

Family Law Act Overview

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Atticus Legal

Family Law Act Overview

- The *Family Law Act* came into effect on March 18, 2013
- It replaced the *Family Relations Act* (in place since 1970 something!)

What Changed?

- Significant changes with **property division**,
- **Codification of case law** into the act on a number of issues: mobility/relocation,
- **Common-law couples** now covered on property division issues
- Expanded definition of **family violence**
- Inclusion of consideration of **family violence in the “best interests of the child”** test.
- Provisions that recognize **IVF, surrogacy and multiple parental** situations and Donors (sperm and egg).

Family Violence

- The *FLA* defines family violence along the usual terms:
 - Physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm;
 - Sexual abuse of a family member;
 - Attempts to physically or sexually abuse a family member
- S. 37(2) is **not an exhaustive list**, so these factors will still be of some use

- The *FLA* also expands the definition of family violence:
- Psychological or emotional abuse of a family members, including
 - Intimidation, harassment, coercion or threats, including threats respecting other persons, pets, or property;
 - Unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy;
 - Stalking or following the family member
 - Intentional damage to property.

Case Law: Family Violence examples

- Court should take a broad view of what constitutes family violence
M.W.B. v A.R.B., [2013 BCSC 885](#)
- Demeaning remarks, blaming parent to a child qualify as family violence
D.N.L. v C.N.S., [2014 BCSC 1417](#)
- Derogatory outbursts, demeaning comments qualify
D.N.L. v C.N.S., [2013 BCSC 809](#)
- Threats, minimal physical contact qualify
K.L.L. v D.J., [2014 BCPC 85](#)
- Litigation abuse, failure to cooperate qualify
M.W.B. v A.R.B., [2013 BCSC 885](#)
- Behaviour causing financial hardship and stress, threats to cause financial hardship qualify
Hokhold v Gerbrandt, [2014 BCSC 1875](#)
- Deliberate failure to pay child support intended to inflict emotional harm or control behaviour qualifies
J.C.P. v J.B., [2013 BCPC 297](#); *S.N. v E.C.*, [2014 BCPC 82](#)

Case Law: Impact of Family Violence



Analysis required involves consideration of each factor

N.C.R. v K.D.C., [2014 BCPC 9](#)

Expert evidence may assist court's analysis

Keith v MacMillan, [2014 BCSC 1352](#)

Cons: Expensive, time consuming and on interim applications generally not possible.

Failure to pay child support as Family Violence

- Although the failure to pay child support may not constitute family violence, **it can be a factor that** the court will consider in allowing relocation
- If the payee parent is so desperate to make ends meet that they are considering moving as a way to reduce expenses, this can be a factor in determining if the move is proposed in good faith (*Hokhold v. Gerbrandt*, 2014 BCSC 1875)

Failure to pay child support as Family Violence

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Options when there is family Violence

- Protection orders (practical problems include difficulty in parenting during order)
- Supervised access (expensive, short term) s59 of the FLA

Supervision orders must serve the interests of the child, nothing else; long-term orders are discouraged, but can be justified if in the interests of the child; case law sets out 15 factors that should be considered in making supervision orders

L.A.M.G. v C.S., [2014 BCPC 172](#)

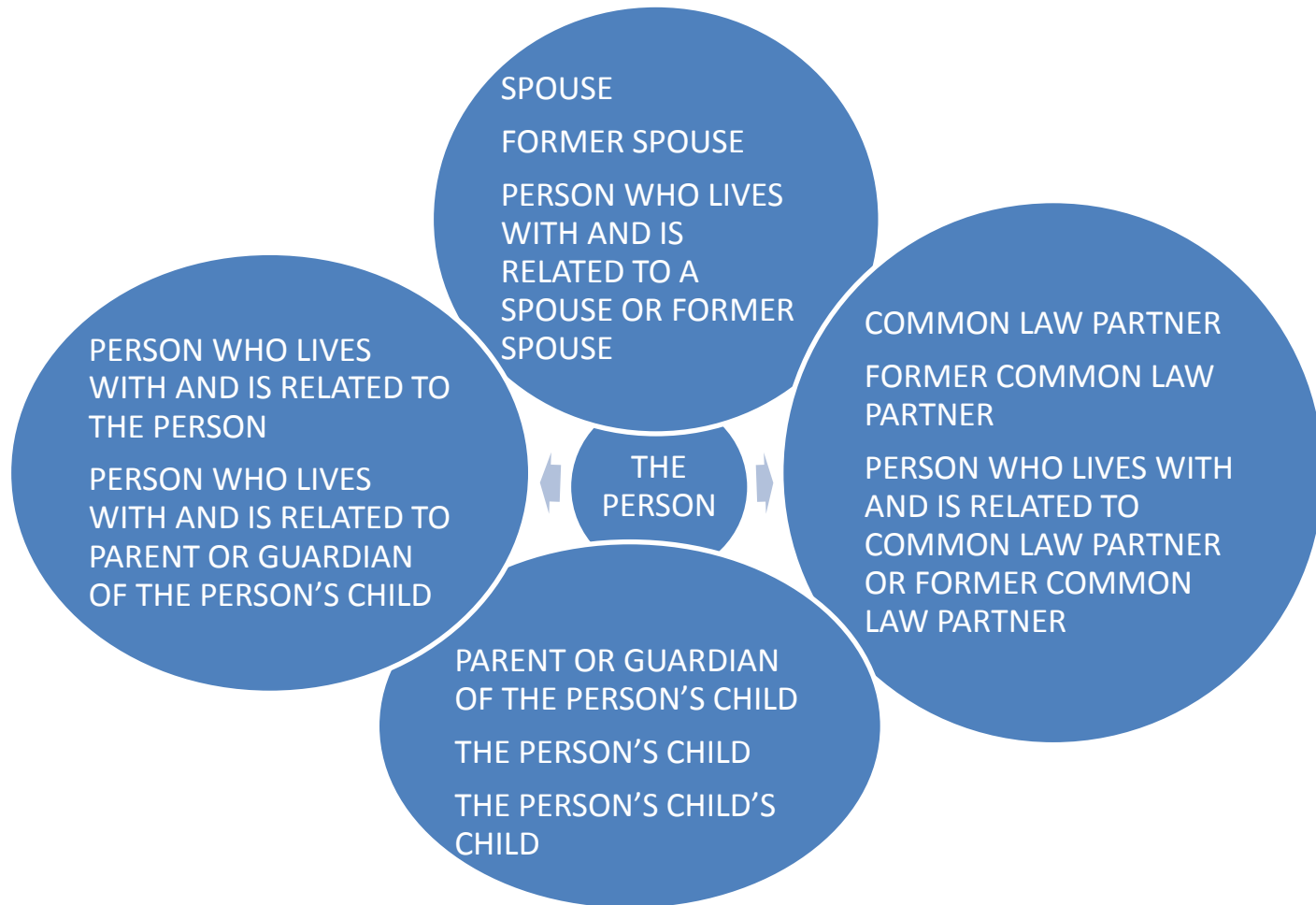
- Terminating guardianship
(only granted in extreme cases)

Who Can Apply for a Protection Order?

section 183(1)

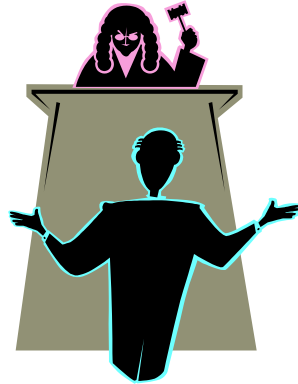
- A family member who is claiming to be an “at-risk family member”
- A person on behalf of the “at-risk family member”
- The court can make the order on its own initiative

Definition of “Family Member”



Protection Order Applications

Sections 183 and 186



183. A Protection Order may be brought as a stand-alone application. That is, a proceeding for parenting arrangements or property division or a divorce does not have to be started at the same time.

186. A Protection Order may be made on a without notice basis. If brought on a without notice basis, the Court can set aside the Order, or change or terminate the Order.

Orders that can be made

section 183(3)

- no direct or indirect communication;
- no attending or entering place regularly attended by the at-risk person (residence, school, workplace, etc.);
- no following the at-risk person;
- no possessing weapons;
- directions to police to remove person from property, accompany person to remove belongings, seize weapons;
- requirement to report to court;
- *Any terms or conditions the court considers necessary to protect the safety and security of the at-risk family member, or implement the order*

A Protection Order expires in one year unless otherwise ordered:
section 183(4)

Factors to be considered (1)

section 184

In determining whether to make an order under this Part, the court must consider at least the following **risk factors**:

- (a) any history of family violence by the family member against whom the order is to be made;
- (b) whether any family violence is repetitive or escalating;
- (c) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at the at-risk family member;
- (d) the current status of the relationship between the family member against whom the order is to be made and the at-risk family member, including any recent separation or intention to separate;

Realities of Family Violence

section 184(2-4)

- **Mutual Protection Orders:** Court must consider whether to make the order against *one person only*, taking into account: the history of/potential for family violence, extent of injuries/harm, and respective vulnerabilities.
- **Self-defence:** The *person who initiates an incident of family violence* is not necessarily the person against whom order should be made.
- **Protection Order may be made, even if...** The Court may make an order *regardless* of whether the family member has complied with a previous order; the family member is temporarily absent from home; the at-risk family member is in shelter/safe house; criminal charges have been laid, the at-risk family member has history of returning; or there's a order restricting communication under s. 225

Restraining Orders

section 255 (transition provision)

- A restraining Order made under the *FRA* (s. 37, 38, 124 or 126) remains in force in accordance with the terms of the Order.

Enforcement – same as for Protection Orders

Enforcement of Protection Orders

Protection Orders

- may *not* be enforced under the *FLA* or *Offence Act*: section 188(1)
- are enforceable as an offence under section 127 of the *Criminal Code*.

