2012

Provincial Training Conference for Legal Advocates

November 20 – 22, 2012

THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

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2012 Provincial Training Conference for Legal Advocates

November 20, 21, and 22, 2012

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Law Foundation of BC and Legal Services Society
Provincial Training Conference 2012

PROVINCIAL TRAINING CONFERENCE 2012 - Radisson Hotel, 8181 Cambie Road, Richmond, BC V6X 3X9
(Aberdeen skytrain)

TUESDAY, NOVEMBER 20, 2012 - 8:00 am - 5:00 pm & Dinner 6 pm

8:00 - 8:30	**Registration**			
8:30 - 9:00	**Opening prayer** **Welcome from Legal Services Society (Mark Benton QC) and the Law Foundation of BC (Wayne Robertson QC)** **Announcements**			
9:00 - 10:30	**The New Family Law Act: an overview and analysis** A session on changes in the new FLA that could affect your clients. There will be an overview of changes with particular discussion of issues such as property in common law relationships, parenting coordinators, and alternative dispute resolution. (There is a separate session on family violence issues.) **SALON A/B** *JP Boyd, lawyer*		**Legal Research and Updates** A workshop that provides an overview of key resources for advocates doing legal research. Learn the important features of CanLII, how to find cases dealing with particular sections of legislation, what the courthouse library can do to help your research. An opportunity to build on research information provided at last year's conference but also accessible for those who did not attend that session. **CAMBIE** *Meghan Maddigan, Client Services, Legal Community Liaison, BC Courthouse Libraries Society*	**Residential Tenancy Branch issues – World Café discussion** Through a fun and interactive process, Jess and Kendra will invite you to share your experiences handling files at the RTB. The goal is to clearly identify specific issues that need to be addressed if the RTB is going to function in a fair, appropriate way. Advocates' input from this session is expected to form the basis of a request that the Ombudsperson investigate administrative fairness at the Branch. **SALON C** *Jess Hadley, Kendra Milne, lawyers, Community Legal Assistance Society (CLAS)*
10:45 - 12:15	**Welfare Update** Updates on recent changes in welfare law and policy **SALON A/B** *Robin Loxton, advocate, BC Coalition of People with Disabilities* *Alison Ward, lawyer, CLAS, Community Adovcate Support Line* *Lisa Rupert, Associate Director, Housing, YWCA Metro Vancouver*		**REPEAT** **Legal Research and Updates** See description above **CAMBIE** *Meghan Maddigan, Client Services, Legal Community Liaison, BC Courthouse Libraries Society*	**LSS Update** An update from LSS about recent changes in legal aid coverage and intake, improvements to the Family Law Website, and new resources to assist advocates and their clients learning about the new Family Law Act. This session is of particular value to advocates helping clients with family and immigration law issues. **BRIDGEPORT** *Sherry MacLennan, Director, Public Legal Information and Applications, Legal Services Society (LSS)* *Sarah Khan, Coordinator, Intake and Referral Services,LSS*
LUNCH 12:15 - 1:30	**PovNet lunch (1.25 hours)**			
1:30- 3pm	**Loss Prevention Management** This session will provide information about advocating for clients being investigated for overpayments, non-exempt assets, and other similar issues. **SALON A/B** *Eugene Kung, lawyer, BC Public Interest Advocacy Centre;* *Robin Loxton, advocate, BC Coalition of People with Disabilities*	**Understanding Mobility Issues in Family Law** An overview of changes under the new Family Law Act and what advocates need to know regarding mobility (called relocation under the new Act). It will focus on the changes to guardianship laws under the FLA and what a parent needs to do if she/he wants to move away with a child or if the other parent is moving with the child. The session will also consider some of the issues that come up when parents want to travel with their children **BRIDGEPORT** *Agnes Huang, lawyer*	**Updates in Aboriginal Law** There have been several changes over the past year in legislation affecting Aboriginal clients, and other changes are in the works. This workshop will provide advocates with an overview of changes in areas such as citizenship, financial issues, matrimonial property and health that may affect Aboriginal clients. **CAMBIE** *Ardith Walkem, lawyer*	**Power Advocacy A: building blocks of an excellent advocacy practice** **(GROUP 1)** This full-day course will take you through a welfare or tenancy file from the initial client interview to the conclusion of a hearing. At each stage, we will cover all the skills you need to be a skillful, confident and professional advocate. The course will be repeated twice during the conference, each time divided into an afternoon session (Power Advocacy A) followed by a morning session (Power Advocacy B) the next day. In Power Advocacy A we will use a case example and exercises to cover issue-spotting, client management, statutory interpretation, and negotiation. **SALON C** *Jess Hadley, Kendra Milne, lawyers, Community Legal Assistance Society (CLAS)*
3:15 - 4:45 pm	**Welfare and Assets** The law about assets and welfare is complicated. This workshop examines how the welfare legislation defines assets, available exemptions, how MSD applies those exemptions, and how to work effectively with various issues that arise (e.g. disposal of assets allegations, whether an asset can be sold, options for trusts and RDSPs, etc). **SALON A/B** *Robin Loxton, advocate, BC Coalition of People with Disabilities* *Alison Ward, lawyer, CLAS, Community Adovcate Support Line,*	**Investigations: Office of the Ombudsperson** In this session, staff from the Ombudsperson's office will provide updates about work the office has done over the year, and talk about the recent "Best of Care Report on Seniors Issues". **CAMBIE** *Linda Carlson, Executive Director of Investigations, Office of the Ombudsperson* *Christina McMillan, Ombudsperson Officer*		
6pm	**DINNER (sponsored by the Law Foundation and Legal Services Society) - Entertainment by M'Girl**			

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WEDNESDAY, NOVEMBER 21, 2012 8:30 am - 5:00 pm

