taxes and savings programs for seniors (RRSPs at 71; RRIFs, etc.)]
15. **Canadian Association of Gerontology** Canadian Association of Gerontology
16. **Canadian Centre for Elder Law** A Practical Guide to Elder Abuse and Neglect Law in Canada
17. **Canadian Centre for Policy Alternatives** – Fact Sheet Series (developed for use in last election, but a useful summary of issues)
    - BC Seniors Fact Sheet - Health Care
    - BC Seniors Fact Sheet - Housing
    - BC Seniors Fact Sheet- Social Support
18. **Council of Senior Citizens Organizations** http://www.coscobc.ca
    Cosco is an umbrella organization seniors' organizations and individual associate members. It advocates for seniors at all government levels. It is the largest federation of seniors' organizations in the province.
19. **Designated Authorities** [responders for elder abuse] **:**
    - Vancouver Coastal Health Authority[Vancouver, the North Shore, Richmond and Coast Garibaldi]
    - Vancouver Island Health Authority [Vancouver Island and the Gulf Islands]
    - Fraser Health Authority[Burnaby to Hope inclusive]
    - Interior Health Authority [Thompson Cariboo Shuswap, Okanagan, East Kootenay and Kootenay Boundary, including Williams Lake and south to Hope]
    - Northern Health Authority [Quesnel and all areas north, east and west]
    - Community Living BC [Designated Agency for all individuals with a developmental disability who are eligible for CLBC Services]
20. **Determining OAS/GIS Eligibility** – Determining OAs/GIS Eligibility for people who came to Canada as adults [a useful tool to find out if someone will be eligible to apply for OAS/GIS when they turn 65]
21. **Employment and Assistance Appeals Tribunal** http://www.gov.bc.ca/eaat/
    - Guide to Employment and Assistance [general information about applying for social assistance in BC]
22. **Government of BC**
    - Residents Bill of Rights
    - **BC Seniors Guide** - BC Seniors Guide *[also available in French, Chinese and Punjabi]*
    - Income Security Programs [a page summarizing federal and provincial benefits available to seniors – including OAS/CPP/EI; Allowance; Veterans Affairs; Seniors Supplement, Social Assistance – with links – Seniors Guide is available in pdf in French, Chinese and Punjabi]
    - **BC Seniors Policy Handbook** - Seniors Policy Handbook
23. **Government of Canada Elder Abuse and Awareness**
    - What is Abuse of Older Adults? (PDF)
    - Types of Abuse and Neglect (PDF)
    - Abuse of Older Adults: Signs and Effects (PDF)
    - Why Does Abuse Happen in Later Life? (PDF)
    - Help is Available (PDF)
    - Pension Trustee Agreement Form – for an individual
    - Pension Trustee Agreement Form – for an agency or organization
24. ***Law Students Legal Advice Program Manual*** –
    - Chapter 15 - Adult Guardianship
    - Chapter 16 – Wills and Estates
25. **Legal Services Society :**
    - Getting-Help-from-the-Police-or-RCMP
    - Protection-Orders

- Safety-Planning-for-Your-Client

26. **Ministry of Health** –
    - Choosing a Care Facility or Home (PDF)
    - Home & Community Care - A Guide to Your Care
    - My Voice - advance planning workbook including Enduring Power of Attorney, Representation Agreements and Advance Directives
27. **Ministry of Justice** - Eliminating Mandatory Retirement
        - Want to Work Past 65? *Now You Can Choose!* (English – also available in Chinese & Punjabi)
        - Information Bulletin
        - Age Discrimination - English, Chinese, Punjabi
28. **National Initiative for the Care of The Elderly** An organization that supports **networking** and **knowledge transfer** regarding care of older adults. Includes a resource library, tools for addressing Care Giving; Dementia Care; Elder Abuse; End-Of-Life Issues; Financial Literacy; Law & Aging; and, Mental Health.
    - Pocket Tools – *pocket size versions of the tools that can be ordered.*
    - **Engaged** Services for Seniors Advocates – tools include a charting sheet tool for documenting elder abuse
29. ***Nidus*** – Nidus Personal Planning Resource Centre and Registry - website has various fact sheets on Enduring Power of Attorney, Representation Agreements, Advance Directives, roles & responsibilities, revoking & resignation
30. **OAS Clawback Calculator** [a useful tool to find out amount of OAS entitlement based on total income] http://www.retirementadvisor.ca/retadv/apps/clawback/clawback.jsp
31. **Patient Care Quality Review Board** Patient Care Quality Review Board
    - How to Request a Review
    - PCQRB Review Form
32. **People's Law School** –
    - Learning About the Law – Elder Law Section
    - When I'm 64 – Benefits [a good free plain language summary of federal and provincial benefits available to seniors – including OAS/CPP/EI]
    - When I'm 64 – Controlling Your Affairs – booklet on advance planning - Wills, Enduring Power of Attorney and Representation Agreements
    - When I'm 64 – Services – booklet on health care, housing, transportation, and recreation resources
    - Power of Attorney – preparing an Enduring Power of Attorney
    - Writing Your Will – preparing a Last Will and Testament
    - A Death In Your Family – practical steps to take (also a ClickLaw 'wikibook')
    - Being an Executor– what's involved, what steps to take
33. **PovNet Seniors and Elders Resources -** http://www.povnet.org/issues/seniors-elders
34. **Provincial Health Services Authority**
        1. PHSA - Find a Patient Care Quality Office
        2. Find a Care Facility Licensing Office
35. **Public Guardian and Trustee:** Public Guardian & Trustee - Adult Services
    - PGT - Assessment and Intervention Referral Form - e-version [form to request assessment and possible intervention by the PGT in an abuse situation]
    - Guidelines for Issuing a Certificate of Incapability under the Patients Property Act [the table at pages 18-19 of this guidebook, entitled "Options to Consider in Abuse and Neglect Situations" is a very good summary of possible responses when someone has difficulty managing their affairs]
    - Protecting Adults From Abuse, Neglect and Self Neglect [summary of Adult Guardianship, role of DA's, CRN, PGT - *also available in Chinese (simplified and traditional), Punjabi, Spanish and Vietnamese]*
    - How You Can Help - a booklet setting out the options that can be used to help adults who cannot manage their financial and legal affairs on their own.
    - It's Your Choice - Personal Planning Tool" - good plain language planning booklet – Enduring Power of Attorney, Representation Agreements, Advance Directives.
36. **Re:Act Capability and Consent Tool** - http://vch.eduhealth.ca/PDFs/IB/IB.100.C33.pdf

37. **RCMP – "E" (BC) Division**
    - Match Location & RCMP Detachment
    - Detachment Contact Info
    - Integrated First Nations Unit
    - RCMP Victim Services
38. **Senior Living Magazine** This monthly magazine for seniors is *distributed throughout Vancouver and the Lower Mainland, in Victoria and across Vancouver Island*
    - Aging-in-Place Resources
    - Senior Living Housing Directory
    - To Move or Not To Move
39. **Seniors BC** Seniors BC
    - **Together to Reduce Elder Abuse Strategy Fact Sheets**[also available in Traditional Chinese and Punjabi]**:**
    - Responding to Elder Abuse: Resources (PDF)
    - Financial Abuse: Protecting British Columbia's Seniors (PDF)
    - Are You Dating? Older Adults and Healthy Relationships (PDF)
    - How to Tell Someone You Are Being Abused: Starting the Conversation (PDF)
40. **Seniors Canada** Seniors Canada
41. **Seniors Services Society** Seniors Services Society
    - Housing Directory
    - Seniors Housing Options Grid [a useful summary in chart form of the various types of seniors housing in BC]
42. **Service Canada** – Services for Seniors
    - Rate Card – Income Security Programs
    - Table of Amounts – OAS/GIS/Allowances
    - Table of Amounts – CPP/Death Benefit/Disability/Survivor/Children
    - International Benefits - **Phone:** 1-613-957-1954 **Fax:** 1-613-952-8901 **Toll free**: 1-800-454-8731 **TTY**- 1-800-255-4786
    - Veterans – Income Assistance Programs
43. **Simon Fraser University** - SFU Gerontology Research Centre
44. **Social Security Tribunal** Social Security Tribunal ***[****Appeals of denial of OAS, CPP or EI go to the new Social Security Tribunal (SST)]*
    - EI jurisprudence library [over 60 years of CUBs (Canadian Umpire Benefits decisions), Federal Court and Supreme Court decisions on EI issues]
    - Pension Appeals Board Decisions [searchable database of decisions of the former appeals board for CPP/OAS matters]
45. **The Care Guide** The Care Guide
46. **United Way** – *2011 United Way Seniors Vulnerability Community Profiles and Discussion Papers*
    - United Way - Seniors Vulnerability Report - 2011
    - *Seniors Vulnerability Community Profiles and Discussion Papers*
47. **Vancouver Sun –** Independently Healthy [special publication on BC seniors' housing and care needs
48. **Veterans Affairs** http://www.veterans.gc.ca/eng/services
49. **Victim Services Victim Services -** www.pssg.gov.bc.ca/victimservices
    - Victim Services Directory [a list of all victim services in BC]

BC CENTRE FOR ELDER ADVOCACY & SUPPORT






Seniors Issues for Legal Advocates

BC Law Foundation Provincial Training Conference

October 8 , 2013

Working with seniors, elder law issues, resources.

BCCEAS

BC CENTRE FOR ELDER ADVOCACY & SUPPORT

2

BC Centre for Elder Advocacy and Support (BCCEAS) is based in Vancouver, provides services provincially:

- Seniors Abuse and Information Line (SAIL)
- Victim Services
- Legal Services
- Outreach

SAIL Line

3

BC CENTRE FOR ELDER ADVOCACY SUPPORT

- First contact point into BCCEAS
- 8am-8pm – 7 days/week
- 604-437-1940 and toll free 1-866-437-1940
- TTY 604-428-3359, toll free 1-855-306-1443
- Language interpretation

Agenda

4

1. **Intro to Older Adults**
   - Practice Tips
   - Ethical Issues
2. **Ageism**
   - Resource allocation
   - Health Care
3. **Seniors & Discrimination**
   - Age Discrimination
   - Exceptions
4. **Income Programs**
   - OAS/GIS/CPP
   - EI & Seniors
   - Provincial programs
   - Appeals
5. **Seniors Housing**
   - Independent Living, Assisted Living, Care Homes, etc.
   - Complaints
6. **Dementia & Capacity**
   - Dementia
   - Assessing capacity
7. **Advance Planning**
   - Health Care Consent
   - EPOAs, RAs, AD
8. **Elder Abuse & Neglect**
   - Forms of abuse
   - Responding
9. **Resources**
   - PLE Materials
   - Websites



5

1. Working With Older Adults

About Older Adults, Vulnerability, Barriers to Justice, Practice Tips, Elder Law Ethics

Legal Advocate Training Conference October 8, 2013

Describing Older Adults



6

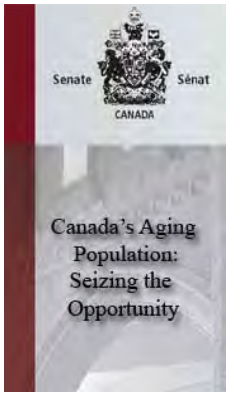
- In general the elderly poor are older, widowed, living alone, and female (to be old, female and poor is "triple jeopardy.")
- There are also many racial disparities in the elderly poor.
- Older adults are often economically vulnerable because their cost of care may exceed their income.

Legal Advocate Training Conference October 8, 2013

Reasons for Inequality

7

- Often an accumulation of disadvantages over lifetime, race and gender differences, and structural issues
- Structural Issues (Special Senate Committee on Aging):
  - Many seniors can't understand the complex programs
  - Others are penalized due to interactions between federal and provincial programs



Vulnerability

8

Three main risk factors that contribute to vulnerability in older adults:

- Health Status
- Cognitive Ability
- Social Network



The oldest adults (85+) have greatest vulnerabilities to exploitation by institutions and individuals due to the worsening of health and cognitive abilities and the reduction in social support over time

Barriers to Justice

9

Older adult accessing justice face various barriers:

- May be unaware of their rights, especially in area of rights of residents of seniors housing;
- Many areas are complex – thick statutes
- Physical barriers, lack of accessible transportation or services;
- Those living in care homes – the staff (who may be the problem) may be only link to outside world;
- Fixed income and limited coverage by BC legal aid;
- Court proceedings often lengthy
- Not a strong 'elder law' bar

Ongoing Relationship

10

- Like many low income people, seniors are often dependent on someone else for the necessities of life
- If a legal process pits them against their service provider or family member – they will be reluctant file complaints – as they must continue to use service provider into the future or want 'peace in the family'
- Advocates may face challenges forcefully putting forward a legal claim
- Many charitable and religious providers expect recipients of their beneficence to be grateful and not bite the hand that feeds – can be worst opponents

11

Practice Tips



Working with the Older Adult Client

Interviewing

12



- A thorough initial interview is fundamental to the development of a plan for effective advocacy.
- For example, the information gleaned from a thorough interview allows the legal advocate to assess any financial or housing choices in terms of that client's likely future.
- Medical information including medical history may be important. (e.g. – capacity assessments)

Interview Tips

13



PRACTICAL CONCERNS:

- Early morning vs 'sundown effect'
- House calls
- Good, indirect lighting
- Some elderly are suspicious of lawyers and other legal providers
- Some elderly may be confused or paranoid which may be the direct result of medication

Challenges of Older Clients

14

Legal advocates must be cognizant of the stress of working with elderly clients who, perhaps more than others, may:

- fear their own mortality
- feel anger, or
- regret their experiences and behavior
- regret the behaviour of their children.