Protection Orders from another Canadian jurisdiction are enforceable under the *Enforcement of Canadian Judgments and Decrees Act*: section 191

Enforcement under the *Criminal Code* (1)

Under the *Criminal Code*, section 127:

(1) Every one who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of

- (a) An indictable offence and liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

...

Enforcement under the *Criminal Code* (2)

The police have to lay charges for the breach.

The Crown has to decide to prosecute, and may not do so in cases of “minor” or singular breaches.

The at-risk family member has no control over the criminal process and may not always be notified of occurrences.

Actual service of the Protection Order seems essential given that *mens rea* (a guilty mind) has to be established.

The standard of proof is *beyond a reasonable doubt*.

The at-risk family member may have to testify and be subjected to cross-examination.

OTHER ORDERS TO “PROTECT”

**Exclusive Occupancy
Conduct Orders**

Restraining Order against Property

Controlling Litigation Abuse

Sections 222 and 223

222. At any time during the proceeding, the Court can make orders to:

- a) facilitate settlement of the family law dispute or an issue in dispute,
- b) manage behaviours that might frustrate the resolution of a family law dispute, or
- c) prevent the misuse of the court process

223. The court may make one or more of the following:

- a) dismiss or strike out all or part of the party's claim
- b) adjourn the proceeding
- c) require all matters to be heard by the same judge
- d) require leave of the court for any application

Orders that can be made

section 183(3)

- no direct or indirect communication;
- no attending or entering place regularly attended by the at-risk person (residence, school, workplace, etc.);
- no following the at-risk person;
- no possessing weapons;
- directions to police to remove person from property, accompany person to remove belongings, seize weapons;
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- *Any terms or conditions the court considers necessary to protect the safety and security of the at-risk family member, or implement the order*

A Protection Order expires in one year unless otherwise ordered:
section 183(4)

Dispute Resolution and Counselling

Section 224

- (1) The Court may do one or both of the following:
 - a) require the parties to participate in family dispute resolution
 - b) require one party or more parties or, without the consent of the child's guardian, a child to attend counselling, specified services or programs.
- (2) In making any of the above orders, the Court may allocate payment of the above among both parties, or require one party alone to pay the fees for the dispute resolution, counselling, services or programs.

Financial Abuse

Sections 226 and 91

226. The Court may do one or more of the following:

- a) require a party to pay the rent, mortgage, taxes, utilities or other expenses related to the residence
- b) Prohibit a party from terminating specified utilities
- c) Require supervision for the removal or personal belongings from a residence

91. The Supreme Court (but not the Provincial Court) may make an order prohibiting a party from disposing of or transferring property in which the applicant *may* have an interest.

Enforcing Conduct Orders

Section 228

If a party fails to comply with a Conduct Order (sections 222 to 227), the Court may do one or more of the following:

- make a further conduct order;
- draw an adverse inference;
- order reimbursement for expenses as a result of the non-compliance;
- require payment of up to \$5,000 to the other party, the spouse or child;
- fine the person up to \$5,000

Case Law Update

What's been Happening?

Given the expanded definition of family violence, we are seeing an increase in protection orders being made. In particular, some interesting cases have been decided:

* Protection Orders can be made even without physical violence. The courts have recognized that threats and words and emotional abuse constituted violence. *Morgadinho v. Morgadinho 2014 BCSC*

- *One act of violence* is sometimes enough to provide a basis that it could occur in the future .

Dawson v. Dawson 2014 BCSC

Case Law Update

- A parent can seek an order of protection against their adult child
- “Risk” of violence is subjective (however, the court still has to assess objectively the overall circumstances)
E(JR) v. 07-BcyLtd 2013 BCSC 2038.
- The court can consider “any circumstances” that might lead to an increase in the risk of family violence – in this case, they made a property division order that the husband was likely to be angry about, so they continued the protection order.
- Protection orders can still be continued EVEN if the Crown drops criminal charges or choose not to charge, and MCFD does not consider allegations substantiated. *“Fitzgibbon v. Fitzgibbon 2014 BCCA 403”.*

Relocation

- Also referred to as MOBILITY
- The *Family Relations Act* didn't have a specific section that deal with. Judges made discretionary decisions based on the best interests of the child. Typically the "status quo" was considered.
- The Family Law Act sets out a new regime.

Relocation under the *FLA*

- s. 65(1): relocation is a change in the child's residence that can reasonably impact the child's relationship with another guardian or someone else with a significant role to play in the child's life – a move within the Lower Mainland “should not be considered a relocation” (*Berry v. Berry*, 2013 BCSC 1095)
- S. 65(2)(b) only applies if there is an order or agreement parenting arrangements or contact

BUT: transitional provisions apply

- s. 251: if you have guardianship or custody through an order or agreement made before the *FLA*, you have guardianship under the *FLA*
- So: the relocation provisions apply if there is guardianship or custody granted under the *Family Relations Act*, the *Family Law Act*, or the *Divorce Act*

The process under the *FLA*

- s. 66: person proposing to relocate must give 60 days notice in writing to any other guardian including the proposed location and date of relocation
- s. 68: relocation is permitted on or after the date proposed in the notice unless the person notified files an application to prohibit relocation

Granting orders for relocation under the *FLA*

- In granting an order for relocation, the court must consider the factors set out in s. 69(4)(a):
 - Proposed relocation must in be “in good faith”
 - Relocating parent must propose reasonable arrangements for the other parent and any persons having a significant relationship with the child to continue that relationship

Resources

- For emergency family law order, duty counsel (free lawyers at the courthouse) can help
- Vancouver and Surrey have more resources.
- Legal Aid funds financially eligible family law cases if there is family violence.

Working with LSS Intake



February 2015

Sherilyn
Provincial Supervisor, Legal Aid Applications
Tel: 604-601-6093

How to apply for legal representation

Call LSS Provincial Call Centre at 604-408-2172 in Greater Vancouver or 1-866-577-2525 (call no charge)



Come into one of our Legal Aid offices
(contact info available on our website
www.legalaid.bc.ca)

Our clients



LOCAL LEGAL AID OFFICES

Duncan Local Agent

c/o Duncan Courthouse
238 Government Street
Duncan, BC V9L 1A5

Tue: 9am to 4pm

Thu: 9am to 12pm

Nanaimo Local Agent

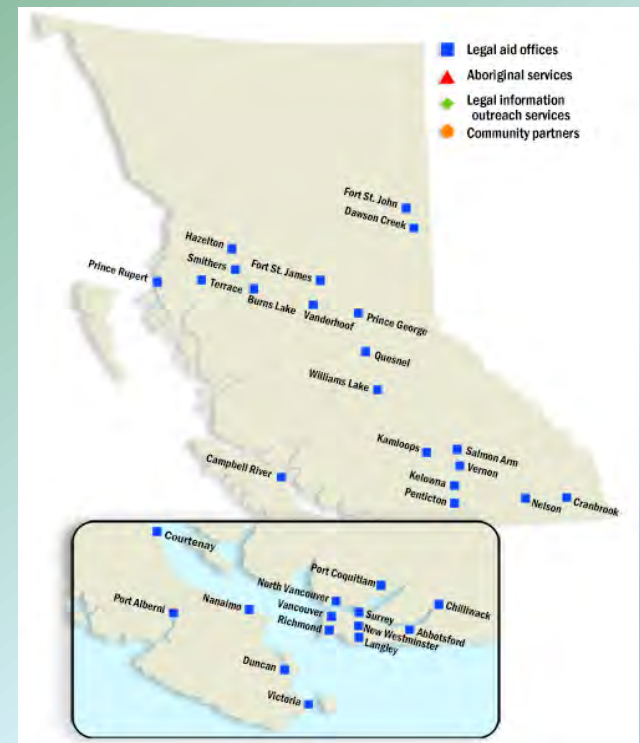
210 Milton Street
Nanaimo, BC V9R 2K6

Mon, Wed, Thu: 9am to 5pm

Tue: 1pm to 5pm

Phone: 250-753-4396

Fax: 250-753-5345



Who qualifies?

A client qualifies for legal aid when:

1. The legal problem is covered by LSS; and
2. The client meets LSS financial guidelines



What legal problems are eligible for coverage?

Criminal – Where charges are serious and there is a likelihood of jail



Immigration – Where the client may wish to claim refugee status or where the client faces an immigration proceeding that may result in their removal from Canada.



Child Removal – Where the Ministry of Children and Family Development or a Designated Agency has removed a child or where there is a **threat** of a child being removed. This could also include custody and/or access issues arising from a child in care.



Family Law – Serious family situations regarding parenting (guardianship, parenting arrangements or custody/access), protection orders, child support and more depending on the issues. The issues need to be addressed immediately to ensure the safety of the children and/or the client.



Family Mediation Pilot Project

LSS and Mediate BC are offering the Mediation Referral program to increase access to affordable mediation services for family law matters.

Services include:

- ❖ mediation services by a private family mediator,
- ❖ information and options for resolving legal issues out-of-court,
- ❖ help for families to reach an out-of-court agreement, and
- ❖ referrals to advice services to prepare and support clients through mediation.

Family Mediation Pilot Project

This program is for clients that qualify financially for legal aid but don't have coverable legal issues. This program provides a referral to Mediate BC for six hours of paid family mediation services.

The types of issues that can be referred to Mediate BC are:

- ❖ property,
- ❖ debt,
- ❖ spousal support issues, and
- ❖ any child-related issues.



Mediate BC will offer mediation services beyond the six paid hours. For those services, client's pay what they can afford, based on their income and assets.

Family LawLINE

Family LawLINE lawyers give brief "next step" advice over the phone on family law issues such as:

- ❖ parenting time or contact/access,
- ❖ guardianship/custody,
- ❖ child support,
- ❖ spousal support,
- ❖ property division,
- ❖ family agreements,
- ❖ adoption, and
- ❖ court procedures.