8:30 - 10:00	**Ethical and Professional Issues in Poverty Law.** A session that considers ethical issues that arise at various stages of the advocate-client relationship. A great opportunity to discuss with experienced resource people and your peers how to deal with ethical issues. **SALON A/B** *Sarah Khan, lawyer* *Amber Prince, advocate, Atira*	**Discussions on Seniors' Issues** A discussion with resource people from the Elder Law Clinic (BC Centre for Elder Advocacy and Support) of current issues affecting seniors **CAMBIE** *Kristine Chew, staff lawyer, Elder Law Clinic, BC Centre for Elder Advocacy and Support (BCCEAS)* *Nighat Afsar, legal advocate BCCEAS* *Genevieve, Smith, Victims' Services Worker, BCCEAS*	**Helping Self-Represented Clients with Family Law Issues** A session that considers how to most effectively help self-represented litigants with family law problems. **BRIDGEPORT** *Kathryn Ferriss, Senior Duty Counsel, Legal Services Society (LSS)*	**Power Advocacy B: building blocks of an excellent advocacy practice (GROUP 1)** In Power Advocacy B we will go on to teach the skills you need to do a great job in a hearing before the RTB, the EAAT, or a similar tribunal. Advocates are encouraged to take the full Power Advocacy course in consecutive sessions, as the case example and exercises used in Power Advocacy A will underpin those in Power Advocacy B. **SALON C** *Jess Hadley, Kendra Milne, lawyers, Community Legal Assistance Society (CLAS)*
10:15 - 11:45	**Canada Child Tax Benefit (CCTB): eligibility, overpayment allegations and appeals** Understanding eligibility criteria for CCTB (including shared eligibility, and the interaction between CCTB and welfare) and responding to allegations of CCTB overpayments, including reconsideration requests to CRA and appeals to Tax Court. **SALON A/B** *Alison Ward, lawyer, CLAS (Community Advocate Support Line)*	**Boundaries and Self Care for Advocates** This workshop helps advocates focus on setting boundaries and identifies the difficulties that many helpers have in doing that. Past participants have found this a very useful session. **CAMBIE** *Robert Bircher, Lawyers' Assistance Program of BC*	**Financial Issues & Separation** Thie session with staff from West Coast LEAF will consider the law that applies to financial issues in separation. Participants will develop the knowledge to answer common questions women may have about financial issues during separation. Provisions of the new *Family Law Act* that apply to Separation Agreements will also be consdiered. **BRIDGEPORT** *Deanna Ogle, Education Manager* *Shahnaz Rahman,Manager of Community Outreach* *Laura Track, Legal Director*	
LUNCH 11:45- 1:45	**Law Foundation lunch (2 hours) SALON A/B** **(SALON C for advocates not funded by the Law Foundation)**			
1:45- 3:15	**Changing FMEP Orders: for recipients and payors** A session that outlines practical steps to help clients applying to collect money under FMEP as well as those who owe money to the program but are unable to pay. **SALON A/B** *Adrian McKeown, lawyer*	**Understanding the Eviction Process from Start to Finish.** This session will cover all aspects of the eviction process in detail with a focus on opportunities for effective advocacy at every stage. It will be suitable for beginning and advanced advocates. **CAMBIE** *Kevin Love, Kaity Cooper, lawyers, Community Legal Assistance Society (CLAS)* *John Cooke, advocate, Together Against Poverty Society (TAPS)*	**Mothers without Legal Status** Mothers without legal status (MWLS) are women who are unable to leave the province because of family law matters, but who have no long term status to live in Canada. Until recently MWLS would often have to rely on charity and transition houses or return to their abusive partners. Some children could not attend school. MWLS could not work or get income assistance. A lot has changed in the2 years; this workshop will walk participants through issues facing MWLS and the changes in laws and specific supports and issues that are still present for MWLS. **BRIDGEPORT** *Lisa Rupert, Associate Director, Housing, YWCA Metro Vancouver* *Andrea Vollans, advocate, YWCA*	**REPEAT** **Power Advocacy A: building blocks of an excellent advocacy practice (GROUP 2)** This full-day course will take you through a welfare or tenancy file from the initial client interview to the conclusion of a hearing. At each stage, we will cover all the skills you need to be a skillful, confident and professional advocate. The course will be repeated twice during the conference, each time divided into an afternoon session (Power Advocacy A) followed by a morning session (Power Advocacy B) the next day. In Power Advocacy A we will use a case example and exercises to cover issue-spotting, client management, statutory interpretation, and negotiation. **SALON C** *Jess Hadley, Kendra Milne, lawyers, Community Legal Assistance Society (CLAS)*
3:30 - 5:00	**REPEAT** **Ethical and Professional Issues in Poverty Law** A session that considers ethical issues that arise at various stages of the advocate-client relationship. A great opportunity to discuss with experienced resource people and your peers how to deal with ethical issues. **SALON A/B** *Sarah Khan, lawyer* *Amber Prince, advocate, Atira*		**Changes in Immigration Law** A general introduction to the Canadian immigration system (excluding the refugee determination process), including an update on recent and anticipated developments. Topics will include: the rise of compliance monitoring in the TFW program; the "Faster Removal of Foreign Criminals Act"; the reorganization of the North American network; new challenges for users of the immigration system; anti-fraud measures and revocation proceedings in the citizenship context; updates to the family class (including changes to spousal and parental sponsorship programs); the growing importance of English/French language proficiency; and, the growth of "Ministerial Discretion" **BRIDGEPORT** *Deanna Okun Nachoff, lawyer*	

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THURSDAY, NOVEMBER 22, 2012 8:30 am - 3:00 pm

8:30 - 10:00 **10:15 - 11:45**	**Employment Insurance** THe session will provide an overview of important upcoming changes to EI legislation, and will look at current issues in the field. **SALON A/B** *Kevin Love, staff lawyer, Community Legal Assistance Society (CLAS)*	**Debt Issues** An update on current issues and hands-on work on sample problems **CAMBIE** *Manjeet Chana, lawyer* *Alison Ward, lawyer, CLAS, Community Advocate Support Line*	**Family Violence: helping clients under the new Family Law Act** Presentations will provide advocates with information about how the new Family Law Act will affect how they can best help clients dealing with family violence. The new family violence factors, protection orders, and how the new legislation affects children in violent situations will be discussed. Other issues such as how to best assist a client going to court to deal with these issues and the role of advocates in these situations will also be addressed as well. **BRIDGEPORT** *Zara Sulemann, lawyer* *Kathryn Ferriss, Senior Duty Counsel, LSS* *Adrian McKeown, lawyer*	**REPEAT** **Power Advocacy B :building blocks of an excellent advocacy practice (GROUP 2)** In Power Advocacy B we will go on to teach the skills you need to do a great job in a hearing before the RTB, the EAAT, or a similar tribunal. Advocates are encouraged to take the full Power Advocacy course in consecutive sessions, as the case example and exercises used in Power Advocacy A will underpin those in Power Advocacy B. **SALON C** *Jess Hadley, Kendra Milne, lawyers, Community Legal Assistance Society (CLAS)*
LUNCH **11:45- 12:45pm**	**LSS Public Legal Education Updates**			
12:45- 2:15	**Discussions with the Ministry of Social Development** An opportunity to discuss current issues in welfare advocacy with the Deputy Minister Mark Sieben and Assistant Deputy Minister Molly Harrington. The focus of the session is to find productive responses to current issues. **SALON A/B** *MarkSieben, Deputy Minister, Ministry of Social Development* *Molly Harrington , Assistant Deputy Minister, Ministry of Social Development*		**Refugee Clients: a legal update and overview of referral resources** This session will provide an overview of the changes in Immigration law affecting refugees, and outline available legal services. The session will also cover other services available to refugee claimants such as: refugee claimant support services, housing sources,and medical clinics. There will be information about support and training sessions for workers helping refugees. **BRIDGEPORT** *Rochelle Appleby, lawyer, Legal Services Society* *Fran Gallo, Kinbrace, READY program*	**Working effectively with clients with mental health issues** This session will provide information from a nurse working in the field about how to work effectively with clients with mental health issues. **CAMBIE** *Anna Cooper RN(C), The Kettle Clinic*
2:30 - 3:00	**Good News from the SCC: changes to the test for public interest standing to bring Charter claims.** One of the lawyers involved in a recent case decided at the Supreme Court of Canada that relaxes the rules for granting public interest standing will talk about the case that she believes will improve access to justice by making it easier for people to challenge constitutionally questionable laws. **SALON A/B** *Katrina Pacey, Litigation Director, Pivot Legal Society*			