Time

15



- Timely access is important to older adults with precarious or deteriorating health
- Procedural processes that result in delays can work to systemically disadvantage older adults and may effectively negate their rights, including lengthy reviews or appeals
- On the other hand, many seniors are systemically disadvantaged by the short time frames in areas such as RTA evictions (5 day grace period, 48 hr OOP)

Death – the other 'D' word

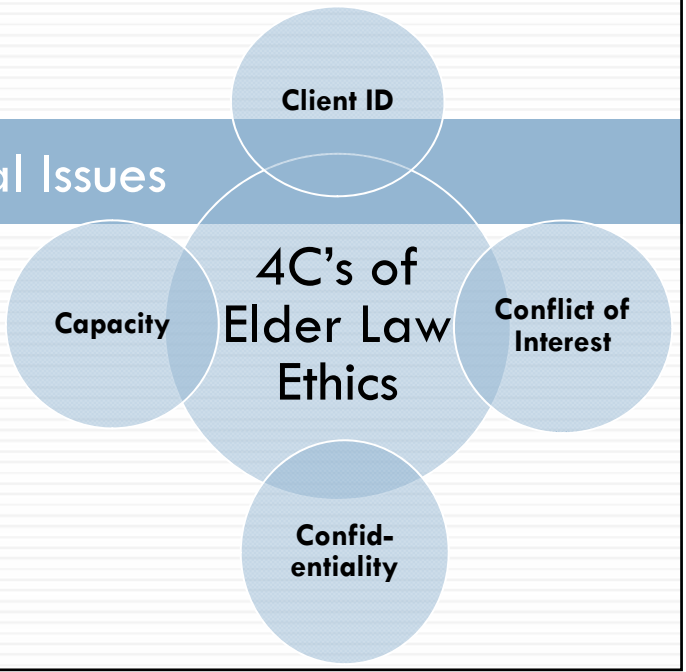
16



- Death can make an elderly person's problem moot.
- So it is urgent to get to elderly clients cases – don't let them be 'dog files.'
- Older adult or their concerned friend/family member who seeks legal assistance usually need help now, not in the distance future or when it is convenient for the legal worker.

17

Ethical Issues

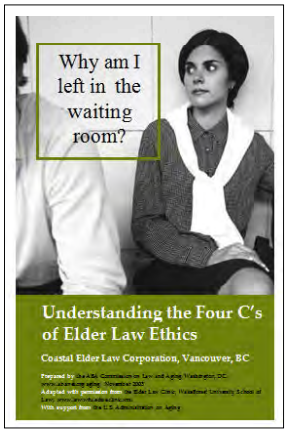


Understanding the Four C's

18

This pamphlet explains to 'friends' and relatives why a legal worker needs to meet with a client alone if at all possible to properly address the four C's:

1. **Client ID** (who is the client – what are instructions)
2. **Conflicts of Interest** (only one client if possible)
3. **Confidentiality** (and protection of privilege)
4. **Competency** (assessing capacity)





19

Ageism

How we stereotype and discriminate against older people because of age.

Report on Ageism – Fall, 2012

20

From International Federation on Aging (IFA)

- "While we've been combating race and gender, in terms of equality issues, the new player on the scene is ageism," says Jane Barratt, secretary general of the IFA.
- "It's something we talk about indirectly but until it actually starts affecting us, I don't think we pay much attention to it.“
- Ageism a 'pervasive and sinister' plague in Canada, experts say

Ageism and Scarce Resources

21

- Ageism and age discrimination are often harder to address than other forms of discrimination as older adults' needs easily become subsumed to the needs of other age groups or to the administrative needs for efficiency or cost cutting.
- Given pressure for scarce resources and given similar need, the fact that one is older often becomes the justification for not receiving a benefit or service or not being treated as a sufficiently high priority.
- In any cost-benefit analysis based on remaining years or future productivity, older adults are always at a disadvantage.

[Law Commission of Ontario]

Ageism and Health Care

22

- Absence of services for older adults
- Age based decision making in health ("age rationing")
- Making decisions about the quality of older people's lives
- Paternalism
- Omission from clinical trials
- Less treatment for mental health issues (15% of mental health care, compared to 80% for 20-64)
- Forced decisions
- Gender bias – more radical mastectomies, less reconstructive surgery
- Over medication [anxiety meds double over 65, hypnotic medication use more than triples]

Note - 40% of all emergency department visits by older adults are medication related



23

Seniors and Discrimination

Discrimination in employment, some exceptions

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Age Discrimination in Canada



24

The most commonly named forms of age discrimination faced by seniors in Canada were:

- treating them as if they're invisible (41 per cent);
- acting as if they have nothing to contribute (38 per cent); and
- assuming they're incompetent (27 per cent).

Employment

25



- An employer cannot refuse to interview, hire, promote or decide to fire an employee because of their age (19 and over).
- An employer cannot make age an issue or advertise for a certain age when hiring. An ad must not say "young people wanted."
- An employer cannot refuse an older applicant because "the job requires a lot of energy and enthusiasm and the company is looking for someone with career potential."

Employer Questions re Age

26



- During the hiring process, an employer cannot ask anything that could reveal age.
- An employer can ask someone if they are of legal working age
- After hiring, an employer might legitimately need to know the employee's age for a purpose like enrolment in a pension or benefits plan.

Allowable Age Distinction

27

Jobs with Age Limits

- There may be some jobs with age limits because of the duties or needs of work or because of safety issues or dangers.
- These true demands of a job are called "bona fide occupational requirements."
- The employer must be able to show that the reasons for the age limits are acceptable under the Code.



Russell Shellard – 63 year old firefighter from Chilliwack fighting forced retirement

Age Distinctions

28



Pension and Insurance Benefits

Pension plans can make distinctions based on age.

- They can set early and standard retirement ages, but cannot force an employee to retire.
- It is argued these age distinctions allow programs to keep operating.
- Group or employee insurance plans, whether self-funded by employers or provided by a third party, can also make distinctions based on age.



29

3. Seniors' Income Programs

Federal and Provincial Programs, issues arising, recons and appeals

Economic Security

30

- Overall, today's seniors, while not affluent, are financially secure – OAS/GIS; CPP; SAFER.
- But there are vulnerable groups:
  - Recent immigrants
  - Unattached older adults (single, widowed, divorced or separated);
  - Aboriginal seniors
  - Those with <10 yrs. in the labour force
  - Those who worked in 'precarious' work their working life – no pension, little or no savings

31

Federal Programs



OAS & CPP

32

OAS	CPP
Based on your years of residency in Canada	Based on your years of working in Canada
Goes to everyone	Only goes to those who contributed
But income tested	Not income tested
About 14% of prior earnings	About 25% of prior earnings
Taxable income (GIS is not taxable)	Taxable income

Old Age Security – OAS



33

- OAS is the foundation or "basic building block of Canada's retirement income system" - CCPA
- A flat rate monthly benefit that goes to *everyone* at age 65, provided they meet certain residency requirements – you don't have to stop working.
- Older adults build on that foundation, saving for their retirement with benefits from the Canada Pension Plan, a workplace pension if they're lucky enough to have one, and private savings.

Three Eligibility Factors



34

Three factors determine if you can receive the Old Age Security pension:

1. your age,
2. your legal status, and
3. the number of years you have lived in Canada:
   - Minimum 10 years after 18 yrs old
   - 40 years after 18 yrs old for full amount
   - Pro-rated amounts between 10-40 yrs –
     10 =1/4 20 = 1/2 30 = 3/4

Residence Requirement

OAS

35

- Even if you don't meet the residency requirement, you may still qualify for a pension since Canada has social security agreements with many countries.
- If you have lived in one of these countries or contributed to its social security system, you may qualify for a pension from that country, from Canada or from both countries.

Documentation

OAS

36

- If the older adult was not born in Canada or has not lived continuously in Canada since age 18, they must submit proof of legal status in Canada such as citizenship or immigration papers.
- Also, they must submit a statement of all the dates they arrived in Canada and departed Canada from age 18 to present.
- They may be asked to provide documents to substantiate this – a lot of an advocate's time can be spent collecting/organizing this info

Late Applications

37

- Older adults should apply for OAS six months before they turn 65, or when they receive an OAS Application form.
- Late applicants of the OAS as well as the GIS and Allowance may receive retroactive payments.
- Retroactive OAS, GIS and Allowance payments may be made for up to 11 months, plus the month in which they receive the application, provided all conditions of eligibility are met.

OAS Outside Canada?

38

Usually, your pension payment can be sent while you're outside the country if:

- you lived in Canada for at least 20 years since age 18; or
- you lived or worked in a country that has a social security agreement with Canada and you meet the 20-year residence requirement under the provisions of that agreement.

- If you do not meet either of the requirements, your payment can only be sent to you for the month that you leave, and for six months after that.

Guaranteed Income Supplement



39

- GIS is an income-tested benefit payable to low income pensioners who are getting OAS - the less income, the more GIS you can get.
- You must apply to receive GIS – then it will renew each year assuming you file your IT return.
- In 2011, 34% of all OAS beneficiaries received some GIS.

Guaranteed Income Supplement



40

- There are different GIS rates for singles and spouses in a couple, depending on family income.
- The maximum benefit in the first quarter of 2012 for the spouse of an OAS pen-sioner is $485.61 a month.
- The maximum GIS for a single individual is $732.36 a month.

Canada Pension Plan

41

- A retiree who has worked and contributed to the Canada Pension Plan (CPP) can receive a pension from the Canadian government.
- It is a pension plan, similar to private pension plans
- It is an extra benefit, in addition to the OAS.
- CPP retirement benefits may begin as early as age 60 – with a reduction, and your rate then remains the same after you turn 65; or receive as late as age 70 with an increase.

CPP Benefits - Generally

42

- You must apply for CPP benefits. You do not receive benefits automatically.
- CPP benefits are separate from OAS benefits.
- CPP benefits are not income tested.
- All CPP benefits are taxable income.
- Your pension rights are not affected if you have changed jobs or moved from one province to another. You can apply for and receive your CPP pension benefits anywhere in the world.
- Private pension plans may be reduced once you start receiving CPP. Check your private pension plan.

Changes to CPP

CPP

43

Two recent changes to CPP are:

- **60-64** - prior to 2012, you had to stop working if you wanted to apply for CPP before you turned 65. Since 2011, if you are aged 60 - 64, you can apply for CPP without any work interruption.
- **65-70** If you work while receiving CPP benefits at that age, you can now choose to make CPP contributions, which will increase your CPP retirement benefits.

Employment Insurance (EI)

EI

44

- If you are 65 or over and still working, or wanting to work, you are eligible for EI.
- You must meet the qualifying and entitlement conditions.
- The receipt of pension income does not prevent you from receiving EI benefits.
- If you return to work and accumulate enough insurable hours and meet the entitlement conditions to set up a claim, your pension income will not be deducted from your EI benefits.



Service Canada 1-800-277-9914

45

- Income Security Programs can be easily accessed by phone.
- Service Agents have immediate access to on-line client information.
- Oral consent to release information can be given by conference call.
- The client will need to give a date of birth and Social Insurance Number.

Service Canada



46

Provincial Programs

Provincial Benefits and Programs for Seniors

Seniors Supplement

47

- The Senior's Supplement is a monthly payment to low- income seniors who need a "top-up" to bring their incomes up to welfare levels.
- For low-income seniors who are receiving OAS, GIS or federal Allowances.
- It is automatic if you qualify – you don't need to apply.



Seniors Supplement [cont'd]

48

- The supplement is also automatically paid to people aged 60 to 64 who receive an Allowance and are married to an OAS pensioner.
- The maximum monthly supplement is $49.30 for single seniors and $120.50 for couples.
- If you are eligible for the supplement and receive veterans benefits, you are entitled to a $50 monthly exemption on your veterans benefits.

SAFER

49

- Shelter Aid for Elderly Renters Program (SAFER)
- provides monthly cash payments to eligible BC residents
- must be 60 years or over and pay more than 30% of gross (before tax) monthly household income towards the rent
- including the cost of pad rental for a manufactured home (trailer) owned and occupied.



Seniors and Welfare



50

- A senior who is:
  - not eligible for the OAS or Guaranteed Income Supplement and
  - needs money for food, housing, clothing and other basic needs

  may be eligible for welfare or income assistance.
- They may also be eligible for some assistance if they are over 65 and on OAS/GIS but are supporting a spouse and/or dependent children who do not receive any benefits and have very low incomes.

Seniors 60-64



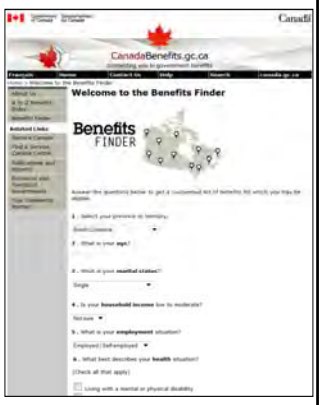
51

- If you are between 60 and 64, MSD classifies you as an employable adult. You must be able to show MSD that you are actively looking for work.
- If you apply for any welfare benefits, MSD will want you to apply early for your Canada Pension Plan (CPP) benefits. MSD will deduct the CPP benefits from your welfare cheques. If you are age 60 to 64 and willing and able to work, you should not have to apply for early retirement from CPP.
- If you or your partner has a disability, you may be eligible for Persons with Persistent Multiple Barriers or Persons with Disabilities benefits.

Benefits Finder

52

- An online survey to develop a customized list of federal and provincial programs based on the answers to the survey, and where in Canada the older person lives.
- This is part of a new federal government website entitled CanadaBenefits.gc.ca.
- It puts together useful pages setting out the various benefits programs, both federal and provincial.
- The sections of the benefits include links to the application forms.



53

Recons and Appeals

Reconsiderations

54

- A formal administrative review process (mandatory prior to appealing)
- Mandatory reconsideration to reduce the volume of appeals to SST.
- Reconsideration is a comprehensive review of the original decision to ensure program policies, guidelines, rules and conditions, as well as the Act and Regulations were applied properly and fairly.