Family LawLINE Hours

Mondays, Tuesdays, Thursdays, and Fridays — 9:00 am to 3:00 pm

Wednesdays — 9:00 am to 2:30 pm

Clients can access this service by calling the LSS Call Centre:

- ❖ 604-408-2172 (Greater Vancouver)
- ❖ 1-866-577-2525 (call no charge, elsewhere in BC)

Reciprocals – Where the client's legal matter may be in another province. This generally encompasses family legal aid problems where the other party resides in another province or the client resides in another province. However, on occasion criminal and immigration cases have gone through the reciprocals process as well.



Financial Eligibility

Income chart (All case types)



Household Size

1

2

3

4

5

6

7 or more

Monthly Net Income

\$1,480

\$2,070

\$2,670

\$3,260

\$3,850

\$4,405

\$5,040

Financial Eligibility

Personal Property (All case types)



Household Size

1

2

3

4

5

6 or more

Exemption

\$2,000

\$4,000

\$4,500

\$5,000

\$5,500

\$6,000

Requesting A Review of A Denial

A client can request a review of a denial for legal aid

- ❖ This request must be in writing
- ❖ The client should state why they disagree with the denial and explain why they believe they should get legal aid
- ❖ The client should include any supporting documents

Coverage and financial eligibility reviews must be submitted within 30 days of the denial of legal aid to:

Provincial Supervisor
Vancouver Regional Centre
400 – 510 Burrard Street
Vancouver, BC V6C 3A8
Fax: 604-682-0787



Working together

You can help your clients:

- ❖ Understand the intake process
- ❖ Prepare for the interview
- ❖ Organize documentation
- ❖ Make sure they follow up and provide intake with requested information



Presenter:

Sherilyn

Provincial Supervisor, Legal Aid Applications

Phone: 604-601-6093

Fax: 604-682-0787

Email: vancouver.sherilyn





Services of Access Pro Bono (2015)



Services of Access Pro Bono (2015)



**ACCESS
PRO BONO**

Access Pro Bono Society of BC

Who are we?

Our mission is to promote access to justice in BC by providing and fostering quality pro bono legal services for people and non-profit organizations of limited means.

- All services are provided free of charge;
- Services provided through staff, volunteer lawyers, volunteer paralegals, and student volunteers;
- Facilities are provided by social agencies committed to providing help to the needy.



Financial Guideline

Our Summary Legal Advice Program adopts the same financial eligibility requirements for legal advice set out by the Legal Service Society (LSS).

To qualify for most of our legal advice services, net monthly household income must be below:

- \$3265 for a household of 1-3
- \$4470 for a household of 4 or more

What do we do?

- Summary Legal Advice Program
- Civil Chambers Program: 604.603.5797
- Roster Programs
- Children's Lawyer Program
- Paralegal Program
- Wills Clinic Project
- Mental Health Program

Roster Programs

- BC Court of Appeal
- Federal Court
- Wills and Estates
- Family Law
- Judicial Review
- Mediation
- and Solicitors

Summary Legal Advice Program

- 105 min. legal advice clinics across the Province
- All law areas
- 1-877-662-6664 or info@slapbc.ca

Civil Chambers Program

- The Civil Chambers Program provides legal assistance and support services to low-income individuals and families in need of legal assistance. The program is a part of the Justice System and is funded by the Government of British Columbia.

Wills Clinic Project

- The Wills Clinic Project is a free service for low-income individuals and families who need help with their wills. The project is a part of the Justice System and is funded by the Government of British Columbia.

Paralegal Program

- The Paralegal Program is a free service for low-income individuals and families who need help with their legal issues. The program is a part of the Justice System and is funded by the Government of British Columbia.

Mental Health Program

- The Mental Health Program is a free service for low-income individuals and families who need help with their mental health issues. The program is a part of the Justice System and is funded by the Government of British Columbia.

Summary Legal Advice Program

- 105 pro bono legal advice clinics across the Province;
- All law areas;
- 1.877.762.6664 or help@accessprobono.ca;

Roster Programs

- BC Court of Appeal,
- Federal Court,
- Wills and Estates,
- Family Law,
- Judicial Review,
- Mediation,
- and Solicitors.

Civil Chambers Program

- The Civil Chambers Program provides legal assistance and representation services to low- and modest-income individuals engaged in civil (non-family) chambers litigation matters before the Supreme Court and the Court of Appeal in Vancouver.
- phone: 604-603-5797 or email: psamarakoone@accessprobono.ca

Wills Clinic Project

- Each Wednesday from 11:30am to 1:30pm at the Justice Access Centre at the Vancouver Courthouse at 800 Hornby Street.
- Trained lawyers and articling students draft and execute simple Wills and Representation Agreements for low-income seniors (ages 55+) and people with terminal illnesses by appointment only.
- call 604-424-9600 or email willsclinic@accessprobono.ca
- coming to Victoria soon!

Mental Health Program

The Mental Health Program provides pro bono representation services to individuals contesting their involuntary detainment under the *BC Mental Health Act*.

Paralegal Program

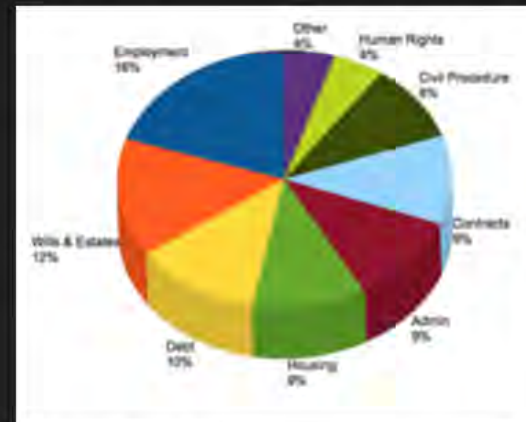
The Paralegal Program is staffed by senior paralegals from several Vancouver law firms, and legal supervision is provided by APB volunteer lawyers. The Program operates on Wednesday evenings from 5:30pm to 7:30pm. Appointments are necessary and can be made by calling the Vancouver Justice Access Centre at 604-660-2084.

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Statistics

Clinic:
General Civil: 60%
Family Law: 30%
Criminal Law: 5%
Immigration Law: 5%



Highlights of our 2014 Fiscal Year:

- \$3.7 Million market value of legal services;
- 11,546 service hours donated by APB lawyers;
- 6,581 individuals or non-profits received legal advice or representation;
- 1,905 enrolled APB lawyers and paralegals; and
- 102 pro bono legal advice clinics across the Province.

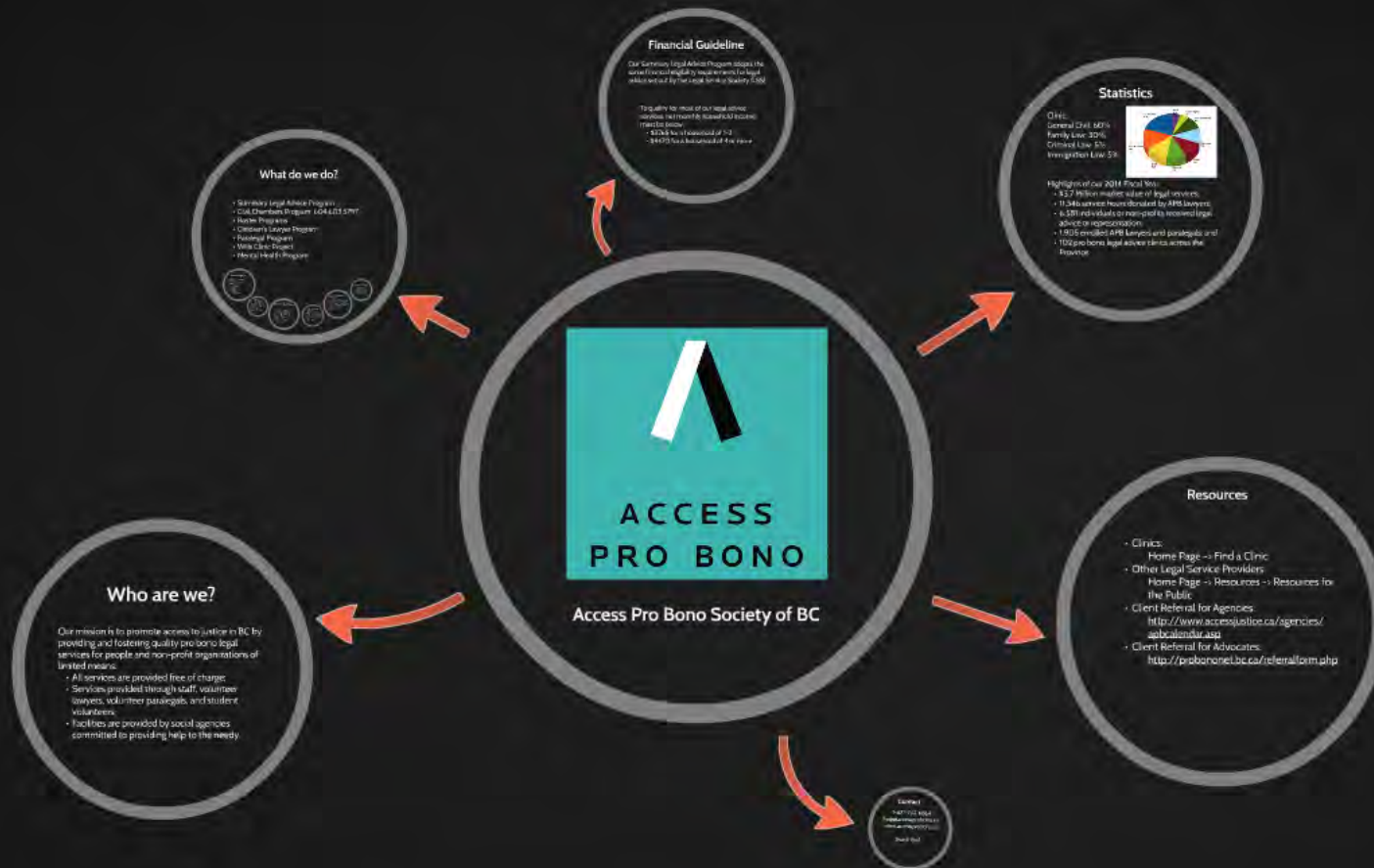
- Clinics:
Home Page -> Find a Clinic
- Other Legal Service Providers:
Home Page -> Resources -> Resources for the Public
- Client Referral for Agencies:
<http://www.accessjustice.ca/agencies/apbcalendar.asp>
- Client Referral for Advocates:
<http://probononet.bc.ca/referralform.php>

Contact

1-877-762-6664

help@accessprobono.ca,
www.accessprobono.ca

Thank You!