1. Aboriginal Issues

- **Updates in Aboriginal Law**
  - Update on Key Legislative Amendments impacting Aboriginal Peoples 2012





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(Note: This discussion does not address the many changes that were made that relate to Aboriginal Title and Rights to lands and resources, such as amendments to the Fisheries Act of Environmental Assessment review process)

The legislation discussed below is legislation that is currently at various stage of consideration before the House of Commons, Senate or various committees. Given the majority enjoyed by the Conservative government, it can be anticipated that this legislative set will likely pass this year.

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Bill C-27: First Nations Financial Transparency Act

Summary

- Requires First Nations to publicly release their audited financial statements, including listing remuneration paid to Chief and Council members
- Information will be made publicly available on the AANDC website
- If First Nations do not comply program or service funding may be withheld

- Information that must be disclosed includes not only funds that are received from government, but also funds that are received from other sources (such as businesses owned by the First Nation)

Comments

- Imposes more strict requirement on First Nations than almost any other level of government in Canada
- Audited financial statements are already required and provided by all First Nations as a prerequisite to participating in government funding;
- Some First Nations have been critical of the fact that the federal governments spending is not equally revealed (for example, despite the fact that it is claimed that a significant amount of money is spent, First Nations argue that the bulk of these monies are taken up within AANDC bureaucracy and do not actually reach First Nations); and
- This legislation, by publicly publishing and making available this information seems more to be an effort to gain public support than to ensure accountability.

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

This was legislation that was introduced in the last legislature and which has been reintroduced and is in process.

Summary

Ordinarily when couples divorce (or upon death), division of real and personal property is divided according to Provincial law. As a result of s. 91(24) of the *Constitution Act, 1867* (giving power to the federal government for Indians and the lands reserved for the Indians) provincial legislation does not apply. There is no recognized body within Canadian law that applies to the division of assets when a marital (including common law) relationship breaks down on reserve.

The Proposed Act would address rights to the family home or other assets within a marriage or common law relationship upon relationship break-down or the death of one of the partners. There are two main parts to the Act:

(1) First Nations can pass their own laws in this area; or,

(2) where First Nations have not passed a law in this area, the laws set out in the Act will apply.

The Act addresses 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 the spouses or common-law partners in or to structures and lands on reserves upon breakup or death. The Act applies on reserve where one of a couple in a conjugal relationship is an Indian

(for example, on lease lands where a couple is both non-Indian, the law would not apply to them and they would be governed by the provincial law).

The Act claims that it does not affect title to reserve lands, and that reserve lands continue to be (1) set apart for the use and benefit of the First Nation and (2) lands reserved for the Indians within the meaning of section 91(24) of the *Constitution Act, 1867*. It does however, allow for other parties to gain an interest (time limited – though the length of time varies) in reserve lands, even if they are not a member of a particular First Nation.

Some key provisions (of the federal provisions that will apply unless a First Nation passes its own law):

- Spouses or common-law partners, whether or not they are First Nation members or Indians, have rights of occupancy during the relationship and, in the event that a spouse or common-law partner dies, for a period of 180 days after the death.
- In situations of family violence, emergency protection orders can be obtained from a designated judge of the province in which the family home is situated; such orders can require, among other things, that the applicant's spouse or common-law partner vacate the home for up to 90 days.
- Individuals can also apply for a court order awarding exclusive occupation of the family home for a prescribed period, whether or not they are First Nation members or Indians. The court that decides on the matter is required to consider a number of matters, including the collective interests of First Nation members in their reserve lands and representations by the First Nations council. Interests or rights held in or to the family home are not affected by emergency protection orders, exclusive occupation orders or exclusive occupation orders made after the death of a spouse or common-law partner.
- The Act sets out a regime for the Division of the Value of Matrimonial Interests or Rights on the breakdown of a relationship or death. In both situations, the calculation of the entitlement amount depends on whether or not a spouse or common-law partner is a member of the First Nation on whose reserve the property is situated.
- Parties can apply to court for a variation of the distribution on the grounds that the legislated distribution is unconscionable in their particular set of circumstances
- With the exception of applications for emergency protection orders and applications for orders relating to confidentiality, courts are required to allow the council of a First Nation on whose reserve the affected lands and structures are located "to make representations with respect to the cultural, social and legal context that pertains to the application and to present its views about whether or not the order should be made"

Changes to the Proposed Act (from when it was first introduced last year to this year)

- The verification process, including the role of the verification officer, has been removed. First Nations are still required to ensure voters are informed of the First Nation's proposed law and when and where the vote will take place;
- The ratification threshold for First Nation matrimonial real property laws has been lowered to a simple majority vote, with a quorum of at least 25% of eligible voters participating; and
- The law will not come into force until 12 months after it is passed, this will allow First Nations to pass their own laws in this area.

Federal Rules that will apply unless First Nations pass their own law:

- Equal right to occupancy of the family home: provides spouses or common-law partners with an equal entitlement to occupancy of the family home until such time as they cease to be spouses or common-law partners.
- Requirement of spousal consent for the sale or disposal of the family home for both First Nation member and non-member parts of couples.
- Emergency protection order: allows a court to order that a spouse or common-law partner be excluded from the family home on an urgent basis (in situations of family violence).
- Exclusive occupation order: enables courts to provide short- to long-term occupancy of the family home to the exclusion of one of the spouses or common-law partners. The duration of this order could range from a determined number of days to a longer period, such as until dependent children reach the age of majority.
- Entitlement of each member spouse or common-law partner to an equal division of the value of the family home and any other matrimonial interests or rights: ensures that the proven value of a couple’s matrimonial interests or rights in or rights to the family home and other structures and lands on the reserve are shared equally on the breakdown of a relationship.
- Order for the transfer of matrimonial real property between member spouses or common-law partners: allows a court to order the transfer, in some circumstances, the matrimonial interests or rights between member spouses or common-law partners together with, or instead of, financial compensation.
- Entitlement of surviving spouses or common-law partners: ensures that when a spouse or common-law partner dies, the surviving spouse or common-law partner may remain in the home for a specified period of time, and can apply under the federal rules for half of the value of the matrimonial real property interests or rights as an alternative to inheriting from the estate of the deceased.
- Enforcement of agreements on the division of the value of the matrimonial property: allows a court to make an order that can be used to enforce a free and

informed written agreement made by spouses or common law partners that is not unconscionable and that sets out the amount to which each is entitled and how to settle the amount.