REQUEST FOR RECONSIDERATION
of an Employment Insurance (EI) decision

Are you: a claimant; an employer; an other interested party or person (see section 6)

FOR OFFICE USE ONLY
Date of Receipt of this Request for Reconsideration

Canada Revenue Agency Business Number

Name of Employer

SECTION 1: REQUESTOR INFORMATION

Name of Requestor
Mailing Address
City | Province | Postal Code
Telephone number (home) | Cell number | Telephone number (daytime) | E-mail address

SECTION 2: DECISION(S) TO BE RECONSIDERED

1. Which Employment Insurance decision or decisions would you like to have reconsidered ?

2. Date the decision was verbally communicated to you, if applicable

SECTION 3 : REASON FOR REQUEST FOR RECONSIDERATION

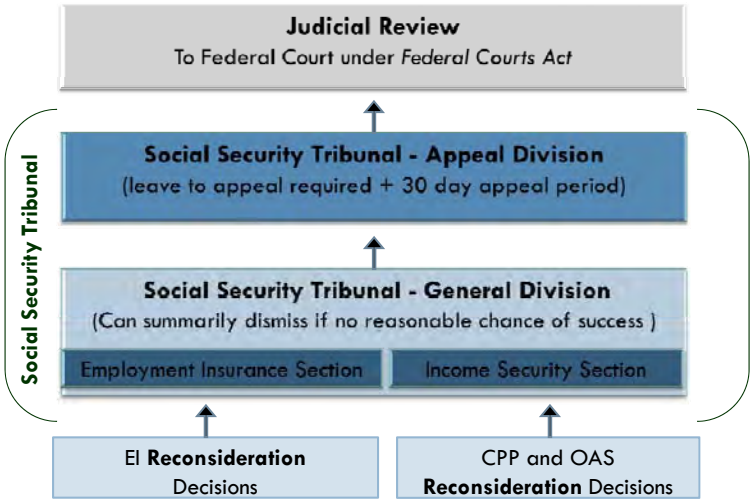
SECTION 4: NOTICE OF REQUEST FOR RECONSIDERATION

Signature | Telephone number (where you can be contacted at the best time) | Date

Canada

EI/OAS/CPP Appeals Process

55



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Seniors' Housing

Forms of housing, issues arising, links

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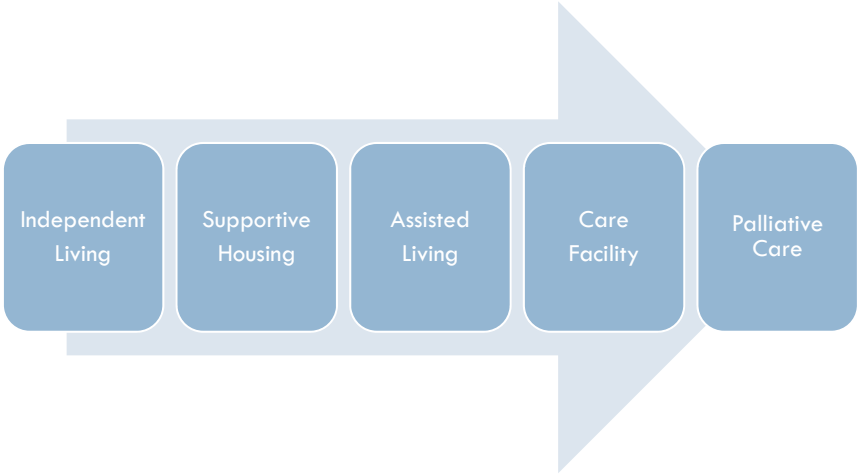
Possible Life Course

57



58

Independent Living

When you can live alone without needing medical care on an ongoing basis.



Independent Living

59

- There are many places that provide independent living opportunities, such as:
  - low-income housing
  - over-55 apartments, and
  - retirement communities.
- Should be able to function without assistance in all daily routines, from meal preparation to taking their own medication to doing their own laundry.



Home Care Includes

60



- **Nursing care** in your own home;
- **Meals** delivery;
- **Rehabilitation therapy** to
  - strengthen muscles
  - offer tips about easier ways to perform tasks
  - Tips about equipment and changes to residence to live more independently;
- **Home support workers** to help with personal care such as bathing, dressing, or grooming;

Community Care Includes

61

- **Adult day centres,** which bring people together for health, social, and recreational activities;
- **Assessment and treatment centres** that try to find out:
  - what is wrong when you have a health problem and
  - what kind of medical treatment would help you



Better at Home

62

For seniors 65+, access to services such as:

- Friendly visiting
- Transportation
- Light yard work
- Minor home repairs
- Light housekeeping
- Grocery shopping
- Snow shoveling

to help them age in place.

- United Way



Seniors' Supportive Housing (SSH)

63

- Provides specially modified rental homes in selected subsidized housing developments, primarily to low-income seniors who need some assistance in order to continue to live independently.
- Support services include
  - one meal per day,
  - 24-hour emergency response,
  - weekly housekeeping/linens, and
  - social and recreational activities.



Shelter Aid for Elderly Renters Program

64

- provides monthly cash payments to eligible BC residents
- Mentioned earlier 60+/30%+ of gross (before tax) monthly household income towards the rent
- including the cost of pad rental for a manufactured home (trailer) owned and occupied.



Home Adaptations for Independence (HAFI)

65

- The Home Adaptations for Independence (HAFI) program helps low-income seniors and people with disabilities finance home modifications for accessible, safe and independent living.
- Eligible homeowners, and landlords with eligible tenants can receive up to $20,000 per home in the form of a forgiveable loan.



66

Assisted Living



Assisted Living

67



- Housing for seniors who want to live independently and need some assistance with daily activities
- But don't want or need 24 hour care.
- Three key components
  1. Housing,
  2. Hospitality services, and
  3. Personal Assistance Services [up to 2 listed services (3 or more listed services makes it a Care Facility)]

Personal Assistance

68

Support Level

- assistance in any number of service areas at the less intensive support level.
- Also known as "personal care."

Prescribed Level

An assisted living operator may only provide personal assistance at the prescribed level in two service areas — e.g.:

- activities of daily living and
- medication assistance.

Exempt from RTA

69

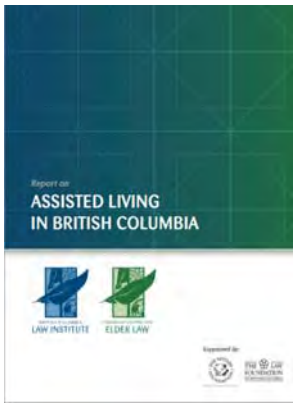
- The housing portion of assisted living is not covered by the *Residential Tenancy Act* – if you are given notice or evicted, you will not be able to dispute to the Residential Tenancy Branch.
- The cost of the housing and services can increase according to the terms of the contract you signed.
- This can happen yearly, or more often if that is in the contract – there is also no limit on the amount of those increases.

Studies of Assisted Living

70

Both the Ombudsperson and the BC Law Institute have looked at some of the shortcomings in assisted living.





Assisted Living – Where to Complain

Type of Unit	Operational Issues - Complaints re staff, services	Complaints about health and safety	Complaints about quality of care	Complaints about placement (ineligibility) and transfer issues	'Tenancy' Complaints - refund damage deposits, increases in rent without notice.
Subsidized	Problems with residence staff, management-staff relations or problems with services (e.g., dissatisfaction with meals) go to Facility operator or contracted service provider. Remedies under contract law – Small Claims? Possibly: Consumer Protection BC.	Office of the Assisted Living Registrar	→First facility operator then →Regional Patient Care Quality Office then →Patient Care Quality Review Board. The Assisted Living Regulation sets standards for storing and administering medication.	Health Authority Case Manager then →Regional Health Authority	Not covered by the Residential Tenancy Act. Office of the Assisted Living Registrar may make informal referral to Residential Tenancy Branch for informal dispute resolution.
Non-subsidized	Problems with residence staff, management-staff relations or problems with services (e.g., dissatisfaction with meals) go to Facility operator or contracted service provider. Remedies under contract law? Small Claims? Possibly: Consumer Protection BC.	Office of the Assisted Living Registrar	No place to take quality of care issues. The Assisted Living Regulation sets standards for storing and administering medication.	N/A	Not covered by the Residential Tenancy Act. Office of the Assisted Living Registrar may make informal referral to Residential Tenancy Branch for informal dispute resolution

72

Care Facilities



Care Facilities

73

Residential care facilities provide 24-hour professional nursing care and supervision

For seniors and people with disabilities who have complex care needs and can no longer be cared for in their own homes.



Care Facilities [care homes]

74

Residential care services include:

- professional nursing care;
- an assisted meal service;
- medication supervision;
- personal assistance with daily activities, such as bathing, dressing or grooming; and
- a planned program of social and recreational activities.

Case Managers

75

- Case managers (such as a community nurse, physiotherapist or occupational therapist) act as co-ordinators to help clients obtain home and community care services.
- They determine the nature, intensity and duration of services that would best meet clients' needs and arrange their services (a "care plan").
- The case manager will stay in touch with the client to arrange care services and make any adjustments necessary in the event their care needs change.

Care Plan

76

A Care Plan can include plans for:

- adequate nutrition monitoring medication,
- bills being paid and banking is done,
- rehabilitation,
- medication review,
- relocation to supportive living or
- a nursing home.

Residents' Bill of Rights

77

- The Resident's Bill of Rights applies broadly to all facilities that provide residential care to adults.
- Includes: long term care facilities, mental health and substance use care facilities, community living homes and hospices, as well as private hospitals and extended care facilities.
- Facilities are required to post a copy in a prominent location, and operators are required to comply with its provisions.



RESIDENTS' BILL OF RIGHTS

Patient Care Quality Offices

78

When complaint about quality of care from a health authority aren't resolved locally, complaint goes to that health authority's **Patient Care Quality Office** (PCQO).

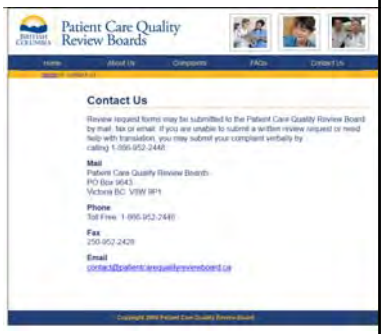
Patient Care Quality Concerns & Complaints

- The PCQO will work with the person making the complaint to try to resolve it and will provide a response within 40 business days.

Patient Care Quality Review Board

79

- Complainants who feel their complaint has not been resolved by a PCQO may contact the **Patient Care Quality Review Board** (the Board).
- The Board is independent from the health authorities and will review the health authority's investigation of the complaint and its response.





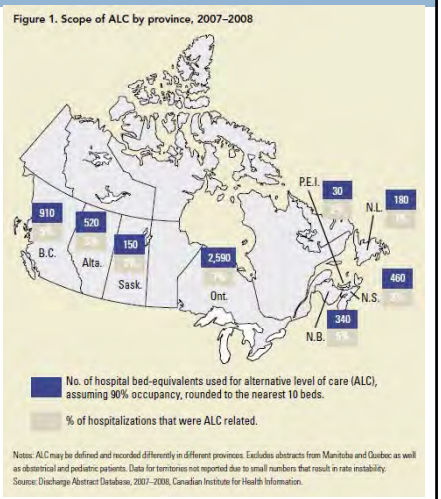
Hospitals & Hospices

Alternate Level of Care

'Alternative Level of Care'

81

- Seniors may be hospitalized for acute care condition - then they need the support of a care facility – but there are no beds available
- These patients are then referred to as requiring an "*alternative level of care*" (ALC)
- They are referred to disparagingly as "bed blockers"

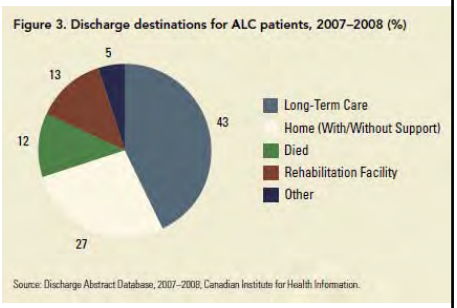


Alternative Level of Care

82

Alternative Level of Care patients are:

- 5% of hospitalizations
- 14% of hospital stays
- 50% are women
- median age is 80 yrs.



Cost Comparisons

83

- The approximate cost per day of a ALC patient is $550
- Compare this to the approximate cost in a Long Term Care Facility of approximately $84/day.
- Cost is about 6X less!

BUT

- In discharging a relatively low-cost ALC patient and admitting a relatively high-cost acute care patient ($900/day), there is a financial disincentive for hospitals to lower ALC utilization.



Other Care

84

Respite Care

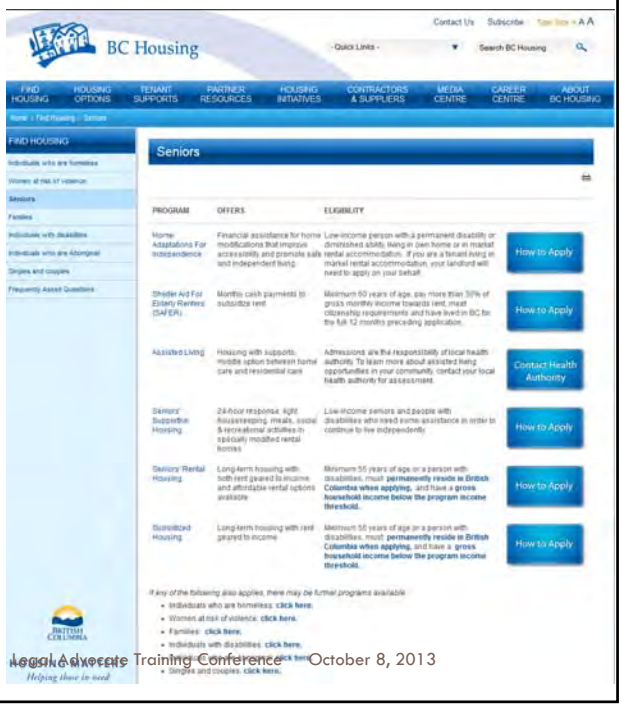
- Gives family members or friends who are providing care some time off.
- A respite care worker may come into the home or
- the person who needs care may be asked to enter a care home for a short time

Palliative Care

- 24 hour care for people who are terminally ill and who want to be at home;
- relieving eliminating and/or controlling symptoms
- so those facing death, and their loved ones, can devote their energies to embracing the time they have together.