Services of Access Pro Bono (2015)

CHILD PROTECTION LAW

AMANDA ROSE

The Law

- Child Family and Community service Act (CFCSA)
- Simpler and Shorter piece of legislation than the Family Law Act.
- Sets out **time limits** the child can be in foster care (without the Ministry applying for longer term orders).
- Sets out principles that the Court and Ministry have to consider when looking at cases before it.

Principles under the CFCSA

- S(2) (b) the family is the preferred environment for the care and upbringing of the children
- The children's views are important
- The attachment and kinship for the extended family should be considered
- If supports can preserve the family, they should be offered

UPDATES IN CASELAW

- **Updates in the Caselaw**
- The *Family Law Act* made some significant changes to our previous legislation. Some of those affect Child Protection cases. They include:
 - **The removal of the term “Custody”.** The Family Law Act does NOT have the word custody in it. The Child Family and Community Services Act does. When a child is removed from a parent pursuant to the Child Family and Community Services Act, the Judge/Director can only “return” the child to the “parent apparently entitled to custody “ (set out in several sections of the CFCSA Act)

Guardianship

- The concept of guardianship now incorporates “custody”, but where does that leave us when determining who a child can be returned to?
- Under the old legislation, the *Family Relations Act*, if parents had Joint Custody, the case law was that the parent who had primary care was the parent apparently entitled to custody. Judge Smith ruled in *The Director of Child Family and Community Service and WI and LMR* 2014 BCPC 164 that the Court was required to make an order giving “primary parenting responsibility” to the other parent, before a child could be returned. This was even when the parents were both “presumed guardians”.
- What this case means: I would suggest this means that an order specifying primary parenting responsibilities needs to be made before a return is made. So for parties that don’t have any orders, this could mean that no return could be made until there are orders in place.

Guardianship and cFCSA

- **The *presumption of Guardianship* (s39 of the Family law Act).** The FRA did not have this presumption, and the concept of guardianship and parenting responsibilities are relevant to MCFD's ability to return a child to the other parent.
- **Consideration of the FLA definitions (ie, best interests of the children, family violence etc.)** when it comes the Court making an order under the FLA when there is a corresponding CFCSA hearing. Given the expanded definitions under the FLA, this has impacted to some extent the outcome when a parent is applying for guardianship to be able to have a child returned to them under the CFCSA.
- Intervention by the Ministry when there is no removal
- There are some cases that we hear about anecdotally where MCFD directs a parent to withhold access, even where there are existing FLA orders in place. To be clear, **MCFD do not have the power to do this.**
- Commonly, you will hear of "safety plans" and requests from a social worker. They are all voluntary, until such time as MCFD legally apprehend the child.

Caselaw

- ***In MLJ v RDJ 2013 BCDC 1358***
- THE FACTS
- In this case, the Mother withheld access to Dad, breaching a court order. She was advised to do so, at the request of MCFD, who were investigating a protection report. MCFD did not take any steps under the CFCSA to remove or supervise the children (or under the FLA), but directed mom to deny dad access.
- A s211 report was completed 4 months later, and eventually MCFD agreed that the children should go back to the regular schedule with dad.
- Dad then sought costs against MCFD and mom, for him having to enforce the order. The Court criticized MCFD and said
- *[28] In the case before me, there were two parents entitled to custody, both the respondent and the claimant. The MCFD took no formal action and thereby denying the respondent due process. With no authority, it removed the child from his care. The director counseled the claimant to breach a court order and provided no legal framework for the respondent to challenge its actions. To paraphrase an excerpt in Black's Law Dictionary, fifth edition, at p. 449, due process of the law provides notice to a person and an opportunity to be heard and to enforce and protect his rights before a court having power to hear and determine the case. The respondent was denied this basic procedural fairness.*
- AND

Caselaw

- **[30]** *I find nothing in my review of the [CFCSA](#) that gives the director the power to limit contact between a parent and child without removing the child and initiating protection proceeds. The CFCSA does provide jurisdiction for the director to apply for leave to intervene in a proceeding under the [Family Law Act](#) in the Supreme Court under [s. 97.1](#) of the [CFCSA](#), but this was not done.*
- **Intervention in [Family Law Act](#) proceedings**
- **97.1** *A director may apply under [section 204 \(2\)](#) of the [Family Law Act](#) to the court, as defined in that Act, for leave to intervene in a proceeding under that Act if the director considers it is in the best interests of a child to do so.*
- *In other words: MCFD cannot be intervening or “directing” parents to breach a current family law order without taking action under the CFCSA or FLA. To do so denies the other parent their procedural rights.*
- *This is a common problem that other parent’s counsel report. This is the first cited case I have seen on this issue.*

Mediation

- *common in Child Protection Proceedings
- Outside the court processs
- Can be quicker than waiting for a trial or proper court time to hear an issue
- Benefits:
 - 1. allows the parent to properly hear concerns.
 - 2. can address communication issues between social worker and parent.
- Can set down expectations and timeframes on both sides.

mediation

- Agreements can be filed in court and enforced.
- Disclosure has to be provided (the parent and child's file) before mediation.
- Often allows the parent to be heard, in a way that the court system doesn't.

The Family Homes on Reserves and Matrimonial Interests or Rights Act

For Courthouse Libraries by Katrina Harry

What we will cover today

- New legislation called the *Family Homes on Reserves and Matrimonial Interests or Rights Act*
- Who, what, when, why?
- More resources:
 - Centre of Excellence for Matrimonial Real Property at www.coemrp.ca
 - Indigenous Bar Association website: <http://www.indigenousbar.ca>
- Definitions will be addressed as they arise

What is the Act

- Federal legislation
- Royal Assent June 19, 2013
- 2 parts to the Act
 - Part 1-How First Nations can enact own matrimonial property laws under the Act
 - Part 2-The provisional federal rules apply as of December 16, 2014

What is the *Indian Act*

- Federal legislation
- Formally consolidated 1876
- To oversee Indians and Indian lands
- Regulated Indians' lives:
 - Created a race-based identity (Status v. non-Status), residency on reserves, livelihoods, attendance at residential schools, creating political system of band councils, etc.
 - For a historical review of the Indian Act, see Battered Women's Support Services website,
<http://www.bwss.org/wp-content/uploads/2010/06/theindianactaboriginalwomens empowerment.pdf>

Why was this Act created

- Case law confirmed that provincial/territorial matrimonial property laws do not apply on reserve lands
- The Constitution Act, sections state that:
- The provinces have authority over
- The federal government has jurisdiction over Indians and lands reserved for Indians

What does the Act say about its purpose and application?

With regard to its creation,

- at Section 4:
 - “The purpose of this Act is to provide for
 - the enactment of First Nation laws and the establishment of provisional rules and procedures that apply
 - during a conjugal relationship,
 - when that relationship breaks down, or
 - on the death of a spouse or common-law partner,
 - » respecting the
 - use,
 - occupation, and
 - possession of
 - family homes on First Nation reserves and the division of the value of any interests or rights held by spouses or common-law partners in or to structures and lands on those reserves.”

Some exemptions from the Act

- First Nations who enact their own laws under section 7-11 of this Act will not fall under the rest of the Act
- First Nations on the Schedule to the First Nations Land Management Act (section 12(2))
- Self-governing First Nations (section 12(3))
- Note that at least ONE of the spouses or common-law partners must be a First Nation member or an Indian in order for the Act to apply

How First Nations can enact own matrimonial property laws-ss. 7-11

Council must:

- notify the Attorney General (section 7(3));
- take reasonable steps in accordance with the First Nation's practices to locate voters, both on and off reserve, and inform them of their right to vote, the means of exercising that right to vote and the content of the proposed laws (section 8(3));
- publish a notice of the date, time and place of the vote (section 8(4));

How First Nations can enact own matrimonial property laws-ss. 7-11

- Once laws are approved, the council must:
 - notify the Minister in writing of the result of the vote (section 10); and
 - send a copy of the approved laws to the Minister, the organization designated by the Minister, if any, and the Attorney General of any province in which a reserve of the First Nation is situated.

Other information

- For templates, training, fact sheets, and more visit the website for the Centre of Excellence for Matrimonial Real Property at www.coemrp.ca
- No direct funding from Aboriginal Affairs and Northern Development Canada
- Dissatisfaction with First Nations Matrimonial Real Property Law

Provisional federal rules (apply December 16, 2014)—ss. 13-52

- Highlighted sections
- S. 13—each spouse or common-law partner has an equal right to live in the family home during the relationship. It does NOT matter whether they are a First Nation member or an Indian.
- S. 14—when a spouse or common-law partner dies, survivor has automatic right to stay in the family home for 180 days after the death

To dispose of or encumber the family home

S. 15-

- Spouse or common-law partner must obtain both the:
 - free
 - informed

consent of their spouse or common-law partner in writing to dispose or encumber the family home.

- A spouse that wishes to dispose of or encumber the family home has the burden of proving they obtained the required consent as set out above.

If consent not properly obtained

- Court may set aside the transaction
- May not be set aside if third party acquired it for value and acted in good faith.