Comments:

- Does not provide the necessary tools and capacity to access justice or to address underlying issues, such as housing shortages, family violence and the need for community-based dispute resolution mechanisms.
- There are already First Nations that have put their own laws and approaches in place on this matter. These must be respected.
- First Nation governments are encouraged to work with their citizens to enact their own laws or codes in this area in advance of this Bill coming into force
- Families in remote communities will have to endure long waiting periods before their cases can be heard because of lack of access to courts (could put women at risk of violence at further risk; could also increase an inability to deal with the issue, as a lot of power is being placed in the hands of courts with no experience in dealing with these matters, and in a situation where First Nations already mistrust courts and the legal process);
- The Act does not provide the tools and capacity to access justice or to address underlying issues, such as housing shortages, family violence and the need for community-based dispute resolution mechanisms;
- First Nations may not have the capacity to develop and pass laws in this area.

Bill S-6: First Nations Elections Act

Summary:

- Currently First Nations appoint their leadership via a number of different mechanisms. Most are elected on a set cycle (i.e., 2 to 4 years as determined by the First Nation). Many First Nations have passed their own election codes setting different terms, and different eligibility requirements (for example, requiring that candidates for certain chief or council positions reside on reserve). Other First Nations (a small number) are appointed by "custom" and for those bands, a different selection process and term may apply – for example, in some cases, no election may be held at all and a leader may be appointed and hold office indefinitely (this is very rare).
- The proposed First Nations Election Act is Opt-in legislation for First Nations who conduct their elections under the Indian Act

- In specific circumstances the Minister can order that the new law apply, for example, where there is a suggestion of intractable dispute about selecting leadership through the established system. In these circumstances the Minister could cancel a community's existing adherence to a "custom" election appointment process and order that a community fall under the new law;
- First Nations can also pass an election code and opt-out of having this Act apply. The Act establishes a legislative process outside of the Indian Act for electing chiefs and council
- Extends term of office for some chiefs and councils (general term will be four years instead of the common two years at present)
- There is a re-call mechanism
- Provisions are made for the challenge of elections in court (and penalties outlined for offences during the election process) – previously appeals were made to the Minister – now they will be made to the Federal Court or provincial superior court with no role of the Minister;
- Adds some requirements to nominating candidates for chief and council: such as a person must consent to their nomination, a person cannot run for both chief and council member in the same election, stating that a person cannot nominate multiple candidates for the same position.

Analysis:

- Could force communities who have operated under a custom system (for example, including those that have recognized hereditary leadership positions) into an elected system;
- Will increase the use of courts (and the need to be able to finance a court challenge) for community members to challenge the results or process of an election;
- A court will hear appeals (unlike the Minister who could arbitrarily decide whether or not to consider or investigate a complaint about elections results or procedure).

Bill S-8: Safe Drinking Water for First Nations

Summary:

- Previously introduced in the last session as Bill S-11. Reintroduced with a commitment that First Nations will have input on developing the regulations, a non-derogation of aboriginal rights or treaty rights clause, and a notation that it only applies to drinking water and not other water uses.

- Stated aim is to improve drinking water on reserve;
- Will create regulations that First Nations are bound by for the provision of safe drinking water. These may incorporate provincial regulations.
- Will set out safety standards for drinking water safety but without any additional resources

Analysis:

- The Act was written without consultation, accommodation or any meaningful involvement with First Nations. It attempts to transfer liability for unsafe drinking water to First Nation communities, without addressing the underlying cause of problems that cause unsafe drinking water (such as environmental damage, lack of resources to pay for infrastructure, etc.) or a lack of resources to build and maintain safe systems;
- There is an attempt to adopt provincial regulations across the country meaning that First Nations will face different standards and water regimes depending on where they are located in the country
- Regulations (whether created with First Nation input or not) are not tied to additional capacity funding so there is no guarantee that First Nations will be able to follow them
- No recognition of First Nations title, rights, treaty rights or jurisdiction over water

First Nations Property Ownership Act (potential)

The actual details of this Act are not known. Government has indicated that it is considering passing such a law that would allow for private property ownership of reserve lands as lands are held privately off-reserve
For information on this proposal see: http://fnpo.ca/Home.aspx (First Nations Property Ownership initiative)

Analysis:

- This legislation has been talked about and is in development but has not been introduced. There are concerns about protecting the collective nature of reserve alnds and what that may mean to communities
- There are concerns about members who may not have access to lands at present and how that may exacerbate economic divides within communities
- Experience for other Indigenous groups where privatization has lead to a splintering of a land base and loss of a collective space

- Concerns with fee simple title & individual privatization of indigenous collective lands and resources

C-10 – Omnibus Crime Bill (Safe Streets and Communities Act)

Summary

- Increase in mandatory minimum sentences, and removal or limitation of conditional sentencing as an option in other areas
- More focus on jail disproportionately impact First Nations people who are overrepresented and have longer sentences already
- Mandatory minimums contrary to *Gladue/ Ipeelee* provisions meant to ensure that courts consider alternatives to prison sentences for Aboriginal offenders
- Changes in the area of the youth justice act limit opportunities for restorative and traditional processes

2. Debt and Consumer Issues

- **Debt Issues**
  - Debt Session Q&A and Fact Pattern
  - Shoplifting Sample Demand Letter and updated "Have you been accused of shoplifting?" handout
- **Bankruptcy Assistance Program Handouts from the OSB**
  - Trustee List
  - Trustee Refusal Letter
  - Initial BAP letter
- **Dealing with debt guide**
- **Limitation periods for unsecured debt issues**
  - Limitation Periods for Unsecured Debt Issues presentation
  - Letter to ICBC Asserting a Limitation Period has Expired
- **Debt Collectors**
  - Debt Collectors presentation
  - Sample CR letter
  - Handouts Dealing with Debt Collectors
- **Benefits protected by statute from garnishment and setoff**
  - Stat Protected Benefits updated November 21, 2012
  - Ontario Court Decision in Metropolitan Toronto v. O'Brien
  - Ontario Court Decision in McIntosh v. Laronde
- **Student Loans**
  - Student Loans presentation
    - Extract from the Canada Student Financial Assistance Regulation
- ***Changing FMEP Orders: for recipients and payors (listed under Family)***





Legal Services Society

Manjeet K. Chana
Provincial Training Advocacy Conference
November 22, 2012

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?

   - A party can only be held responsible for repayment of a debt if he or she signed the original contract, loan agreement or credit card application. 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?