BC Housing has a webpage with information on how to apply for:

- HAFI – Home Adaptations for Independence
- SAFER – Shelter Aid for Elderly Renters
- Assisted Living
- Seniors Supportive Housing
- Seniors' Rental Housing
- Seniors' Subsidized Housing





86 Dementia and Capacity

How we recognize dementia, and address the question of the older adult's legal capacity.

Terminology - Three C's

87

For the purposes of this presentation, we will be using the following inter-changeably:

- Capacity/Incapacity
- Capability/Incapability
- Competence/Incompetence

3 C's

Usually we use the terms capacity and incapacity

General Definition

88

Legal Capacity generally is the ability:

- to understand the information you need to make a decision

AND

- to appreciate the consequences of making a decision.



Capacity & Outcomes

89

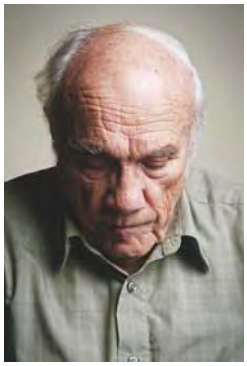
- In this sense capacity is about a person's decision-making *process*, and it is neutral as to the *outcome* of that process.
- Therefore, all adults retain the right to make unwise or risky decisions, where they make these choices with capacity, regardless of age, disability or illness
- even in the context of abuse.



Incapacity

90

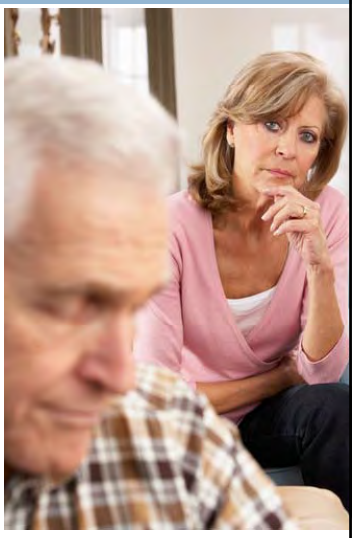
- The elderly suffer more often from loss of mental capacity than any other age group because they are susceptible to dementia
- Informal evaluation of capacity to make a decision is often based, at least in part, on circular reasoning: the individual's choice is considered evidence of a condition of mental impairment, which is the basis for a prediction that the individual needs assistance to make other decisions.



Who Decides Whether You Have Capacity

91

- You can decide – presumed capable
- Someone can challenge your capacity
- Capacity is a legal determination – medical evidence helps inform the decision
- Medical evidence and a court order can result in you losing control of your finances



Capacity

92

Not a Switch



More Like a Gauge



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No Easy Answers

93

- There is no illness that, of itself, will lead to a finding of incapacity
- No such concept as 'total' or 'global' legal incapacity resulting from mental disability.
- "Incompetence is not to be understood in any global sense, but rather as reflecting incapacities with respect to specific decisions or areas of decision.

(Ont. Enquiry on Mental Competency – Professor David Weisstub)



No 'Capac-o-meter'

94

Unfortunately, there is no 'capac-o-meter'.



Under Age – presumed incapable

95

- **Age 12** – to consent to adoption – *Adoption Act*
- **Age 12** – criminal responsibility – *Youth Criminal Justice Act*
- **Age 15** – to consent to sexual relations – *Criminal Code*
- **Age 16** – to enter into an insurance contract – *Insurance Act*
- **Age 16** – to marry – *Marriage Act*
- **Age 18** – adult criminal responsibility – *Criminal Code*
- **Age 18** – to vote federally – *Canada Elections Act*
- **Age 19** – to vote provincially – *Election Act*
- **Age 19** – for most purposes – *Age of Majority Act*



Presumptions - Adults

96

- When you reach adulthood, the legal presumption is reversed - in BC, every adult is presumed to be capable of making decisions.
- Presumption is rebuttable in all cases if the test for capacity cannot be met
- An adult's way of communicating with others is <u>not</u> grounds for decisions about incapability .

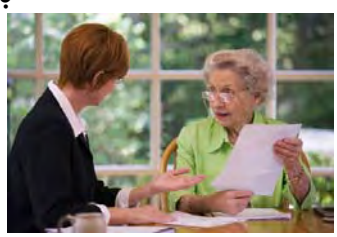


Capacity Issues – Legal Services

97

1. Does the client have the capacity to retain us for our services?

2. Does the client have the capacity to complete the legal transaction?



Legal Capacity – It's Legal

98

The assessment of someone's capacity is a legal assessment:

1. An initial assessment component

-*and, if necessary*, -

2. Use of a clinical consultation or formal evaluation by a clinician,

-*and* –

3. A final legal judgment about capacity by the lawyer (or Judge).



Why Not Their Physician Deciding?

99

Physicians are highly trained in:

- **Diagnosis** – what illness(es) is/are causing the symptoms?
- **Functional Assessments** – assessing impact on functioning (daily activities)
- **Treatment** – what can be done to improve or cure this illness and its symptoms?



Legal Standards of Capacity

100

- There are different standards or tests of legal capacity for different situations
- Most standards are found in the common law
- Few statutory standards (EPOA; RA's)
- BC Law Institute is studying need for more statutory standards, for more clarity



Easy to get into, hard to get out of…

101





Divorce
High
Threshold
of Capacity

Marriage
Low
Threshold

102

Identifying Incapacity

How to identify it

Diminished Capacity

103

Diminished capacity can arise as a result of:

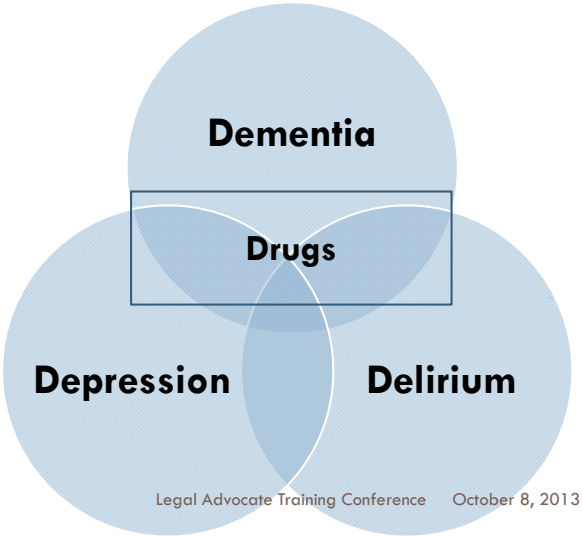
- Mental illness
- Lack of mental development due to a birth defect
- Brain damage at some point after birth
- Extreme physical impediments which prevent communication and understanding



The Four D's

4 D's

104



Dementia – what is it?

105

- Describes a group of brain disorders that cause memory loss and a decline in mental function over time
- Mild to severe cognitive impairment - depends on number and location of brain cells destroyed or lost.
- Some conditions can be treated and slowed down, others are irreversible.
- Dementia should be understood and appreciated as a *terminal illness*, not just a by-product of aging



Common Symptoms

106

- Short-term memory loss coupled with poor judgment and reasoning.
- Becoming lost in familiar places.
- Difficulty using or understanding words
- Difficulty performing routine tasks that require organization (e.g., balancing a cheque book, making a grocery list, shopping).



Dementia Doubling Rule

107

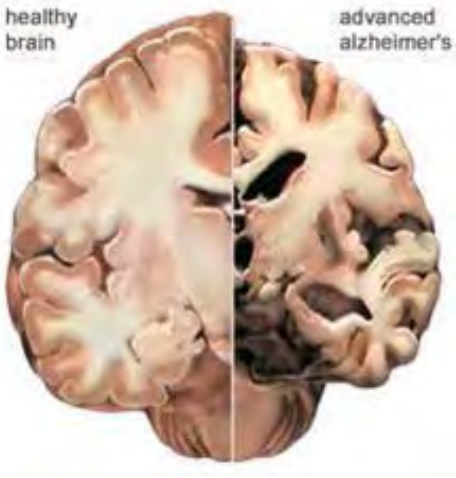
Doubling Rule

Age	Risk
<65	1%
65-69	2%
70-74	4%
75-79	8%
80-84	16%
85-89	32%

Risk doubles every five years

Each additional risk factor approximately doubles the risk

Positive family history doubles the risk



108 Effect of Alzheimer's Disease on the Brain

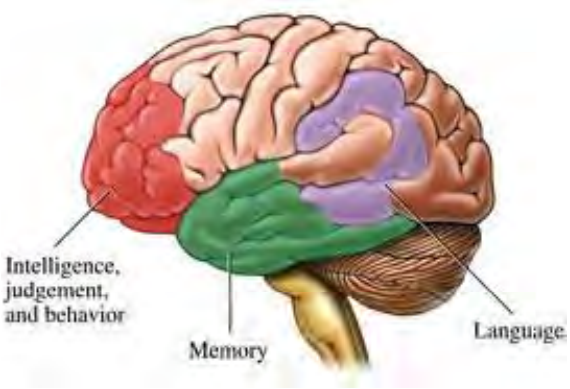
Alzheimer's is an extreme form of dementia, especially in its advanced form.

Executive Brain Functions

109

From the frontal lobe of the brain:

- Impulse control
- Abstract thinking
- Planning
- Judgment



Executive Functioning

Executive dsyfunction can:

- turn a tea-totaler into a heavy drinker,

or

- a prudent person into a 'player' or target for lottery scams etc.



Hardest Incapacity to Assess

111

- Identifying/assessing incapacity involving executive dysfunction can be very challenging
- Client may present as well dressed, articulate, with good recall
- Client may be doing things that waste $ - is this their nature, or has it been caused by incapacity?



St. Mike's Study of Homeless

112

- St. Michael's Hospital in downtown Toronto studied the homeless population *[Centre for Research on Inner City Health]*
- Over half (53 %) of those in homeless shelters had sustained a traumatic brain injury vs. 8.5% per cent lifetime prevalence rate among the general population
- 70% suffered their injury before they became homeless.



113

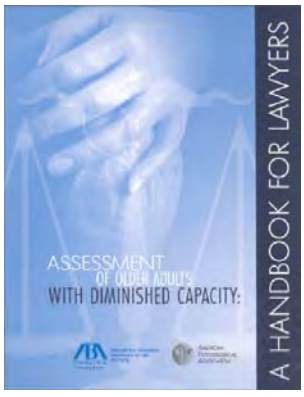
Capacity Assessment Tool

A tool used at BCCEAS to assess capacity when required.

ABA Capacity Assessment Handbook

114

- Compares legal standards and clinical (psychological) models
- Recommends a procedure for conducting an assessment and a suggested capacity worksheet
- Suggests how to enhance capacity where possible
- When/how to refer for assessments
- Using and understanding capacity assessment reports



Capacity Worksheet

115

This capacity worksheet helps us identify and organize:

- Observational signs of diminished capacity.
- Mitigating factors affecting capacity.
- Transaction-specific elements of legal capacity.
- Task-specific factors in evaluating capacity.
- Preliminary conclusions about client capacity.



BCCEAS Capacity Assessment Worksheet

ADVOCACY SUPPORT

Client Name:

Date of Interview:

Lawyer:

File #:

A. PRELIMINARY INFORMATION

Reason for capacity assessment:

Medical documentation:

Legal representative, if applicable:

Potentially adverse to client

Notes:

Other interested parties:

Other Preliminary Observations/Notes:

Process

116

The process outlined is meant to structure and record observations leading to a legal judgment that is:

- Sufficiently comprehensive in scope;
- Systematic in process;
- Accountable if challenged; and,
- Well documented.



B. OBSERVATIONAL SIGNS

Cognitive Functioning — Examples

Short-term Memory Problems

Language/Communication Problems

Comprehension Problems

Lack of Mental Flexibility

Calculation/Financial Management Problems

Disorientation

Emotional Functioning — Examples

Emotional Distress

Emotional Lability

Behavioural Functioning — Examples

Delusions

Hallucinations

Observation - tips

117

- Focus on decisional abilities, not cooperativeness or affability.
- Watch out for 'confabulation' – filling in the gap with stories, and 'tells' – inadvertent prompts by you for positive/negative answer
- Pay attention to changes over time; history is important.
- Beware of 'ableism' and 'ageism' stereotypes.
- Consider whether mitigating factors could explain the behavior.



Check Your Assumptions

118

Just because someone has:

- a diagnosis of a mental illness;
- dementia;
- Alzheimer's Disease or related disorder;
- a negative assessment; or even
- a 'committeeship'



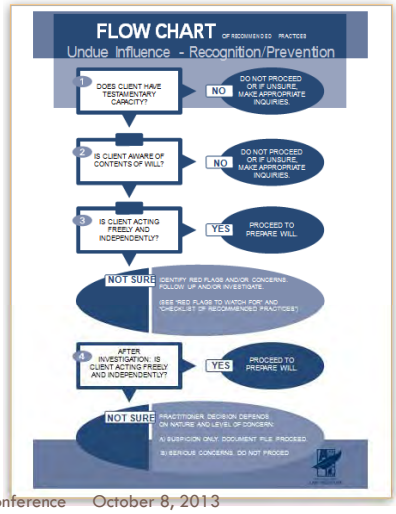
does not <u>automatically</u> mean that they lack decisional capacity

[From Judith Wahl of the *Advocacy Centre for the Elderly*.]