Emergency protection order—s. 16-19

- On an ex parte application, a judge can make an emergency protection order for a period of **up to 90 days**. Orders can be varied, revoked, or extended beyond the 90 days.
- Judge must be satisfied that **family violence has occurred** and there is a **serious or urgent situation** that requires an immediate response to protect a person or property.
- The spouse or common-law partner may make the application even if that person has been forced to leave the family home as a result of violence.
- Judge's considerations are numerous.
- An emergency protection order can include a provision for exclusive occupation/reasonable access of the family home, among many other provisions.
- The application for an emergency protection order can be made by:
 - a spouse or common-law partner; or
 - by a peace officer with or without the consent of the spouse or common-law partner's consent.

Definition of family violence—s. 16(9)

- The Act includes a definition of family violence (s. 16(9)), which the court **must** consider) when determining whether to make an emergency protection order (ss.16(1) and 4).
- See s. 16(9) for definition of family violence
- Immediately, after an emergency protection order is made under section 16, the order and all supporting materials must be sent to a supreme court judge.
- The court must review the order within three working days, if a judge is available, and must either confirm the order or direct a rehearing of the matter (s. 17(3)).
- Designated judge/court may find that family violence has occurred for the purposes of this Act whether or not a criminal charge has been laid, dismissed or withdrawn, or a conviction has been or could be obtained (s. 22)

Emergency protection order continued

- Upon receiving notice of the order, person is bound by it
- A peace officer must serve a copy of the order on the persons referred to in the order, or by a substituted manner (as prescribed by the regulations), and must advise the applicant as soon as that has been done.

Emergency protection order-rehearing ss. 16-19

- If a rehearing is ordered:
 - evidence at rehearing must include the original evidence and can also include the collective interests of the First Nation members on whose reserve the family home is situated.
 - the order continues in effect and is not stayed unless the court orders otherwise.
- An order that is confirmed is deemed to be an order of the supreme court.
- Any person named in an emergency protection order can make an application to vary or revoke the order
- At a hearing or rehearing a judge can make an order:
 - to exclude members of the public, other than the parties from all or part of the hearings;
 - prohibiting the publication or broadcasting of any information from the hearing or rehearing, including the name of a party, witness or child; and
 - prohibiting disclosure to the public of any information in a court document or record related a proceeding under section 17 or 18.

Emergency protection order- application to vary or revoke-s. 18

- An application can be made to vary or revoke within 21 days after notice was received (though the court can allow further time), or at any time if there has been a material change in circumstances.
 - If the emergency order was granted by a justice of the peace or provincial or territorial judge, there is a time limit of 21 apply to revoke or vary the order.
 - After 21 days or after a rehearing, any person named in the order can apply to have the order revoke or varied if there has been a material change in circumstances.
- To read case law about material change in circumstance, try reading the Supreme Court of Canada case [Gordon v. Goertz, \[1996\] 2 S.C.R. 27.](#)
- The court must notify the parties or any persons specified in the order of the court's decision and any consequent procedures. This ensures the principles of fundamental justice and procedural fairness are met.

Exclusive occupation order-s. 20

- A court may grant an order for exclusive occupation of the family home and reasonable access to that home for a period that the court specifies.
- Violence does not necessarily have to be factor
- There are several factors a court must consider prior to granting an exclusive occupation order.

Exclusive occupation order contents—s. 20

An exclusive occupation order may require that:

- the spouse or common-law partner (whether a First Nation member or Indian or not) must leave the family home immediately or by a certain time, and prohibit them from re-entering the home;
- the spouse or common-law partner must preserve the condition of the home until they vacate it;

Exclusive occupation order contents—s. 20

An exclusive occupation order may also state that:

- An applicant make payment to the other spouse or common-law partner towards the cost of other accommodation; and
- A provision either spouse or common-law partner to pay for all or part of the repair and maintenance of the family home and other liabilities arising in respect of the home, or to make payments to the other spouse or common-law partner for those purposes.

Exclusive occupation order-vary or revoke-s. 20(6)

The exclusive occupation order can be varied or revoked by:

- anyone specified in the order, or
- by anyone who holds an interest in or a right to the family home if there has been a material change in circumstances

For an example of what may constitute a material change in circumstance, see the Supreme Court of Canada case [*Gordon v. Goertz*, \[1996\] 2 S.C.R. 27.](#)

Exclusive occupation order and death of a spouse or common-law partner—s. 21

- A surviving spouse or common-law partner may apply for an exclusive occupation order and reasonable access to the home for any period the court specifies.
- An interim order may be made before the application is determined.
- The court must consider many factors (see section 21(3) for full list)

Exclusive occupation order after death

cont-s. 21

An exclusive occupation order after death may include provisions such as:

- A survivor must preserve the condition of the family home;
- A specified person must leave the home, and are prohibited from re-entering; and
- An executor of a will/administrator of the estate or the holder of an interest or right in or to the home pay for all or part of the repair of the home or other liabilities.

Division of the value of matrimonial interests or rights—s. 28

- Section 28 provides, where both spouses/common-law partners are First Nation members, upon breakdown of the relationship each is entitled, on application made under section 30, to ½ of the value of the family home.
- There is a difference between what can be granted to First Nations members versus non-First Nations members.

Valuation date

- Valuation date for married spouses will be the earliest of these days
 - the day on which the spouses separated with no reasonable prospect of reconciliation,
 - the day on which the divorce judgement was made,
 - the day on which the marriage was nullified,
 - the day on which one of the spouses made an application related to the consequences of breakdown of the relationship
- Valuation date for common-law couples will be the earliest of these days
 - The day on which one of the partners manifested the intention not to continue the relationship
 - The day on which one of the partners made an application related to the consequences of the breakdown of the relationship
 - The day on which one of the partners made an application to restrain improvident depletion of the interest or right in or to the family home and of the matrimonial interests or rights that is subsequently granted.

Division of matrimonial interests or rights upon relationship breakdown-s. 28

If spouse or common-law partner is **First Nations member**

- $\frac{1}{2}$ of the value of the structures or lands situated on the reserve that were acquired by the spouse or common-law partner either during the conjugal relationship or before the relationship but in specific contemplation of the relationship
- The greater of either $\frac{1}{2}$ of the appreciation in the value of certain other structures or lands held by the other spouse or common-law partner that are situated on the reserve or, the amount of any monetary contributions made by them to improvements to those structures or lands less any remaining outstanding debt incurred for those contributions and
- Where certain other structures or lands held by the other spouse or common-law partner that are situated on the reserve did not appreciate in value, the amount of any monetary contributions they may have made to them less any remaining outstanding debt incurred for those contributions.

Division of matrimonial interests or rights upon relationship breakdown-s. 28

If spouse or common-law partner is **NOT** a First Nations member, they are **entitled to:**

- $\frac{1}{2}$ of the value of the structures that are situated on reserve that were acquired by the other spouse or common-law partner either during the conjugal relationship, or before the conjugal relationship but in specific contemplation of the relationship.
- The greater of either $\frac{1}{2}$ or the appreciation in the value of certain other structures held by the other spouse or common-law partner that are situated on the reserve, or the amount of any monetary contributions made by them to improvements to those structures less any remaining outstanding debt incurred for those contributions; and
- the difference between the amount of any monetary contributions to certain lands or structures held by the other spouse or common-law partner and any remaining outstanding debt incurred for those contributions.

Variation of amounts payable-s. 29

Section 29

- a spouse or common-law partner can make an application to vary an amount ordered by a court pursuant to section 28 if the amount ordered would be unconscionable.

Variation of amounts payable—s. 29

In hearing an application to vary an amount payable a court may consider:

- The applicant's financial responsibility for care and upbringing of children in the applicant's charge;
- Debts or other liabilities incurred by each spouse or common-law partner;
- Significant change in the value of the interests or rights between the valuation date and the day on which the order was made;
- Whether exclusive occupation is given to one spouse or common-law partner;
- Availability of other on-reserve housing;
- The length of the relationship;
- Whether there was any agreement made;
- Any loss of value due to improvident depletion or disposition or encumbrance without the applicant's required consent; and
- Any other consequence resulting from the relationship breakdown.

Amounts payable—s. 29

- A spouse or common-law partner must apply **within 3 years after separation** to divide the value of the matrimonial rights or interests.
- Court may determine the amount payable by one spouse/common-law partner to the other by:
 - lump sum;
 - instalments; or
 - the transfer of an interest or right.
- The court can extend the period to bring an application beyond the 3 years.

Death of a Spouse or common-law partner

- There is a difference between what First Nation members and Non-members are entitled to.
- A survivor must apply within 10 months for any entitlement; however, the survivor can apply to extend the 10 months.
- The determination of value:
 - The difference between what a buyer would reasonably be expected to pay for interests or rights that are comparable to the interests or rights in question.
 - The amount of any outstanding debts or other liabilities assumed for acquiring the interests or rights or for improving or maintaining the structures and lands that are the object of the interests or rights.

Valuation date in death of a spouse or common-law partner

- The valuation date in the case of death is:
 - Spouses (married couples)
 - the day before the death occurred;
 - the day on which the spouses stopped living together; or
 - the date on which the survivor made an application to restrain improvident depletion (which was subsequently granted).
 - Common-law partners
 - The day before the death of the common-law partner; or
 - the date on which the survivor made an application to restrain improvident depletion (which was subsequently granted).