- There are two ways in which a second party can be held responsible for repayment of the debt:
    - the primary cardholder requests a secondary card and the secondary cardholder signs an application form agreeing s/he is an additional card user who, as a joint borrower, accepts full responsibility for any outstanding balances;
    - 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. Often, the credit card agreement renders the second person responsible for any past and or future debt upon use of the card. (See also s. 97(4) of the *Business Practices and Consumer Protection Act*, 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 British Columbia *Business Practices and Consumer Protection Act* ("BPCPA"), once a card issuer is informed by phone or registered mail 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

debit cards or when a credit card is 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), 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 *Bankruptcy and Insolvency Act* 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;
    - 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) who participate in the BAP 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 the 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 EIA, which is currently about $3,400.

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 Responsibility Act*. 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 against an 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; or
  - where an infant performs or partially performs or does not repudiate or reject the contract within one year after reaching 19.

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.

b. <u>Contracts made by someone with a mental illness</u>

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 basic level of mental capacity by which he or she understands the nature and effects of the contract being signed.

ii. Is a contract made by someone who has a mental illness void?

- If someone has a serious mental condition (like schizophrenia or Alzheimer's) which makes them incapable of caring for themselves or managing their affairs in general, that person can be declared mentally incompetent by a court (for

example, under the BC *Patients Property Act*). This type of person is said not to have the mental capacity in law necessary to make a valid contract. A contract entered into by this type of person would be void and a court would likely decline to enforce a contract made by such a person.

- A person may have a mental condition which makes him or her incapable of appreciating the nature and effects of a transaction or contract, but has not been declared by a court to be mentally incompetent. If a person enters into a contract in this type of situation, the contract is voidable (that is, can be proven to be invalid).

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

- Some examples include lack of capacity, non est factum (similar to mistake), misrepresentation (false statements), unfairness, unconscionability, undue influence (stronger pressures weaker), and duress (coercion). These defences are also available to mentally competent individuals.
- Non est factum means "not his/her deed". It covers the situation where a contract has been signed by mistake, without the knowledge of its meaning. The person pleading non est factum would have to prove that they sincerely believed that the document they thought they were signing was fundamentally different from the one they actually signed.
- Unconscionability exists where the terms of the contract are so unfair and adverse to one party so as to be inequitable. The BC *Business Practices and Consumer Protection Act*, 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.

iv. 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.

- 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?

- According to the current British Columbia *Limitation Act*, the limitation period for debt is 6 years, which means that a court action cannot be brought by a creditor more than 6 years after the debt became due and owing. If a creditor has started a court action more than 6 years later, a debtor can argue that the debt is extinguished and can raise a "limitations" defence, contending that the creditor's claim is "statute-barred".

ii. Are there are exceptions to this 6 year time limit?

- If a debtor confirms a cause of action before the end of the 6 year limitation period, the whole 6 year limitation period restarts. The British Columbia *Limitation Act*, s. 5, says that a person confirms a cause of action only if the person acknowledges a debt in writing (and is signed by the debtor) or makes a payment or partial payment in respect of a debt.

- 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 the debt is still owed.

iii. How long is a judgment enforceable?

- According to the British Columbia *Limitation Act*, creditors have up to 10 years from the date of a judgment 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".

iv. When does the new BC *Limitation Act* come into effect?

- In April 2012, new legislation was introduced by way of Bill 34 to replace the existing BC *Limitation Act*, which dates back to 1975. Bill 34 received Royal Assent on May 14, 2012 and will come into effect on June 1, 2013. The

current *Limitation Act* remains in effect until then. One of the key changes that will be made includes 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 (limitation period is 10 years), exempted claims and actions that have limitation periods set by other statutes.

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 and personal property of a First Nations person on 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 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 reserve can be seized by a First Nations creditor.

IV. List of Resources

- "Consumer Law and Credit/Debt Law" by Allan Parker (see Legal Services Society (LSS") publications at http://www.lss.bc.ca/publications/pub.php?pub=17)
- "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?" by Bruno Drucker
- 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 factsheet about the *Wage Earner Protection Program Act:* http://www.hrsdc.gc.ca/eng/labour/employment_standards/wepp/factsheet.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*, *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*

Manjeet K. Chana
Provincial Training Advocacy Conference
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Debt Session 2012 Fact Pattern - Joint Debts/Dealing with Debt Options/Defences

Megan, a 38 year old woman living in Prince George, BC, comes to see you at your advocacy office. She tells you that she and her spouse, Tim, have been married for 7 years and they separated 1.5 years ago. Until recently, Megan and Tim each earned similar incomes, although Megan's income was about $14,000 lower than Tim's.

Megan and Tim made a written separation agreement 1 year ago, and it sets out that they have a joint VISA credit card debt totaling $12,000 and a joint line of credit with Royal Bank of Canada ("RBC") totaling $8,000. The separation agreement also notes their agreement that:

- Tim will make all credit card payments to VISA until the debt is paid;
- Megan will make the line of credit payments to RBC until the debt is paid;
- Tim will continue making small payments on a payday loan judgement obtained by Money Mart against Megan just over 1 year ago; and,
- Megan and Tim are each liable for his or her own personal debts. Megan tells you she has 2 credit card debts of her own - $2,000 owing to Canadian Tire and $3,500 to Sears. These debts have been accumulating over the past 2 years, and she cannot remember the last time she made a payment, if any, on these cards).

Megan is also a secondary cardholder on Tim's MasterCard. She says she did not sign an application form or the card she received in the mail 2 years ago. She cannot remember for sure, but she does not think she has ever used the MasterCard and does not know how much is currently owing on it. Besides, Megan says to you, the expenses on that card are Tim's as he is the primary cardholder.

Tim and Megan jointly own a home, which Megan tells you was purchased 4 years ago. However, Tim signed the RBC mortgage agreement (where the outstanding mortgage balance is $300,000) and Megan signed the mortgage as a guarantor. Tim has been earning a good salary over the last 5 years and his credit record has stabilized, but prior to that, his credit record was variable and that is why the bank wanted Megan (who had a good credit rating) to sign onto the mortgage as guarantor. Tim is making the mortgage payments and agreed he would continue to do so.

Three months ago, Megan was involved in a fairly significant car accident that rendered her unable to work (temporarily, she hopes), and she has retained the help of a lawyer. In the meantime, she is having difficulty making her various debt payments. On top of that, she received phone calls from VISA and Money Mart demanding that she pay the monies owing; Tim apparently stopped making payments a few weeks ago on both of these debts even though he is still working and earns more than she does. When she contacted Tim to ask him about this, he said that he recently realized that the debts in question were hers

or mostly hers and he feels he should not have to pay for them. Megan tried to explain their separation agreement to VISA and Money Mart, but they ignored her and told her, "We want our money."

Megan has brought her VISA agreement, her RBC line of credit agreement, her Money Mart judgement, a copy of the mortgage agreement, and the contracts relating to her own personal credit card debts. She does not have a copy of the MasterCard application form sent to her a couple of years ago. Megan has a number of questions for you, including:

1) Why are VISA and Money Mart contacting her when she and Tim have a separation agreement stating that Tim is to pay off the VISA and Money Mart debts?