Undue Influence

119

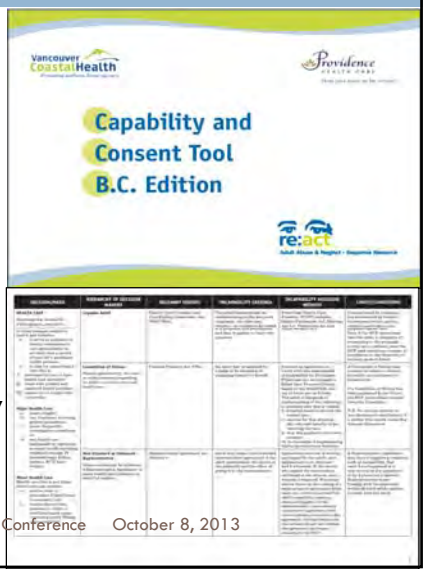
- The BC Law Institute has prepared a guide book ("*Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide*")
- It includes a checklist of recommended procedures, useful in any situation where undue influence is suspected.
- It also includes a checklist of 'red flags'



Other Capacity Questions

120

- A good general reference for issues of capability and consent regarding health care, finances, facility placement and psychiatric treatment, see the *Capability and Consent Tool* from **re:act**, **Vancouver Coastal Health**.
- 9 pages of charts of setting out: Decision/Need; Hierarchy of Decision Makers, Relevant Statute; Incapability Criteria; Incapability Assessor/Witness; and, Limits/Conditions.





121

5. Advance Planning

Health Care Consent, Advance Planning Instruments, Adult Guardianship, Committeeship

Legal Advocate Training Conference October 8, 2013

122

Health Care Consent

Overview



Legal Advocate Training Conference October 8, 2013

Consent to Health Care

123

THREE GENERAL RULES

- Adults can only be given health care with their consent
- Adults are presumed to be capable of giving consent.
- Adult must be approached first for a decision about health care (every time)

Advance Planning

124

- Planning for if and when someone becomes unable to make medical decisions (for example, because he/she is unconscious or in a coma).
- Specifying the treatment or care someone wants to receive or not receive
- Inability to make decisions for oneself may happen suddenly, as with a stroke, or gradually as with Alzheimer's disease or dementia.

End-of-Life Care Decision Making

125

- Life-Sustaining Treatment
- Artificial Nutrition and Hydration (tube feeding)
- Cardiopulmonary Resuscitation (CPR)
- Do-Not-Resuscitate Order (DNR)
- Palliative Care
- Hospice

Alternate Decision Makers

126

- The law recognizes the roles of family and friends who are able and willing to make health care decisions for you
- The law sets out a hierarchy of alternate decision makers in this order

'Committee of the Person'
– court appointed

'Representative'
- under Representation Agreement

Advance Directive
– you speaking through a document

Temporary Substitute Decision Maker ("TSDM") – family member or friend

TSDM – the list in order of priority

127

- spouse
- child
- parent
- brother or sister
- grandparent
- grandchild
- anyone else related by birth or adoption to the adult
- a close friend of the adult
- a person immediately related to the adult by marriage

128

Documents



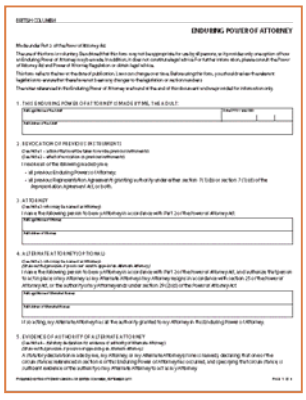
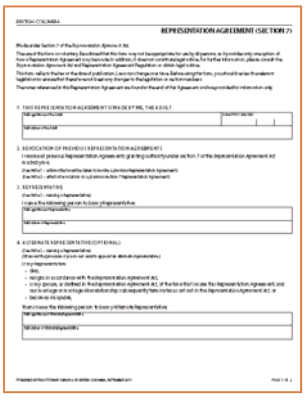
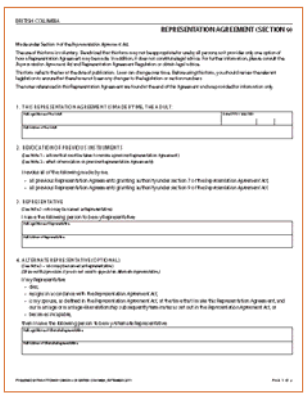
Terminology

129

Power of Attorney	Representation Agreement
Donor – a person who appoints someone to stand in her shoes for financial and legal matters through a power of attorney	**Adult** – a person who makes an agreement with someone to be their representative and speak on their behalf regarding medical and personal care matters.
Attorney – the person receiving authority to manage someone else's finances & legal affairs	***Representative –*** the person receiving authority to manage someone else's medical and personal care matters
Power of Attorney – the instrument that creates the relationship of donor & attorney, and empowers the attorney	***Representation Agreement*** – the agreement that creates the relationship of adult & representative, and empowers the representative

POAs & RAs

130

Power of Attorney (Enduring)	Representation Agreement (s 7 – standard powers)	Representation Agreement (s 9 – enhanced powers)
		

These are the 'fill-in-the-blanks' pdfs available from the AG's website

131

Power of attorney



Empowering another for financial and legal matters.

Powers of the Attorney

132

There is no definition of a 'power of attorney' in the Act. It seems to assume that everyone knows it is a legal instrument giving power from one (competent) adult (the donor) to another (competent) adult (the attorney) to do certain things or take actions on the donor's behalf regarding financial and legal matters.

A power or attorney does not permit an attorney to:

- Consent to marriage or civil union
- Vote
- Adopt a child or place a child up for adoption
- make a will or dispose of testamentary gifts (property donor bequeathed in their will)

Types of Powers of Attorney

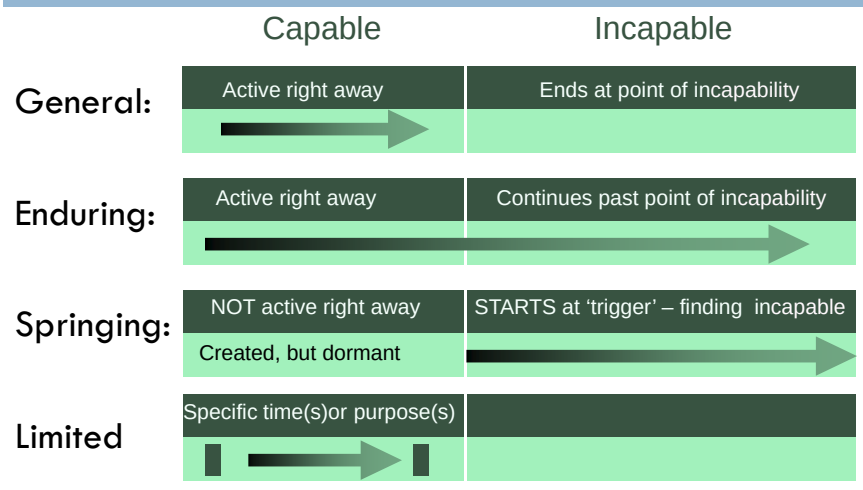
133

1. **General** – now fairly rare – ends on incapability
2. **Limited** – less common – like general, but for specific purpose(s) and/or limited periods of time
3. **Enduring** – common – active now and continues into incapability
4. **Springing** – somewhat common – not active until incapability (or other 'trigger') and with capability trigger, ends if the donor regains capability

These categories are not mutually exclusive – an EPOA or Springing POA can be limited

Capacity & POAs

134



Continued Authority Clause

135

To make an Enduring Power of Attorney, the following clause is included:

"My Attorney may exercise the authority granted by this Enduring Power of Attorney while I am capable of making decisions about my financial affairs, and this authority ***continues*** despite my incapability to make those types of decisions."

136

Representation Agreements



Empowering someone to speak/decide for you re health and personal care matters

Representation Agreements

137

- A representation agreement is a written agreement between an adult and one or more representatives
- authorizing the representatives to make decisions or do things on behalf of the adult
- in relation to his or her personal care and health care.

Wishes and Instructions - RAs

138

- Representation agreements give effect to an adult's specific instructions and wishes indirectly, by requiring the representative to consult with the adult and comply with the adult's current wishes "if it is reasonable to do so…"
- This is unless the representation agreement provides that the representative need only comply with the adult's wishes expressed while capable.
- If it is not reasonable to comply with current wishes, they are not known or the duty to comply with them is excluded in the agreement, then the representative must comply with the adult's instructions or wishes expressed by the adult while capable

Types of Representation Agreements

139

Section 7 Standard Powers	Section 9 Enhanced Powers
Minor/major health care	Minor/major health care+
Personal Care	Personal Care +
Routine financial management	End-of-life decisions
Obtaining legal services and instructing counsel	[NO financial or legal matters]

Monitors

140

- A **monitor** is a person responsible for making reasonable efforts to determine whether a rep is complying with their duties under the *Act*.
- A monitor is ***required*** if rep authorized to make, or help make, decisions concerning ***routine management of financial affairs***, but ***not*** if the rep is the adult's spouse, the Public Guardian and Trustee, a trust company or a credit union, and not if 2 or more reps with this power.
- Monitor must complete a Certificate (Form 2)

141

Advance Directives



Make your wishes known –
but be careful what you wish for!

Advance Directives

142

- An *advance directive* is a written document stating how you want medical decisions to be made if you lose the ability to make them for yourself, including and especially end-of-life decisions.
- They can be general in their direction, or they can give specific directions about various medical procedures, including whether life-prolonging treatment (e.g. *CPR*, *intubation*, *tube-feeding*) should be given in certain circumstances (for instance, if there is a diagnosis of *persistent vegetative state*, or when it is clear the end is near).

Representation Agreement vs. Advance Directive

143

Advance Directive	Representation Agreement
An Advance Directive cannot cover all possible health care decisions that might arise	A Representation Agreement can cover more health care matters
the health care provider could be unsure and reject your instructions for a number of reasons	carries more authority because it gives a person or people the authority to carry out your wishes
	even if the health care provider is unsure



144

4. Elder Abuse

Identification & Responding

Definitions

145

- "senior abuse" or "elder abuse" is not a legal term defined anywhere in legislation in Canada
- World Health Organization's 'Toronto Declaration on the Global Prevention of Elder Abuse' came up with the following definition:

  "Elder abuse is a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person."



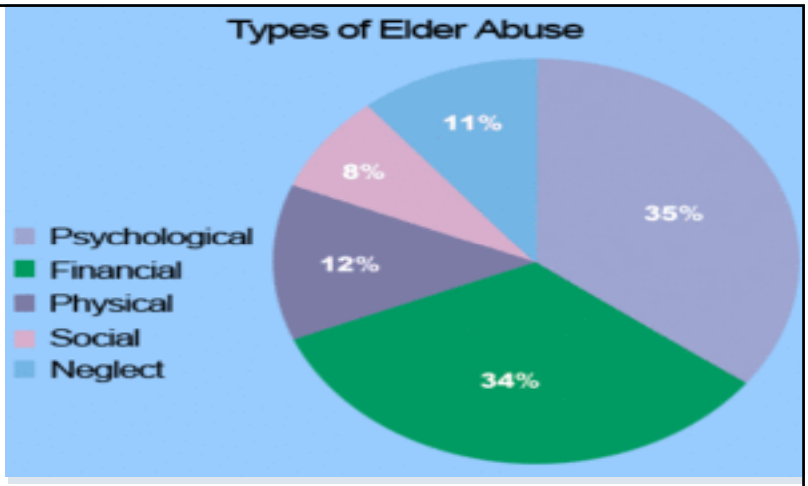
Themes from definitions

146

Key themes that emerge from the definitions are:

- harm or risk of harm to an older person,
- action or inaction,
- trust,
- imbalances of power,
- using power to control another, and
- limiting someone's rights and freedoms.

From – Background Paper: Financial Abuse of Seniors: An Overview of Key Legal Issues and Concepts - **Canadian Centre for Elder Law** (March 2013)



147

Types of Elder Abuse

No hard data on the prevalence, no national prevalence study. The above chart sets out the rough proportions.

Prevalence of Abuse

148

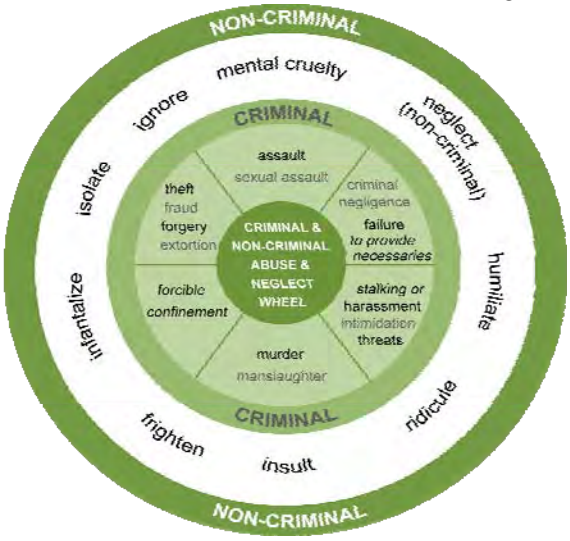
Various research studies indicate:

- One out of 12 (8%) seniors in B.C. have been financially abused
- financial and emotional abuse are frequently linked; and
- little is known about assault — estimates are that about 50% of physical abuse of seniors occurs in a spousal relationship.

In many cases violence has been a problem for over 25 years.