Entitlement after death-

First Nation members-s. 34(2)

A survivor who is a member of the First Nation on whose reserve are situated any structures and lands that are the object of interests or rights that were held by the deceased individual is also entitled to an amount equal to the total of

- (a) one half of the value, on the valuation date, of matrimonial interests or rights referred to in paragraphs (a) and (b) of the definition “matrimonial interests or rights” in subsection 2(1) that were held by the deceased individual in or to structures and lands situated on a reserve of that First Nation,
- (b) the greater of
 - (i) one half of the appreciation in value, between the day on which the conjugal relationship began and the valuation date inclusive, of matrimonial interests or rights referred to in paragraph (c) of that definition that were held by the deceased individual in or to structures and lands situated on a reserve of that First Nation, and
 - (ii) the difference between the payments that the survivor made towards improvements made, between the day on which the conjugal relationship began and the valuation date inclusive, to structures and lands situated on a reserve of that First Nation that are the object of matrimonial interests or rights referred to in that paragraph (c) that were held by the deceased individual, and the amount of debts or other liabilities outstanding on the valuation date that were assumed to make the payments, and
- (c) the difference between the payments that the survivor made towards improvements made, between the day on which the conjugal relationship began and the valuation date inclusive, to structures and lands situated on a reserve of that First Nation that are the object of interests or rights that were held by the deceased individual that would have been matrimonial interests or rights referred to in that paragraph (c) if they had appreciated during the conjugal relationship, and the amount of debts or other liabilities outstanding on the valuation date that were assumed to make the payments.

Entitlement after death- non members-s. 34(3)

A survivor who is not a member of the First Nation on whose reserve are situated any structures and lands that are the object of interests or rights that were held by the deceased individual is also entitled to an amount equal to the total of

- (a) 1/2 of the value, on the valuation date, of matrimonial interests or rights referred to in paragraphs (a) and (b) of the definition “matrimonial interests or rights” in subsection 2(1) that were held by the deceased individual in or to structures situated on a reserve of that First Nation,
- (b) the greater of
 - (i) 1/2 of the appreciation in value, between the day on which the conjugal relationship began and the valuation date inclusive, of matrimonial interests or rights referred to in paragraph (c) of that definition that were held by the deceased individual in or to structures situated on a reserve of that First Nation, and
 - (ii) the difference between the payments that the survivor made towards improvements made, between the day on which the conjugal relationship began and the valuation date inclusive, to structures situated on a reserve of that First Nation that are the object of matrimonial interests or rights referred to in that paragraph (c) that were held by the deceased individual, and the amount of debts or other liabilities outstanding on the valuation date that were assumed to make the payments, and
- (c) the difference between the payments that the survivor made towards improvements made, between the day on which the conjugal relationship began and the valuation date inclusive, to the following lands and structures situated on a reserve of that First Nation, and the amount of debts or other liabilities outstanding on the valuation date that were assumed to make the payments:
 - (i) lands that are the object of matrimonial interests or rights that were held by the deceased individual, and
 - (ii) structures that are the object of interests or rights that were held by the deceased individual that would have been matrimonial interests or rights referred to in that paragraph (c) if they had appreciated during the conjugal relationship.

Summary

- Spouses/common-law partners have equal entitlement to occupy the family home until they cease to be spouses or common-law partners.
- Spouses must give their consent before the disposition or encumbrance of the family home.
- An emergency protection order can exclude a spouse/common-law partner from the family home on an urgent basis (where there is family violence) for up to 90 days.

Summary cont...

- An exclusive occupation order provides short to long term occupancy of the family home (where one spouse is excluded).
- Each spouse is entitled to an equal division of the value of the matrimonial home and any other matrimonial rights or interests.
- In some circumstances, the courts may transfer matrimonial interests or rights between member spouses or common-law partners together with, or instead of, financial compensation.

Summary cont...

- When a spouse or common-law partner dies, the surviving spouse or common-law partner may remain in the home for up to 180 days after their spouse or common-law partner's death.
- The courts can enforce a free and informed written agreement between spouses or common-law partners.

Issues lawyers may face

In using the Act, the practical issues lawyers will face include:

- becoming familiar with all aspects of the new provisional rules,
- gaining knowledge about new laws individual First Nations communities develop under the Act, and
- learning about local court procedures and processes, especially given the access to justice issues many communities face.

Issues First Nations may face

- Deciding whether to develop their own community specific laws, or wait for the Act to apply on December 16, 2014,
- Educating First Nation members about the Act and its implications,
- Managing the capacity issues (for example, the legal costs of developing of their own laws, potentially revising existing policy to be in-line with the Act, determining who will represent the views of the council to the court), and
- Working with local peace officers to carry out the functions outlined within the Act

ALERT BAY COMMUNITY JUSTICE PROGRAM

Working Toward a Healthier
Community: A Restorative
Approach

By

Michael Jacobson-Weston
Coordinator

RESTORATIVE JUSTICE FEATURES

- Explosion of interest in Restorative Justice
- No single, universal definition
 - Repair harm caused by crime
 - Restore parties to state of wellness or wholeness, which was disturbed by the crime
 - Hold offender responsible for actions
 - Provide opportunity for parties to identify and address their needs in the aftermath of crime
 - Seek resolution that affords healing, reparation, reintegration, and prevent future harm

Restorative Justice (RJ)

A Philosophical Shift

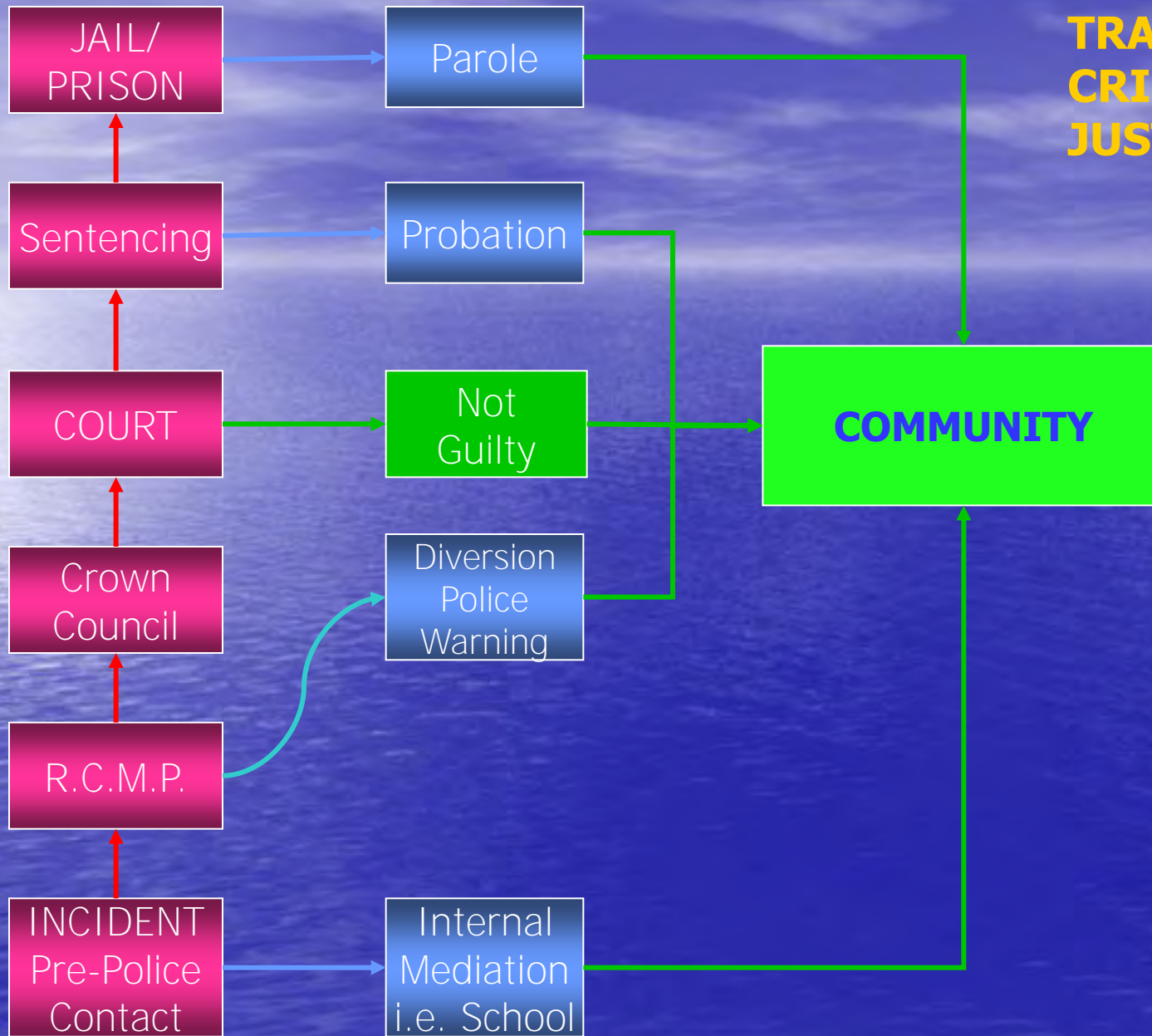
- RJ contrasts with present adversarial system of Criminal Justice
 - Violations against the crown
- RJ allows the community to play an active role:
 - Holding offender responsible
 - Supporting victims
 - Providing opportunities for offender to make amends

Restorative Justice Applications

- It can be applied:
 - To prevent crime where mediation is used to resolve conflict before becoming criminal act
 - To every stage of the Criminal Justice system from police diversion to post sentence stage
 - In cases of more serious crime when taking into account the more challenging interpersonal dynamics in the cases