2) Who is responsible for the VISA joint credit card debt and the RBC joint line of credit?

3) Can Megan stop making the RBC line of credit payments if Tim has stopped making the VISA payments?

4) If Sears or Canadian Tire sues Megan in Small Claims Court and obtains a judgement, can either creditor garnish a joint bank account of Megan's?

5) Can Money Mart register its judgment against the joint title to Megan and Tim's home?

6) What happens if Tim stops making the mortgage payments?

7) Can MasterCard seek repayment of the credit card debt from Megan?

8) If something happens to Tim while they are separated but still married, is Megan responsible for paying Tim's debts?

9) a) What options does Megan (and debtors in general) have to deal with debts?
   b) What are the pros and cons of each option?

10) What legal defences should Megan (and debtors in general) be aware of?

Notes:	**Joint debts**	**Megan's Personal Debts**	**Other**
	VISA credit card; and, RBC line of credit	Canadian Tire credit card; Sears credit card; and, Money Mart judgement	RBC mortgage of which Megan is guarantor; and, arguably the MasterCard credit card, of which Megan is a secondary cardholder (but she did not use the card or sign it or an application form)

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LawLINE

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

This article first appeared in the March 2001 issue of Community Law Matters and was updated in August 2009 by the author, Bruno Drucker, of the former LawLINE of the Legal Services Society. It has been updated again in November 2012 by Manjeet Chana.

Background:

Many of you 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, Safeways, Overwaitea, The 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 $600.00 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 Responsibility Act, S.B.C., 2001, Chapter 45.

- **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 Responsibility Act allows parents to be sued for torts committed by their children. 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. The store will not tell you 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* (BC law passed in 2001 which says parents can be held liable for damage/expenses caused by their children in certain situations). 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*, 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.

2. Debt and Consumer Issues

- **Bankruptcy Assistance Program Handouts from the OSB**
  - Trustee List
  - Trustee Refusal Letter
  - Initial BAP letter

THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

Bankruptcy Assistance Program –
Trustee list

Vancouver and Burnaby Trustee

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

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

Boale, Wood & Company
410 – 800 West Pender St
Vancouver BC V6C 2V2
604-605-3335 **(YUKON as well)**

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

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

Kootnays
G Moroso & Associates Inc.
241 Columbia Ave
Castlegar BC V1N 1G3
250-365-7287

Caribou
KPMG Inc.
200 – 177 Victoria St
Prince George BC V2L 5R8
250-563-7151/1-800-665-5595

Vancouver Island

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

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

Okanagan

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

BDO Dunwoody Ltd..
260 – 1855 Kishner Road
Kelowna BC V1Y 4N7
250-979-4357

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

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BANKRUPTCY ASSISTANCE PROGRAM
Trustee Refusal of Service

DEBTOR'S NAME: _____

ADDRESS: _____

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Date: _____

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

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Details:

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or/audrey.berlovan@ic.gc.ca
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Fax 306-975-5317

Canada

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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

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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

For additional copies of this publication or to request this publication in accessible formats, please contact:

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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

NOTES

NOTES

2. Debt and Consumer Issues

- **Limitation periods for unsecured debt issues**
  - Limitation Periods for Unsecured Debt Issues presentation
  - Letter to ICBC Asserting a Limitation Period has Expired

THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

Limitation Periods for unsecured debt issues (including ICBC)

(prepared by Alison Ward, lawyer, CLAS, November 21, 2012)

The current British Columbia *Limitation Act* provides there is a general limitation period of 6 years for an unsecured creditor to sue someone in relation to that debt. In other words, a court action cannot be brought by a creditor more than 6 years after the debt became due and owing, unless the debtor has 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 renews the running of the limitation period (i.e. the 6 years starts again from that date).

If a creditor starts a court action more than 6 years later, a debtor can raise a "limitations" defence and argue that the creditor's claim is "statute-barred".

i. Are there are exceptions to this 6 year time limit?

- As explained above, if a debtor confirms a cause of action before the end of the 6 year limitation period, the whole 6 year limitation period restarts. The British Columbia *Limitation Act* says that a person confirms a cause of action only if the person acknowledges a debt/the money owing in writing (and signed by the debtor) or makes a payment or partial payment in respect of a debt.

- 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 the debt is still owed.

ii. How long is a judgment enforceable?

- According to the current British Columbia *Limitation Act*, creditors have up to 10 years from the date of a judgment 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". A judgment can be renewed by the creditor starting a new lawsuit against the debtor, before the 10 years are up, in which the creditor basically sues the debtor on the initial judgement as a contract for money owing.

iii. Does the 6 year limitation period apply to motor "vehicle indebtedness" (money owed to ICBC)?

Basically, yes. Under BC's current *Limitation Act,* if ICBC is seeking repayment of monies paid out on behalf of an insured, one of the options ICBC has is to start an action for debt against the insured within 6 years. If the insured debtor has not acknowledged the debt and the 6 year limitation period for starting an action has passed, the debt has arguably expired and no court action can be commenced by ICBC to get a judgment for the debt. The insured should be permitted to reapply for a license and insurance.

A **sample letter that can be sent to ICBC** asserting a limitation period has expired, is **attached.**

Note that a new BC *Limitation Act* will come into force on June 1, 2013. This new act will, generally speaking, introduce 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. **It remains to be seen what limitation period will apply to ICBC claims for "vehicle indebtedness" as of June 1, 2013.** It is possible that the Insurance Vehicle Act could, for example, be amended to provide that some other limitation period applies to ICBC lawsuits against an insured where ICBC has paid out monies on their behalf.

iv. Can ICBC prevent someone from driving in BC if that driver has an outstanding motor vehicle debt that was incurred in another Canadian province or even in the United States?

Yes. The BC *Motor Vehicle Act* (s. 91) says that if there is a **final judgment** for damages in an action for personal injury or damage to property (over $400), involving the use of a motor vehicle, and this judgment is obtained against a person in a court in Canada or in the US, ICBC **can** prohibit the person from driving a motor vehicle if the amount owing is not paid within 30 days of termination of all proceedings. ICBC also has authority to cancel the prohibition if, for example, the person does pay the amount owing to the corresponding driving authority in the other province.

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

2. Debt and Consumer Issues

- **Debt Collectors**
  - Debt Collectors presentation
  - Sample CR letter
  - Handouts Dealing with Debt Collectors

THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

Resources for Dealing with Debt Collectors

*Prepared by Alison Ward, Barrister and Solicitor, CASL, November 22, 2012

Debt collectors working in BC are licensed & regulated by the *Business Practices and Consumer Protection Act* ("BPCPA"). Part 7 of the BPCPA deals with debt collection; sections 113-124 deal with prohibited collection practices.