Criminal and Non-Criminal Abuse & Neglect Wheel



Abuse tends to escalate and crimes often overlap and blend together.

ADAPTED, WITH PERMISSION, FROM ELDER ABUSE: THE HIDDEN CRIME — ADVOCACY CENTRE FOR THE ELDERLY, TORONTO

Profiles of Victims and Abusers

VICTIMS may:

- be socially isolated;
- be under the control or influence of the abuser;
- have some degree of physical impairment or incapability;
- be physically frail, but mentally capable;
- be widowed or living alone; or
- not appear to be vulnerable in any way.

ADAPTED WITH PERMISSION FROM MATERIAL DEVELOPED BY ADVOCACY CENTRE FOR THE ELDERLY (ACE) IN TORONTO.

Profiles of Victims and Abusers

151

ABUSERS may:

- resent expectations to provide care or support;
- be dependent on the senior for assistance, housing or money;
- have substance abuse problems;
- have a history of mental illness or emotional problems; or
- just seem normal.

ADAPTED WITH PERMISSION FROM MATERIAL DEVELOPED BY ADVOCACY CENTRE FOR THE ELDERLY (ACE) IN TORONTO.

Dependent Abusers

152

- Contrary to portrayals of older people as weak, dependent victims, older adults are most often abused by people who are dependent on them.
- Adult children who harm their parents often exhibit various health, mental health and financial problems, including financial dependence on the older person, substance abuse, social isolation, and employment issues.
- The abuser may rationalize the mistreatment with a false sense of entitlement toward the senior's money or belongings: eg. I am the only daughter, I deserve the money, etc.
- These complex dynamics can make identifying the appropriate response to abuse especially challenging.

From – Background Paper: Financial Abuse of Seniors: An Overview of Key Legal Issues and Concepts - Canadian Centre for Elder Law (March 2013)

Financial Abuse

153

Linked to a combination of factors including:

1. **opportunity** – may increase at transition points in life, e.g., senior has physical or mental health problems or has recently lost spouse
2. **need** or **greed**; and
3. a **false sense of entitlement**.

- A recent B.C. study found that 8% of older adults have been financially abused, losing, on average, $20,000 each!
- 92% of older adults that experienced financial abuse were women.



Common Family Pressures

154

- Emergency loans
- Places to live when they are out of job
- Help paying for higher education (university)
- Assisting with major purchases (i.e.. car)
- Making down payments for a home
- Co-signing or serving as guarantor for loans
- Using house title as collateral
- Help avoiding bankruptcy (adult son/daughter) at the point of losing business, home



Adapted from: Charmaine Spencer, Diminishing Returns (1995)

Undocumented Loans

155

- Family loans are frequently undocumented
- there will not necessarily be a common understanding concerning the terms of repayment and related matters
- Often the result is the family member claims this was always intended to be a gift
- Law presumes a 'bargain' (loan) not a gift, for adult children



Designated Agencies (DAs)

156

Designated Agencies that are legally mandated to look into reports of abuse and neglect of adults under the *Adult Guardianship Act* are:

- Regional Health Authorities;
- Providence Health for Catholic Hospital in Greater Vancouver; and
- Community Living Services of the Ministry of Children and Family Development (for adults with a developmental disability).



Designated Agencies (DAs)

157

- **Designated Agencies** have legal tools available under the *Adult Guardianship Act* (AGA)
- Three ways to gain access to a premises
- Will report abuse/criminal neglect to the police
- No contact and civil support orders
- DA can apply to a court for an order for a 'Support and Assistance Plan' – could involve admission to a care facility, restraining orders, etc



Part 3 of the *Adult Guardianship Act (AGA)*

158

The purpose of this *Act* is to provide support and assistance for adults who are abused and neglected and unable to seek support and assistance because of:

- physical restraint;
- a physical handicap that limits their ability to seek help; or
- an illness, disease, injury or other condition that affects their ability to make decisions about the abuse or neglect.

Guiding Principles for People Working Under the *AGA*

159

- Self determination.
- Most effective but least intrusive form of support or protection.
- Court orders as a last resort.

AGA

160

PUBLIC GUARDIAN AND TRUSTEE OF BRITISH COLUMBIA

604-660-4444
www.trustee.bc.ca

- Investigates allegations of financial abuse even in the absence of a power of attorney, guardian, representative or substitute decision-maker having been previously appointed.
- Makes health care decisions
- Manages financial decision-making
- Assists and provides resources to substitute decision-makers

Role of Public Guardian and Trustee

161

- Arrange for assessment of incapability *AGA, s.53(5)*.
- Ability to temporarily freeze assets in an emergency *PGT Act, s. 19*.
- Special investigation powers *PGT Act, s. 17 and 18*.
- Inquire into complaints about representatives *Rep Agreement Act, s. 30*.



Community Response Networks (CRNs)

162

- CRNs are groups of local people and organizations who work together to ensure an appropriate and coordinated response to adult abuse, neglect and self-neglect.
- This involves prevention, education, advocacy, protocols…



Federal Pensions Trusteeship

163

Income Security Programs – this office may:

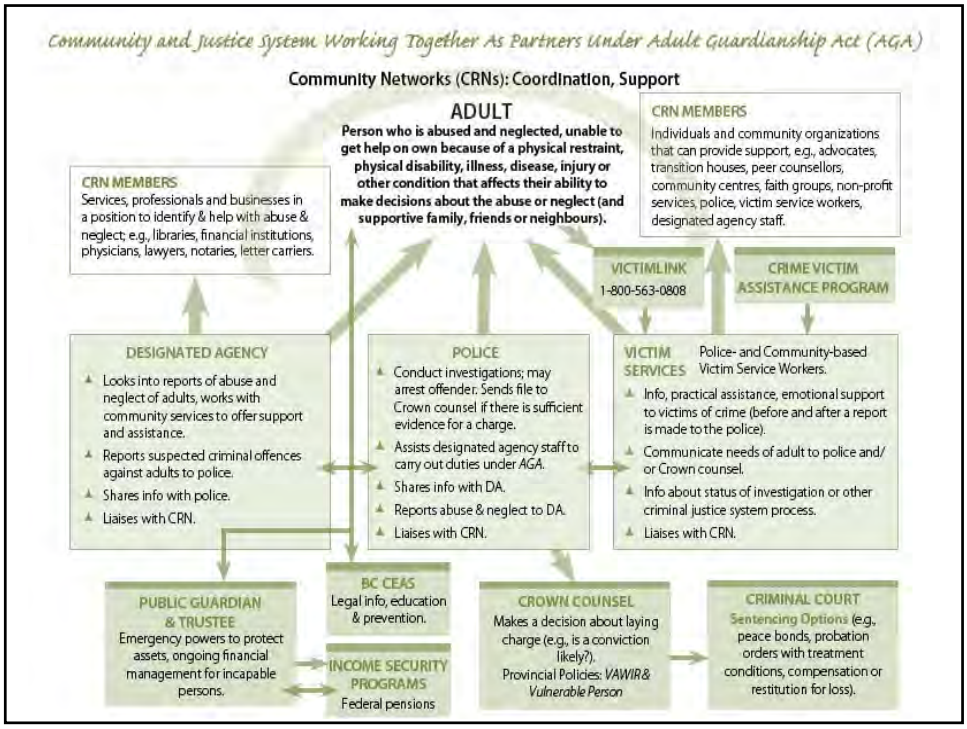
- after receiving a signed application and medical report, appoint someone (called a "pension trustee") to manage the federal pension benefits for a mentally incapable person; and
- look into misappropriation and theft of pension monies (including stopping or redirecting payment of benefits).

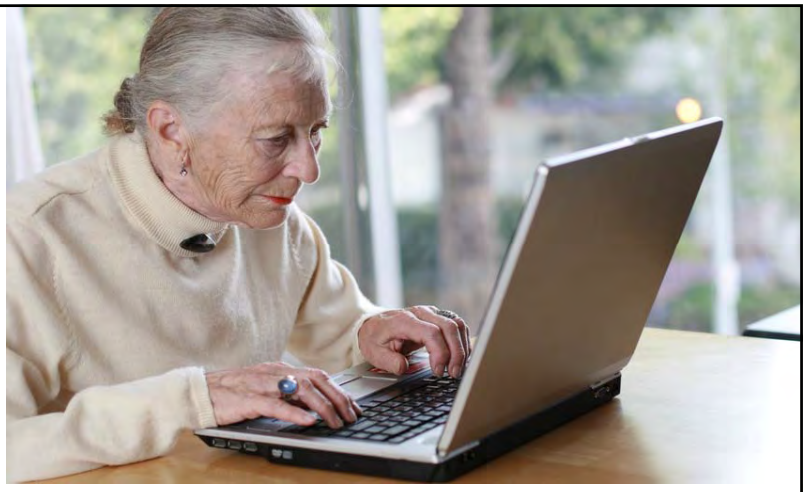
BC CEAS (B.C. Centre for Elder Advocacy and Support)

164

- Provides education, information and representation about abuse and neglect of seniors.
- Provincial SAIL (Senior Abuse and Information Line) (8am-8pm; 7 days/wk):
  - Telephone: 604-437-1940
  - Toll Free 1-866-437-1940
  - E-mail: info@bcceas.ca
  - Website: www.bcceas.ca

BC CENTRE FOR ELDER ADVOCACY SUPPORT





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Seniors' Resources

A 'toolkit' for advocates working on seniors' issues.

Legal Advocate Training Conference October 8, 2013

Resources – Advance Planning

167

- ***Nidus*** – various fact sheets on EPOAs, RAs, roles & responsibilities, revoking & resignation
- ***Attorney General*** - website has downloadable pdf forms for basic EPOA, s7 & s9 RA's
- ***Public Guardian & Trustee*** – "*It's Your Choice*" - good plain language planning booklet
- ***Canadian Bar Association*** –
  - *BarTalk* – info on changes to laws, prudent practice, etc.
  - Precedent for EPOA
- ***CLE BC*** –
  - PracticePoints – articles in Wills, Estates & Trusts section on advance planning
- ***Ministry of Health*** – *My Voice* - personal planning workbook including EPOA, RA's and Advance Directive *(new 2012)*
- ***LSLAP*** – Chapter 15 of LSLAP manual on Adult Guardianship
- ***Peoples Law School*** –
  - *When I'm 64 – Controlling Your Affairs* – booklet on wills, EPOA &RAs *(new Aug 2012)*
  - *Power of Attorney* – booklet on preparing EPOA *(3rd edition – 2012)*

NIDUS Handouts

168

Roles & Responsibilities of an Attorney



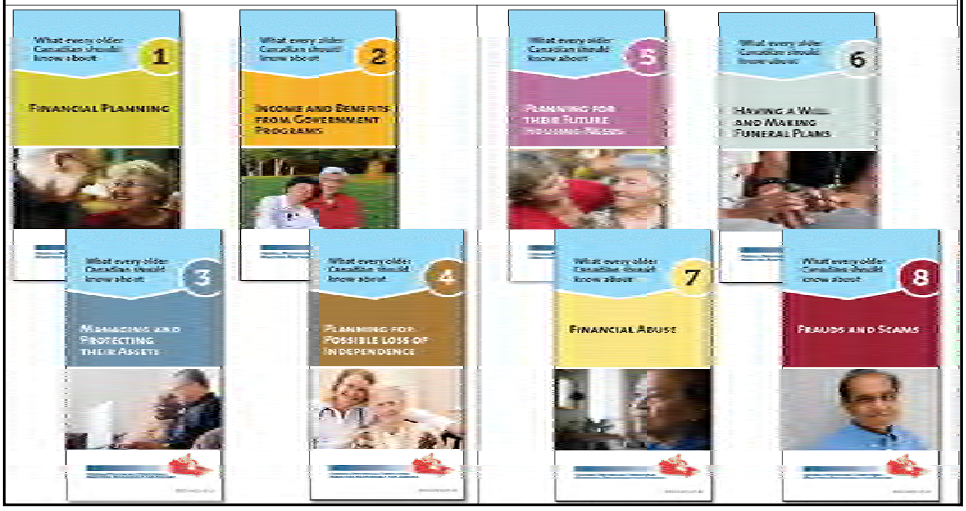
Roles & Responsibilities of a Representative



Fed/Prov Ministers Pamphlets

169

What every older Canadian should know about:

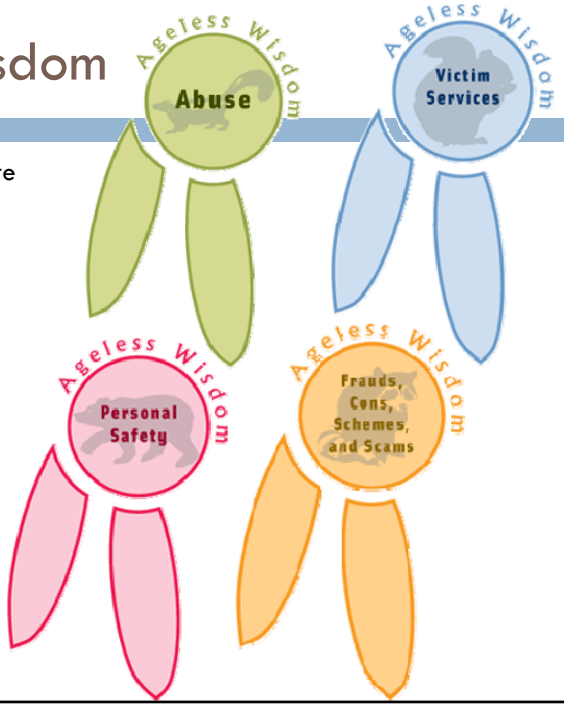


Ageless Wisdom

170

Informational brochures are available from the RCMP First Nations Community Policing Services on the following topics

- **Abuse**
- **Frauds, Cons, Schemes & Scams**
- **Personal Safety**
- **Victim Services**



First Nations re:act

171

- Preventing and Responding to Abuse in First Nations Communities – online manual and eTools.
- Includes:
  - a discussion of the roles and responsibilities of various agencies
  - tools and templates
  - case studies and
  - Resources including online WebPlays and manual for service providers



Useful Websites

172

Provincial



Service BC



Seniors BC

Federal



Service Canada



Seniors Canada

When I'm 64

173

The People's Law School has three excellent booklets in a series entitled "When I'm 64: Services; Benefits; and, Controlling Your Affairs.