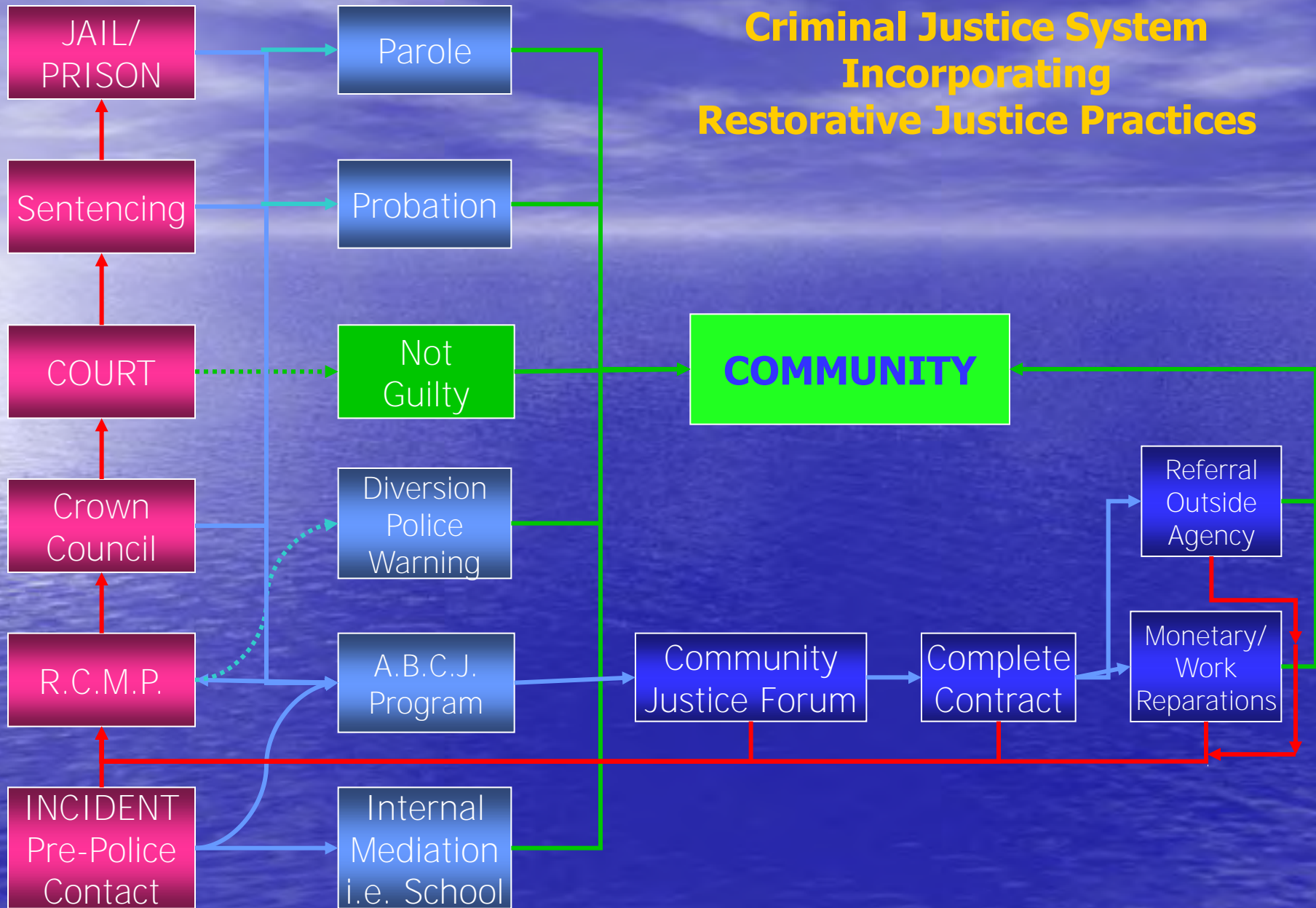
MORE SERIOUS CRIMES, what types of cases are eligible

- Initially, more serious offences won't be handled, until:
 - Facilitators gain more experience to effectively and safely handle them, and the community has built, or there exists, services that are required



**TRADITIONAL
CRIMINAL
JUSTICE SYSTEM**

Criminal Justice System Incorporating Restorative Justice Practices



SERIOUS OFFENCES continued

- Serious offences need serious consideration by police and processed to appropriate level of criminal justice system
 - Safety of victim, and anybody close to the victim
 - RJ practices and guidelines
 - Charges laid, restraining order issued
 - Trial sentencing
 - Post incarceration

RECENT CANADIAN HISTORY

- Roots in cultures of Aboriginal People
- RJ concept consistent with principles underlie traditional healing approaches (i.e. sentencing circles)
- 1974 Kitchener-Waterloo, where M.C.C. introduced victim-offender mediation in courts
- Since then non-governmental/faith communities continue to be driving force

YOUNG OFFENDERS ACT 1984

Flawed System

- Lacked clear, coherent youth justice philosophy
- Incarceration was over-used
- Sentencing decisions resulted in disparities and unfairness
- Did not ensure effective reintegration after being released

FLAWS Continued

- System did not make clear distinction between serious violent offences and less serious offences
- Did not give sufficient recognition to the concerns and interests of victims

YOUTH CRIMINAL JUSTICE ACT (YCJA) Addresses those flaws

- Contains provisions to increase use of “extrajudicial measures.” (EJM)
- Sets out clear objectives to guide the use of EJM
 - Repairing harm caused to victim and community
 - Provide opportunity for victims to participate in decisions

YCJA Continued

- Ensure measures are appropriate to the seriousness of the offence
- Encourage involvement of families, victims and other members of the community
- 5 levels of EJM, only one pertinent here
 - “referral to a community based program”
- YCJA’s principles parallel RJ
 - Allows easy implementation of our CJProgram

WHAT ABOUT THE VICTIM?

- Number of concerns expressed by victims groups, including but not limited to:
 - Programs focus on offenders/don't recognize needs of victims
 - Lack of services to victims currently within mainstream system
 - Danger the victims feel pressured into participating in RJPrograms
 - They may find the meetings inconvenient and time consuming.

HOW DOES RJ VIEW THE VICTIM

- RJ practices states:
 - The needs of victims for information, validation, vindication, restitution, testimony, safety, and support are the starting points of justice.”
- This means-“victims rights will be a cornerstone to our program”
- Compared to 3 bodies of Canadian Legislation that covers victims rights, RJ is all encompassing even exceeds their requirements

3 MAIN BODIES LEGISLATION

- B.C. Victims of Crime Act
- Youth Criminal Justice Act
- Criminal Code of Canada

IN CLOSING

What you should have learned about RJ

- Guiding principles and holistic approach, is a growing concern
- Contrasts with present adversarial system
- Broad range of applications
- Roots in cultures of aboriginal people and traditional healing approaches
- Attention to needs of victims and offender

An enormous amount of hope is being invested with Restorative Justice

- Provide better justice and healing opportunities to offenders, victims, and communities
- Success, counts on the ability and willingness of communities to commit to the process and assume justice responsibilities!

Aboriginal Criminal Justice Stats

- Aboriginal people—3% of population
- Comprise 20% people sentenced custody
- 3X more like victims of violent crime
- 60% violent crimes went unreported
- **YCJA '02 seen decline all forms custody**
- Aborig custody steady/non-ab sees decline
- Aborig youth=5% pop./ 25% sentenced custody



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How much legal understanding is needed?

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No legal understanding required. Outline or “first step” information, written in clear language for those with no previous knowledge or experience with the law.

Level 2 — Some helpful.

Some understanding helpful but not essential. Offers all basic information on a topic, meant for those who are reasonably comfortable reading and who may have a general sense of some legal concepts.

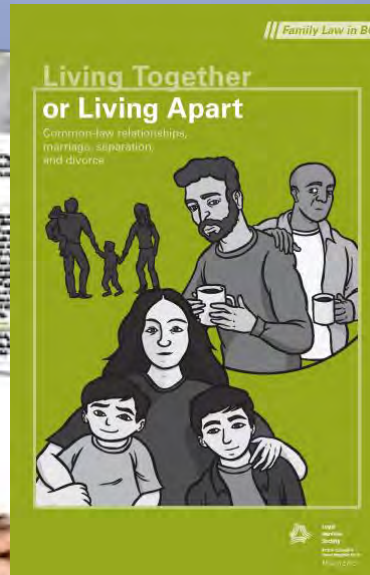
Level 3 — Some needed.

Basic familiarity assumed. Detailed material, written primarily as a reference for the advocate/intermediary audience, although accessible to members of the public with adequate literacy skills.