If you have clients who are being contacted by debt collectors, there are several resources that will assist you:

- For a helpful overview of the law in sections 113 to 124 of the BPCPA, see chapter 5, "Collection Agents" and chapter 25 "Harassment" of Consumer Law and Credit/Debt Law, published by LSS. That publication is available online at http://www.lss.bc.ca/assets/pubs/consumerLawAndCreditDebitLaw.pdf

- Copies of sections 113 to 124 of the BPCPA are attached for your reference (at pages 1 to 6), and well as an FAQ page from the BPCPA's website which summarizes the legislation (at pages 7 to 8).

- Attached at pp 9 to 10 is a copy of the BPCPA's summary of how to complain to them about debt collectors.

- Section 115 of the BPCPA provides that a debt collector must not phone a person until 5 days after the collector has sent them written notice setting out the amount of the alleged debt, the name of the creditor, and the collector's authority to collect the alleged debt. A person who has not received this information is entitled to receive it upon request.

  Attached is a template letter that clients can use to assert their s 115 rights (at page 11).

- Sections 116 and 117 of the BPCPA set out a person's right to draw limits on how a debt collector communicates with them. For example, section 116(4)(a) of the BPCPA entitles a person to require that debt collector deal with them in writing only, provided they have provided the debt collector with their mailing address. Section 116(4) provides that a collector must not communicate with a person at all if the person has notified the collector and the creditor in writing that they dispute their liability for a debt, and that the debtor would like the creditor to take the case to court.

  Attached are 2 template forms that clients can use to assert their rights under ss 116 & 117 of the BPCPA (at pages 12 to 13).

- The Business Practices & Consumer Protection Authority (also known as Consumer Protection BC) takes complaints about unfair practices by collection agencies, including complaints that a debt collector has continued to contact a person in breach of section 116 after the person has asserted their rights under section 116, and complaints that a collector has engaged in an unreasonable collection practice. You must make a written complaint to the BPCPA about a debt collector; it can be submitted by fax, email or regular mail. The BPCPA has a specific complaint form for issues regarding debt collectors: it is at http://www.consumerprotectionbc.ca/images/content/inquiries/debt%20collection%20complaint%20form%202011.pdf A copy of the BPCPA's Debt Collection Complaint form is also attached (at pages 14 to 15).

- The Credit Counseling Society is a non-profit organization that offers free debt counseling, and help negotiating with creditors for residents around B.C. Resolving the underlying debt problem will eliminate debt collectors trying to contact the client. Go to www.nomoredebts.org or call 1 888 527 8999 toll free.

More information is also available from:

- The UBC Law Students Legal Advice Program ("LSLAP") Manual. Go to http://www.lslap.bc.ca/main/?manual and click on "view current manual." Then proceed to Chapter 10: Creditors' Remedies & Debtors' Assistance; and
- The Canadian Bar Association's "Dial A Law" program has a number of scripts on Credit, Debt and Consumer Law topics. . See http://www.cba.org/BC/Public_Media/dal/credit.aspx

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

October 12, [redacted]

PRIVATE AND CONFIDENTIAL
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]

BUSINESS PRACTICES AND CONSUMER PROTECTION ACT

[SBC 2004] CHAPTER 2

*extracted from BC Laws website November 21, 2012

Part 7 — Debt Collection

Division 1 — Prohibited Debt Collection Practices

Definition

113 In this division, **"collector"** means a person, whether in British Columbia or not, who is collecting or attempting to collect a debt.

Harassment

114 (1) A collector must not communicate or attempt to communicate with a debtor, a member of the debtor's family or household, a relative, neighbour, friend or acquaintance of the debtor, or the debtor's employer in a manner or with a frequency as to constitute harassment.

(2) Without limiting subsection (1), one or more of the following constitutes harassment:

(a) using threatening, profane, intimidating or coercive language;

(b) exerting undue, excessive or unreasonable pressure;

(c) publishing or threatening to publish a debtor's failure to pay.

Disclosure to debtor

115 (1) A collector must not attempt to collect payment of a debt from a debtor until the collector has notified the debtor in writing or the collector has made a reasonable attempt to notify the debtor in writing of

(a) the name of the creditor with whom the debt was incurred,

(b) the amount of the debt, and

(c) the identity and authority of the collector to collect the debt from the debtor.

(2) A collector must not initiate verbal communication with a debtor with respect to the collection of a debt until 5 days after the collector has sent to the debtor the written notice referred to in subsection (1).

(3) If a debtor informs the collector that the debtor has not received the notice required under subsection (1), the collector must send that information to the debtor at the address provided by the debtor.

Communication with debtor

116 (1) A collector must not communicate or attempt to communicate with a debtor at the debtor's place of employment unless

(a) the collector does not have the home address or telephone number for the debtor and the collector contacts the debtor solely for the purpose of requesting the debtor's home address or telephone number or both,

(b) the collector has attempted to contact the debtor at the debtor's home address or telephone number, but the collector has not contacted the debtor in any of those attempts, or

(c) the collector has been authorized by the debtor to communicate with the debtor at the debtor's place of employment.

(2) The collector must not make more than one verbal attempt, under subsection (1) (b), to contact the debtor at the debtor's place of employment.

(3) At the time a collector communicates with a debtor, the collector must first indicate to the debtor

(a) the name of the creditor with whom the debt was incurred,

(b) the amount of the debt, and

(c) the identity and authority of the collector to collect the debt from the debtor.

(4) A collector must not continue to communicate with a debtor

(a) except in writing, if the debtor

(3)

(i) has notified the collector to communicate in writing only, and

(ii) has provided a mailing address at which the debtor may be contacted,

(b) except through the debtor's lawyer, if the debtor

(i) has notified the collector to communicate only with the debtor's lawyer, and

(ii) has provided an address for the lawyer, or

(c) if the debtor has notified the collector and the creditor that the debt is in dispute and that the debtor would like the creditor to take the matter to court.

Communication with persons other than debtor

117 (1) Except for the purpose of obtaining the debtor's home address or telephone number, a collector must not communicate or attempt to communicate with a member of the debtor's family or household, or a relative, neighbour, friend or acquaintance of the debtor unless

(a) the person contacted has guaranteed to pay the debt and is being contacted in respect of that guarantee, or

(b) the debtor has authorized the collector to discuss the debt with the person contacted.

(2) A collector must not communicate with a debtor's employer except

(a) for the purpose of confirming the debtor's employment, business title and business address, or

(b) for other purposes authorized in writing by the debtor.

Time of communication

118 (1) In this section, **"statutory holiday"** means a holiday, except Sunday, unless the holiday falls on a Sunday.

(2) Except on the request of the person contacted, a collector must not communicate, either by telephone or in person, with the debtor, a member

of the debtor's family or household, or a relative, neighbour, friend or acquaintance of the debtor, or the debtor's employer or guarantor

(a) on a statutory holiday,

(b) subject to paragraph (a), on a Sunday, except between the hours of 1 p.m. and 5 p.m. local time for the person contacted, or

(c) on any other day, except between the hours of 7 a.m. and 9 p.m. local time for the person contacted.