Estate Planning/Administration

174

The People's Law School also has three excellent booklets for estate planning: Writing Your Will, A Death in Your Family (also a wiki), and Being an Executor.

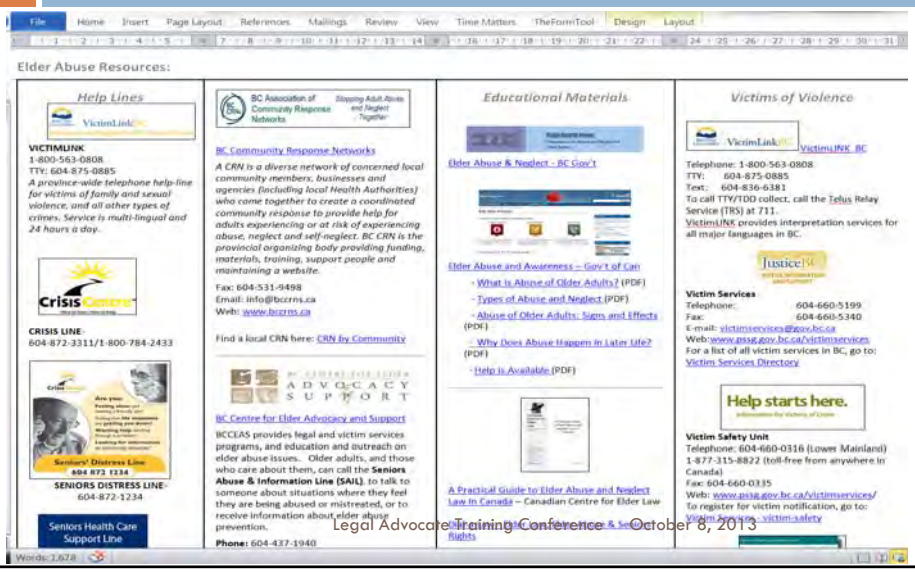






BCCEAS Portal Pages

175



BCCEAS Website

176



Upcoming

177

- Seniors Advocate for BC – systemic issues
- Age Friendly BC – gov't working with others to support seniors to live active, socially engaged & independent lives in the community.
- Better at Home – expanding across the province
- BC-CRNs – expanding into over 100 communities
- Discovery Project – CNPEA - national hub for elder abuse info and resources
- Civil Resolution Tribunal – strata cases & small claims

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THE END

Questions?

WILLS, ESTATES & SUCCESSION ACT (WESA)

This new legislation is slated to be proclaimed in force March 31, 2014. Here are some of the important changes that this new Act will make to B.C. Wills & Estates practice:

1. A new small estate procedure with simplified application and accounting requirements has been created. The limit of "small" is anticipated to apply to estates under $50,000. However, this is not set to come into force on March 31, 2014, however it may be proclaimed in the not-too-distant future.

2. Survivorship rules will change. Under the current legislation, in a common accident where it is impossible to tell who died first, the younger person is deemed to have died after the older person. Under *WESA*, each person is deemed to have survived the other. In the case of joint tenancy, then the asset is deemed to be held instead as tenants in common and will not pass to the survivor. If a person fails to survive the deceased by 5 days, they are deemed to have died before the deceased.

3. Intestacy rules (where a person dies without a Will) shall change:

    a. The spousal life interest in the matrimonial home is to be abolished under *WESA.* Instead, the spouse will have the right to purchase the matrimonial home or elect that it be considered part of his or her share of the estate. The spouse must elect this option within 180 days from the grant of letters of administration. There is a new procedure to determine the home value.

    b. The distribution of assets has changed where there is spouse (the current spousal share is $65,000). Now the surviving spouse receives the first $300,000 of the estate, but if there are children from a prior relationship, the surviving spouse only receives $150,000.

    c. There can be more than one spouse: e.g. deceased is not divorced and has not been living separate for more than two year, but had been living common-law with another person and is in that relationship for at least two years immediately prior to date of death. In this case, there are two spouses and each will have to apply to share as a "spouse."

    d. There will be a different distribution scheme where there are no spouses or children based on "parentelic" relationships not consanguinity, i.e. now based on closeness to a parent rather than just closeness in blood relations.

4. The probate procedure to have the court validate a Will or appoint an administrator where there is no Will, shall change significantly as result of the new legislation:

    a. new probate rules and forms – eg. a specific Notice form is required to send to all beneficiaries, intestate heirs or persons entitled to claim under the *Wills Variation Act*. The form will contain more information so that parties will have more information earlier in the process. There is a 21 day waiting period from the date the Notice is sent.

b. The mandatory estate Submission and Affidavit forms are set out in the Probate Rules. They are designed to be completed by lay persons.

c. As a first step, a person may apply to get court authorization to obtain information in order to make an application for probate/administration.

5. Wills:

a. Testamentary intent: with the changes, it may be possible for a document which is not duly signed and completed to supersede an older Will which is properly made under the old Act. i.e. the court will have power to declare that a document which does not meet the formality requirements of a Will, to be effective as a Will.

b. There will be additional powers to "fix" a Will that has errors, including power to the court to rectify a Will after a grant of probate has been issued.

c. Marriage will no longer revoke a prior Will.

d. Anyone over the age of 16 shall be able to make a Will.

e. Where a witness to a Will is also a beneficiary, the gift to the witness is still considered void, but the gift may be saved by the Court on application.

6. Many applications are now to be made within the probate proceeding file; for example: to interpret a Will, prove the Will in solemn form, determine spousal shares and valuations of spousal homes. The Court may give directions for the evidence and procedure to deal with the application.

7. Changes to challenging grants of probate/administration. The old probate Caveat is now a Notice of Dispute. Only one Notice of Dispute can be filed and it only lasts for one year; however, it may be amended and or renewed by court order. An application to court can be made to cancel it.

8. Challenging a Will based upon Undue Influence. The onus has shifted from the opposing party having to prove undue influence directly, to the beneficiary (usually a caregiver) who is claiming the Will is valid, to prove that undue influence was not exerted.

9. Passing of Accounts and personal representative remuneration. Similar affidavits and forms are specified, but this procedure may now be forced by an interested party or the executor. The Court may summarily pass the accounts.

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Barristers & Solicitors

WILLS & ESTATES and WESA

Legal Advocates Training

October 9, 2013

Hugh McLellan

McLELLAN HERBERT
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- INTRODUCTION
- WILLS VALIDITY
- PROBATE GRANTS
- ESTATE ADMINISTRATION
- WVA
- WESA

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❖INTRODUCTION

- Now many Acts and common law
- BCLI project
- WESA
- New Probate Rules

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❖Wills Validity

- Wills Act formalities
- Capacity
- Undue influence
- Caveat
- Proof in solemn form

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❖Probate Grants

- Probate rules (21-4, 21-5)
- Forms set in Rules
- Probate or Administration
- Notice required
- Requisition, Affidavits filed
- Probate fee paid

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❖Estate Administration

- Obtain grant or not
- Gather in assets
- Pay estate debts
- File tax returns and get tax clearance
- Provide accounts for approval or passing
- Obtain discharge?

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❖Wills Variation Act

- 6 months from grant of probate
- Spouse or child only
- Will no adequate provision
- No guidelines
- Maybe able to state reasons
- Try to avoid WVA

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❖Wills, Estate and Succession Act and amendments

- Most proclaimed as of March 31, 2014
- Repeals virtually all existing Wills related Acts
- Changes some substantive common law
- Changes probate procedure

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- WESA
- Intestacy Rules Changes
  - Definition of spouse
  - Spousal home
  - Spousal share
  - Intestate distribution scheme:
    Parentelic vs consanguinity

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- Spousal Share
  - EEA – “spouse”
    - Includes a common-law spouse
    - Common-law spouse is
      - a person who is united to another person by a marriage that, although not a legal marriage, is valid by common law, or
      - a person who has lived and cohabited with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, for a period of at least 2 years immediately before the other person's death;

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- spouse takes no part of the deceased spouse's estate if the spouses
  - had, immediately before the death of one spouse, separated for not less than one year with the intention of living separate and apart, and
  - had not during that period lived together with the intention of resuming cohabitation.

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- S. 2 of WESA – definition of “spouse” provides that: 2 persons are spouses if were both alive immediately before death of one of the spouses AND were
  - Married to each other or
  - Lived with each other in a marriage-like relationship for at least two years

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- Cease to be a spouse if
  - In case of marriage if
    - Live separate and apart for at least 2 years with one or both having the intention to live separate and apart or
    - An event occurs causing an interest in family property to arise under the Family Law Act
  - In the case of marriage-like relationship if one or both persons terminate the relationship

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Spousal Home

- WESA abolishes life interest in the spousal home;
- Personal representative to notify spouse of right to acquire spousal home
- Court can adjudicate spousal home disputes

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- Home cannot be sold for 180 days unless assets other than home are not sufficient to pay debts and liabilities and a mortgage or charge is not enough
- Spouse must deliver within 180 days a written notice to the personal representative exercising his/her right to buy, including valuation

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- Occupancy Costs – until home issue resolved, spouse must pay insurance, property taxes, expenses to maintain and repair, utilities, mortgage or penalty
- Court may allow spouse to get home but subject to interest of children - Can register charge to protect share in property plus interest

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❖DISTRIBUTION SCHEME

Where a person dies without a Will, there is an intestacy

- EEA – Table of Consanguinity
  (from CLE Probate Practice Manual)
- WESA – Parentelic Distribution

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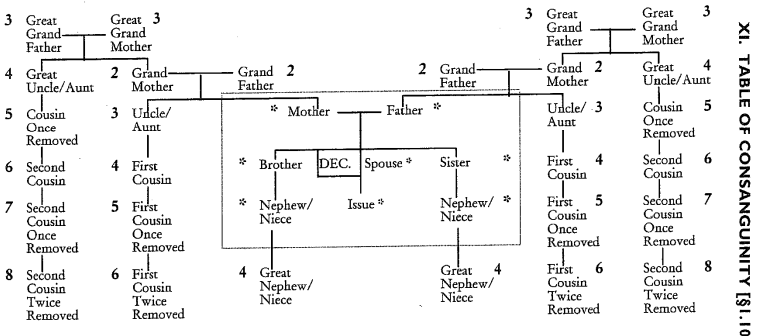
XI. TABLE OF CONSANGUINITY [§1.109]



*Distribution to the relatives set out within the dotted rectangle is specifically covered by the *Estate Administration Act*.

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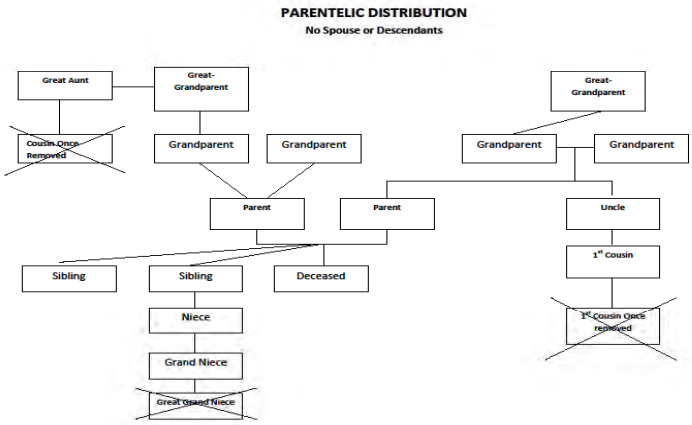

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- Survivorship rules change
  - No presumption of predecease
  - Each survive each other
  - Pass as tenant in common
  - Default 5 days survive or deemed predeceased

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❖Wills Validity

- Still formalities, but Court may declare document not meet them to be a Will
- Court has power to fix Wills
- Gift to Will Witness might be saved
- Marriage shall not revoke a Will

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❖Probate application

- New Probate Rules (25)
- New Submission and Affidavits forms
- Can apply for Authorization to obtain information before apply for Grant
- Still pay probate fee based on value

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❖Challenges to Wills/Grants

- Use Notice of Dispute
- Can only file one
- Last one year
- Can be amended or renewed

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❖Probate Actions

- Brought under existing probate file
- Maybe able to have valid even if not signed correctly
- Biggest change to undue influence
  - Onus shifts to gift recipient

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❖Applications

- Most under probate file, for example:
  - Dispense with Notice
  - Determine what is a WIll
  - Will interpretation/rectification
  - Who to be Executor/Administrator
  - Determine spouse share
  - Determine matrimonial home value
- Court can give directions for evidence and procedure

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❖Pass Accounts and Personal Representative Remuneration

- Apply under probate file
- Similar forms and affidavits
- Court can summarily pass accounts

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❖Transition

- WESA generally applies to deaths occurring **ON or AFTER** the date on which those parts come into force, i.e. March 31, 2014

Hot Topics in Family Class Immigration

Presentation for Law Foundation of BC

Provincial Training Conference for Legal Advocates

10 October 2013

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Overview

- (Discussion Scenarios)
- Family Class Immigration in a Nutshell: What is the Sponsorship Undertaking and How Does it Work?
- Summary of Sponsorship Eligibility Criteria
- Who can be Sponsored Today? What Changes are on the Horizon?
- New Provisions on Conditional Permanent Residence for Certain Sponsored Spouses
- Sponsorship Breakdown: What it Means and How it Might Impact your Client
- (Discussion Scenarios) – reprised

Scenario # 1

- Jose is a Mexican citizen who became a permanent resident of Canada in January 2009 after having being sponsored by his wife, Andrea (a Canadian citizen), a woman he had met and married just 6 months before she applied to sponsor him.
- Jose and Andrea began having problems soon after Jose arrived in Canada. By March 2009 he had moved out of the house, and by June 2009 he had begun dating Francesco, a citizen of Mexico whom he had been close friends with for almost a decade before they began dating.
- Jose and Francesco are in a very serious relationship and wish to marry and settle in Canada. But Jose's divorce (from Andrea) is tied up in the Canadian courts, and even if the divorce were to be granted, Francesco has been denied a Canadian visitor visa. Marriage among same-sex partners is not legal in Mexico, so they really have no way to marry at this time.
- Six months ago, Jose went to stay with Francesco in Mexico to help him recover from major surgery. He is now unsure whether it would be better for him to stay in Mexico while his application to sponsor Francesco is being processed, or if he can return to his job in Canada without foregoing a sponsorship application.