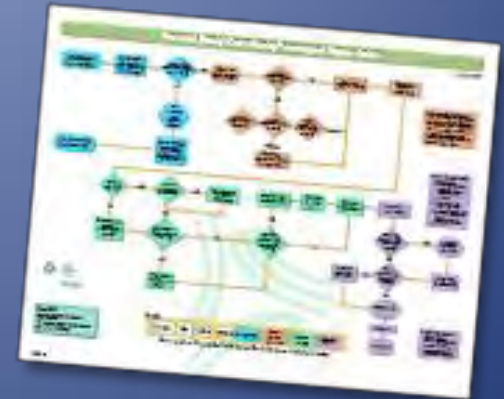
Family law publications

Level 2

Level 1



Level 3



Family violence

Level 1

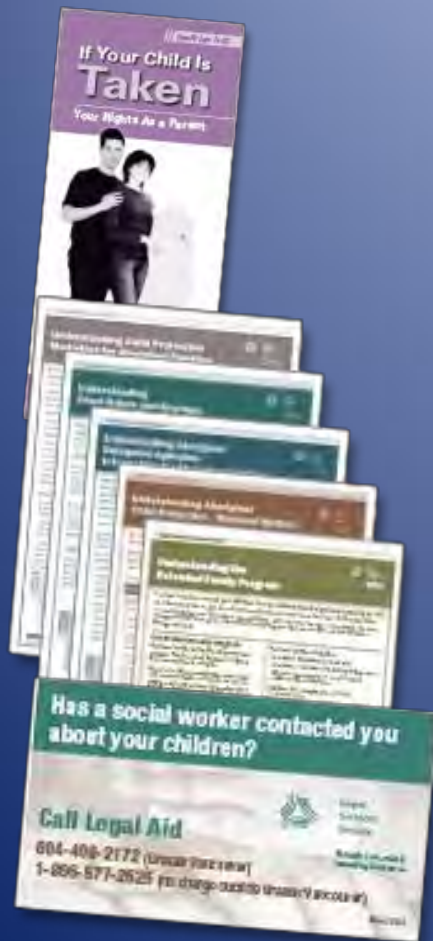


Level 2



Child protection

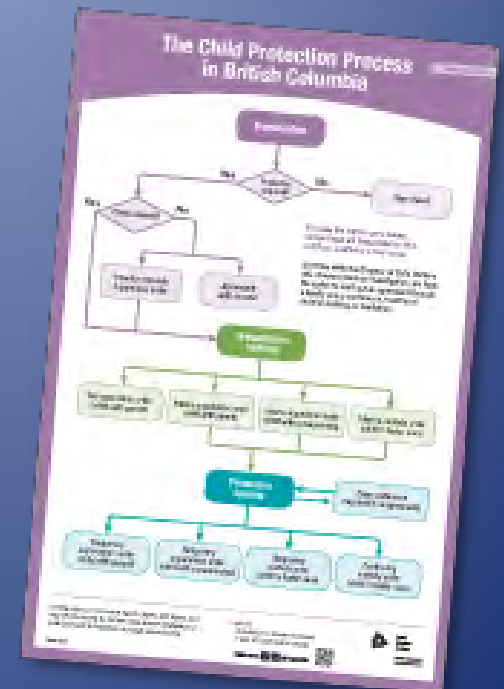
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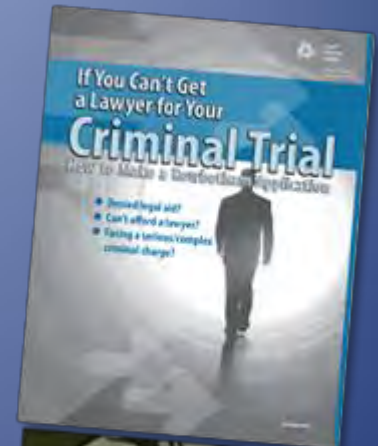
Level 3



Criminal

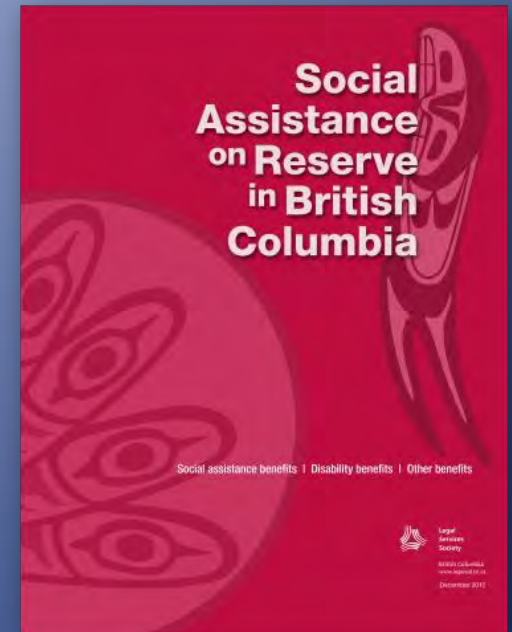
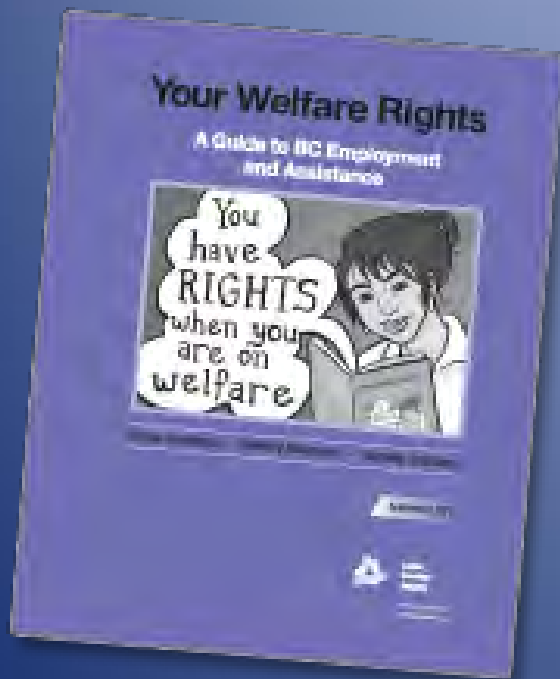
Level 1

Level 2



Civil publications

Level 2





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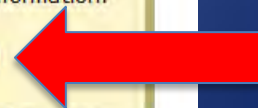
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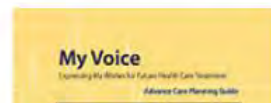



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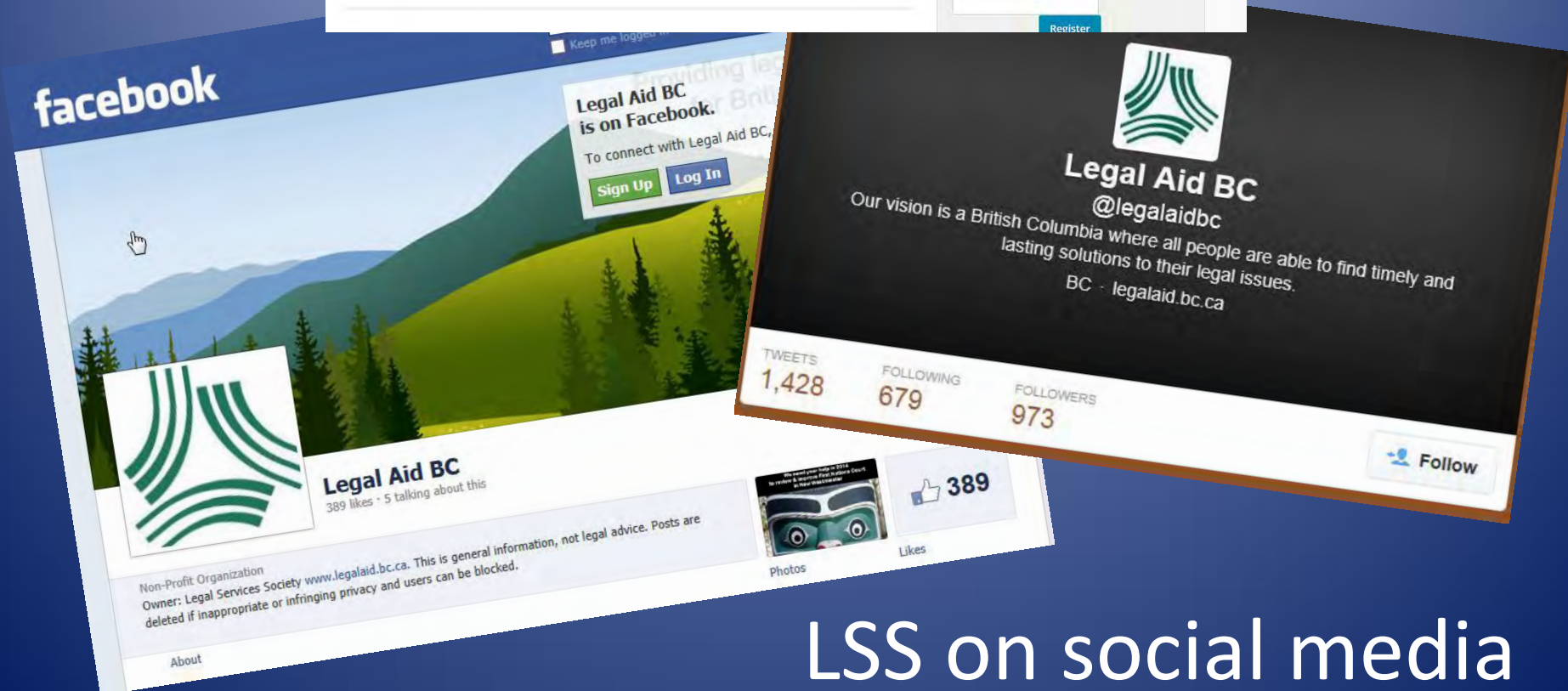
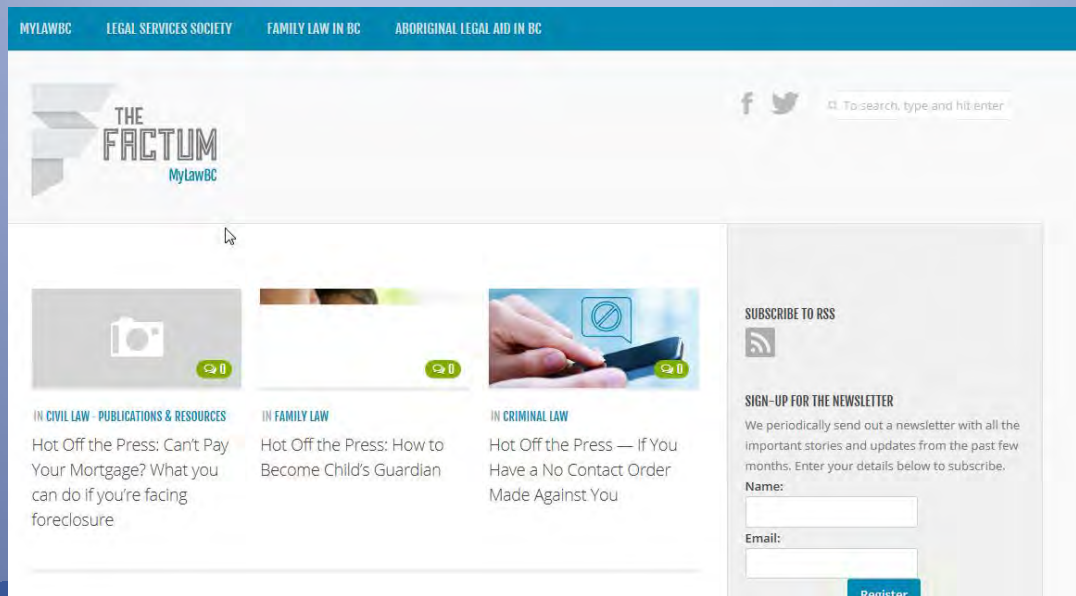




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Thank You

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February 2015