Scenario # 2

- Marvin and his wife Bolita are both Canadian citizens of Canada. They are married and living in Vancouver where they are raising three young children.
- Bolita's parents are currently in Canada visiting their grandchildren. They have decided that they want to remain in Canada permanently, in part because Bolita's father has some chronic health issues that he feels will be better served in the Canadian healthcare system.
- Marvin and Bolita have decided to sponsor Bolita's parents, but have some concerns about the application:
  - Bolita has only been a permanent resident of Canada for 6 months. She has proof of the income she earned in the UK in the year before she immigrated to Canada (she earned well above $100,000 in that year), but she has only just found a job in Canada;
  - Bolita has a sister who is currently 21 years old, and would like to be included in her parent's application for permanent residence, if possible.

Scenario # 3

- Marla is a citizen of the Romania who married a Canadian citizen in October 2012. In November 2012, her husband applied to sponsor her as a permanent resident, and she was landed just four weeks ago.
- Marla recently found a copy of the permanent residence application that her husband filed on her behalf, and discovered that it contained a whole lot of incorrect information – which he had changed without her knowledge.
- In the few short weeks since her arrival in Canada, Marla's husband has become insanely jealous and suspicious of her, and keeps threatening to tell immigration that they should deport her because she is sleeping with another man. He is refusing to let her out of the house and has even threatened to kill her.
- Marla has absolutely no money, no friends and no safe place to stay in Canada. Moreover, her family spent their life savings paying her way to Canada – on the understanding that she'd soon be able to repay them with her Canadian income. She is traumatized at the thought of "letting them all down".
- She wants to know:
  - What immigration issues she needs to worry about, and whether her husband can make good on his threat to have her deported;
  - Whether she can apply for social assistance.

Family Class Immigration in a Nutshell

- The “Family Class” is the application stream that enables eligible sponsors to bring certain family members to Canada as permanent residents (PRs)

- Sponsors sign an undertaking to “provide for the basic requirements of the sponsored person and his or her family members who accompany him or her to Canada if they are not self-supporting”.

- “Basic requirements” are deemed to include such things as food, clothing, utilities, shelter, fuel, household supplies, health care that isn’t provided by public health, etc.

Family Class Immigration in a Nutshell

- The undertaking serves as a contractual promise to CIC that the sponsored persons will not apply for social assistance during the period of the undertaking

- Under the law as it stands today, the applicable period of an undertaking spans:

  - 3 years for spouses, common-law (CL) partners, conjugal (CJ) partners, and dependent children who were 22 years or older at the time of landing;
  - 10 years for dependent child who were less than 22 at the time of landing, unless/until the date of their 25th birthday; and
  - 10 years for any other eligible dependent.

- A sponsorship undertaken can be withdrawn before the PR application is approved; after that, the undertaking run its full course, even if a divorce is granted.

Sponsor Eligibility Criteria

- Must be 18+ years of age
- Must be a Canadian Citizen (CC) or PR of Canada (not under removal order; not currently detained)
- Must live in Canada (if a PR), or be able to prove intent to live in Canada after PR of spouse and/or dependent child has been approved (if a CC)
- Must have sufficient income to provide for sponsored family members – Low-Income Cutoff (LICO) for a family of 5 is roughly $47,000/annum in 2013) – ***N.B. LICO doesn't apply if applicants are the sponsor's spouse and/or dependent child who has no dependent child of their own***

Sponsor Eligibility Criteria (continued)

- Cannot be an undischarged bankrupt
- Must not be in receipt of social assistance for any reason other than disability
- Must not be in "default" of a previous undertaking, immigration loan or family support payments
- Cannot have been convicted of an offence of a sexual nature, a violent criminal offence, an offence against a relative that results in bodily harm or an attempt or threat to commit such an offences
- Cannot have sponsored another spouse who was landed < 3 years ago
- Applies to Sponsorship applications received post-Mar 2012: Cannot have been sponsored as a spouse within past 5 years

Who can be Sponsored? (Admissibility)

- Sponsored family members must not be inadmissible to Canada on grounds of:
  - Security (s.34 IRPA)
  - Human or International Rights Violation (s.35 IRPA)
  - Criminality, Serious Criminality or Organized Criminality (ss.35-37 IRPA)
  - Medical (s.38 IRPA) – with some exceptions for sponsored spouses or dependent children
  - Financially (s. 39 IRPA)
  - Misrepresentation (s.40 IRPA)
  - Cessation of Refugee Protection (s.40.1 IRPA)
  - Non-Compliance with the Act (s.41 IRPA)
  - Inadmissible Family Member (s.42 IRPA)

Who can be Sponsored? (Eligibility – Spousal)

- ***Spouse***: Applicant (A) and Sponsor (S) are legally married; marriage is valid where solemnized and under Canadian law
- ***Common-Law (CL) Partner***: A and S have cohabited in a continuous f/t conjugal basis for at least one year
- ***Conjugal (CJ) Partner***: A and S have been in a conjugal relationship (without continuous f/t cohabitation) for at least one year (only in the context of an outside Canada application, and only where there is an obstacle to marriage or CL).
- Evidence must show that:
  - A qualifies as spouse, CL or CJ partner;
  - that there is an ongoing intention to reside together, **and**
  - relationship was not entered "primarily for the purpose of gaining admission to Canada"

New Provisions on Conditional PR for Certain Sponsored Spouses

- Effective 25 Oct 2012 CIC introduced “conditional PR” provisions (s.72.1 IRPR), which apply to sponsored spouses who have been in a relationship with their S for 2 years or less and have no children with their sponsor at the time of application.
- If subject to the condition, an A “must cohabit in a conjugal relationship with their S for a continuous period of 2 years after the day on which they became a PR.
- Failure to meet the condition within the initial 2 year period and ***at any time thereafter*** could face PR revocation proceedings.

New Provisions on Conditional PR for Certain Sponsored Spouses

- There are two “exceptions” that will cause the condition to cease applying:
  - Where S dies in the 2 yrs immediately following A’s landing (s.72.1(5) IRPR)
  - Where an officer determines that S has abused/neglected the A, the A’s child, or a relative of the S or A who lives in the home (s.72.1(6) IRPR)
- Operational Bulletin (OB) 480 (www.cic.gc.ca/english/resources/manuals/bulletins/2012/ob480.asp) provides direction to officers on how to administer the condition, including the exceptions

New Provisions on Conditional PR for Certain Sponsored Spouses (continued)

- The Regulatory Impact Analysis Statement (RIAS) provided the following policy rationale (see www.gazette.gc.ca/rp-pr/p2/2012/2012-11-07/html/sor-dors227-eng.html):
  - "The spousal sponsorship process is open to abuse when individuals enter into relationships of convenience in order to facilitate entry into Canada".
  - "While firm figures on the extent of relationships of convenience are not available, out of 46 300 immigration applications for spouses and partners processed in 2010, approximately 16% were refused. It is estimated that most of these cases were refused on the basis of a fraudulent relationship".
  - "Other countries, such as Australia, the United States and the United Kingdom, employ a form of conditional status period as a deterrent to those who would commit marriage fraud. The lack of a comparable conditional status measure to deter marriage fraud makes Canada vulnerable to this type of unlawful activity".

New Provisions on Conditional PR for Certain Sponsored Spouses (continued)

- The condition doesn't apply where there was a child at the time of application, but it provides no exception where a child was born after A's landing
- The condition applies even where there is no allegation or evidence of fraud
- In spite of the exceptions for abuse and neglect, the condition may severely impact persons facing domestic violence given:
  - the psycho-social issues of placing an abused/neglected newcomer to Canada into the enforcement arena;
  - the practical challenges of proving abuse/neglect;
  - that there is no guarantee the exception will be granted (which may discourage reports of domestic violence).

Who can be Sponsored? (Eligibility – Child, as it stands today….)

- ***Type A*** - child < 22 y.o. and not a spouse or CL partner,
- ***Type B*** - child who has:
  - depended substantially on parent's financial support since < 22 y.o., or (if he/she became a spouse or CL partner before age 22) since becoming a spouse or CL partner, AND
  - has been continuously enrolled in/attending accredited post-secondary institution pursuing a f/t course of professional or vocational training
- ***Type C*** - child who is > 22 y.o., has depended substantially on parent's financial support since before age 22 and is unable to be financially self-supporting due to a physical or mental condition

Who can be Sponsored? (Eligibility – Child, what's yet to come

- May 2013, CIC gazetted a regulatory package that would:
  - reduce age of age of dependency from 22 to 19 years; and
  - eliminate dependency based on continuous f/t studies

- The RIAS provided the following policy rationale (see www.gazette.gc.ca/rp-pr/p1/2013/2013-05-18/html/reg1-eng.html):
  - "Statistics demonstrate that older dependent children (those who arrive between the ages of 19 and 21) have lower economic outcomes than those who arrive in Canada at a younger age (between 15 and 18 years old)".
  - "the current allowance for older dependent children who are pursuing full-time studies to accompany principal applicants creates significant challenges and inefficiencies in processing applications. The verification of attendance and enrolment is both labour-intensive and vulnerable to fraud".

Who can be Sponsored? (Eligibility – Parents/Grandparents (PGPs))

- Pre Nov 2011, CIC accepted an unlimited number of applications to sponsor PGP. Processing was extremely slow, and the backlog of unprocessed applications grew by nearly 40,000 applications per year

- Nov 2011, CIC announced:
  - a one year hiatus on PGP sponsorship to cut the backlog of 165,000 + applications in the queue;
  - the “supervisa” – to allow eligible PGP (with private health coverage and financial support) to obtain 10 year multiple-entry visas and an extended authorized stay of up to 2 years

Who can be Sponsored? (Eligibility - PGPs, what the future holds)

- May 2013, CIC announced intended re-opening of new PGP stream in Jan 2014 (see www.cic.gc.ca/english/department/media/backgrounders/2013/2013-05-10b.asp):
  - S will need to meet LICO plus estimated 30% over the 3 yr period before application filing (formerly 1 year of evidence was required)
  - Only CRA confirmed income will be considered
  - Sponsorship undertaking will span 20 years (previously 10)
  - CIC will accept only 5,000 P/G applications in 2014

Who can be Sponsored? (Eligibility – PGPs, what the future holds)

- The RIAS provided the following policy rationale (see www.gazette.gc.ca/rp-pr/p1/2013/2013-05-18/html/reg1-eng.html):
  - "The PGP program generates costs to Canadian taxpayers, as **PGPs are unlikely to engage in paid employment or to become financially independent when in Canada"**.
  - "**Low labour market participation** by PGPs means limited contributions to Canada's tax base, a higher likelihood of low incomes, and consequently a **potential increased draw on social assistance benefits** in comparison to economic immigrants, who consistently demonstrate a use of social assistance below PGP and average Canadian levels".
  - The PGP program also generates **costs to Canadians in terms of health care** given that many PGPs enter Canada at a time at which health care costs typically increase. The average age of a PGP principal applicant at arrival is 65 years. In Canada, more than 50% of a person's lifetime health care expenses are incurred after age 65; these consume nearly 44% of all health care dollars.

Who can be Sponsored? (Eligibility – other relatives)

- a sibling, niece/nephew or grandchild, ***only*** if that family members is orphaned, under 18 years of age and not a spouse or CL partner

- a "last remaining family member" – i.e. any other relative of any age or relationship, ***only*** if the sponsor does not have a living spouse, CL or CJ partner, child, parent, grandparent, sibling, uncle/aunt or nephew/niece who could be sponsored as a member of the family class, nor any relative who is a CC or a PR or registered as an "Indian" under the *Indian Act.*

Sponsorship Breakdown: What Does it Mean?

- A sponsorship breakdown occurs when S, who has undertaken to provide for the basic requirements of the A and his/her accompanying family members, is unable or unwilling to do so.

- The phrase is also used more loosely to describe situations where a promised or pending sponsorship is used as an instrument of abuse against a Foreign National (FN):

  - where the FN has been induced to enter or remain in Canada on the promise of a sponsorship that is never advanced;
  - where the FN whose status depends on a sponsorship application is threatened with withdrawal of that application.

Sponsorship Breakdown: Mavi v. Canada

- When a PR who has been sponsored to Canada collects social assistance during the period of the sponsorship undertaking, his/her S will be unable to sponsor any other relative unless/until the full amount of any social assistance or welfare payment issued is repaid to the satisfaction of the government authority that issued that benefit

- The Ontario Court of Appeal has held in *Mavi* v. *Canada (Attorney General)*, 2009 ONCA 794 that while the provinces have discretion to suspend collection in cases where abuse has been alleged, the Canadian sponsor will not be discharged from their sponsorship obligation by reason of abuse