Cost of communication

119 A collector must not communicate or attempt to communicate with a person for the purpose of collecting, negotiating or demanding payment of a debt by a means that results in the costs of the communication being payable by the person.

Collection from person not liable for debt or in excess of amount of debt

120 A collector must not

(a) collect or attempt to collect money that exceeds the amount of the debt owing,

(b) collect or attempt to collect money from a person who is not liable for the debt, or

(c) if a person has informed the collector that the person is not the debtor, continue to communicate with that person unless the collector first makes all reasonable efforts to ensure that the person is in fact the debtor.

Legal proceedings

121 (1) If a debt has been assigned to a collector, the collector must not

(a) bring or continue a legal proceeding for the recovery of a debt as plaintiff unless the debtor has been given notice of the assignment, or

(5)

(b) bring a legal proceeding unless the collector first gives notice to the debtor that the collector intends to bring the proceeding.

(2) A collector must not recommend to a creditor that a legal proceeding be brought, unless the collector first gives notice to the debtor that the collector intends to recommend that a proceeding be brought.

(3) Nothing in subsection (2) affects solicitor-client privilege.

(4) A collector must not directly or indirectly threaten, or state an intention, to bring or continue a legal proceeding for the recovery of a debt

(a) for which the collector does not have the written authority of the creditor, or

(b) for which there is no lawful authority.

Removal, seizure, repossession and distress

122 A collector must not do any of the following, whether on the collector's own behalf or on behalf of another person, directly or indirectly:

(a) unless there is a court order to the contrary, remove from inside the debtor's private dwelling any personal property claimed under seizure, distress or repossession, in the absence of the debtor, the debtor's spouse, the debtor's agent or an adult resident in the debtor's dwelling;

(b) seize, repossess or levy distress against personal property that is not specifically charged or mortgaged, or to which legal claim may not be made under a statute, court judgment or court order;

(c) remove, seize, repossess or levy distress against personal property during a day or during the hours of a day when removal, seizure, repossession or distress is prohibited by the regulations.

False or misleading information and misrepresentations

123 In collecting or attempting to collect payment of a debt, a collector must not

(6)

(a) supply any false or misleading information,

(b) misrepresent the purpose of a communication,

(c) misrepresent the identity of the collector or, if different, the creditor, or

(d) use, without lawful authority, a summons, notice, demand, or other document that suggests or implies a connection with any court inside or outside of Canada.

Additional prohibited practices

124 A collector must not commit or engage in a prescribed act or practice.

(7)

Copied November 1, 2012 from the website of the Business Practices and Consumer Protection Authority, at http://www.consumerprotectionbc.ca/consumers-debt-collection/faqs#q1

Debt Collection: Frequently Asked Questions

Q. When can collection agencies contact me?
Q. How do I get collection agency to stop calling me about my debt and contact me by mail instead?
Q. I am getting calls about somebody else's debt, how do I get these calls to stop?
Q. I am disputing the debt that I am being contacted for, how do I dispute the debt properly?
Q. Can a collector contact my friends and family?
Q Can a collector contact my place of employment?
Q. If I am contacted about a family member's location, am I obligated to provide that information?
Q. Is there a time limit on collection?
Q. How do you know if you have an outstanding debt?
Q. Can you pay the creditor instead of the collection agency?

When can collection agencies contact me?

A collection agent can contact you between 7am and 9pm Monday to Saturday and between 1pm and 5pm Sundays. These times are based on your local time, not where the collector is located. Collection agents are not allowed to contact you on statutory holidays.

How do I get collection agency to stop calling me about my debt and contact me by mail instead?

You can request that a collection agency contact you in writing only. For more information visit our How to Make A Complaint page and access our Request for communication in writing only form.

I am getting calls about somebody else's debt, how do I get these calls to stop?

If you are being contacted about somebody else's debt, you can stop the calls by notifying the collection agency in writing that you are not the owner of the debt. For more information visit our How to Make A Complaint page and access our form.

I am being contacted about a debt I do not feel that I owe, how do I inform the collection agency that that I don't think I am responsible?

If you are being contacted by a collection agency for a debt that you do not feel you owe you can dispute the debt. You must inform both the original creditor and collection agency that you are disputing the debt. For more information visit our How to Make A Complaint page and access our Dispute a debt form.

Can a collector contact my friends and family?

The *Business Practices and Consumer Protection Act* states that collectors can contact

(8)

members of a debtor's family or household, a relative, neighbour, friend or acquaintance of the debtor, for the purposes of obtaining the debtor's home address or telephone number or if you have authorized the collector to discuss the debt with the party being contacted.

Can a collector contact my place of employment?

Collectors can contact your place of employment for the purposes of confirming your employment, business title and business address or for other purposes you have authorized in writing.

If I am contacted about a family member's location, am I obligated to provide that information?

The *Business Practices and Consumer Protection Act* is silent with regard to this question. It comes down to what you are personally comfortable disclosing.

Is there a time limit on collections?

This is something that falls under a piece of legislation called the *Limitation Act* and is not a piece of legislation administered by Consumer Protection BC. It is suggested that you seek legal advice for clarification on whether or not a debt collector is allowed to pursue your debt.

How do I know if I have an outstanding debt?

A collection agency is not required by law to contact a debtor immediately when they have been hired to collect a debt. Most people know when they owe money and who they owe it to although learning about a legitimate debt sometime after it has occurred can come as a surprise. This is why it is important to check your credit report from time to time. You may owe an outstanding debt that you were not aware of or forgot about that has now gone to collections.

Can I pay the creditor instead of the collection agency?

When a creditor hires a collection agency to collect a debt on their behalf it is often because they do not want to spend the time or effort trying to collect the debt themselves. In some instances a debt has been sold to the collection agency and therefore the agency should be paid.

(9)

Taken November 1, 2012 from the Business Practices and Consumer Protection Authority's website at http://www.consumerprotectionbc.ca/consumers-debt-collection/how-to-make-a-complaint/debt-collection#othercomplaints

Debt Collection Complaints

Consumer Protection BC can assist you with the following:

- How to request communication in writing only
- How to request communication be done through your lawyer
- How to dispute a debt
- How to stop the calls because you are not the debtor
- Other collection agency complaints (click here)

To resolve these issues, you must take the following steps:

1. Contact the Collection Agency In Writing
The first step to take is to contact the collection agency in writing to let them know what your concerns are. The list below includes links to forms which can help you:

Request communication in writing only
Request communication be done through your lawyer
Dispute a debt
Stop the calls because you are not the debtor

2. Keep A Copy of Your Request
Be sure to send the letter or form in a way that proves your request was sent and received, such as a registered letter, email, or fax. Keep a copy of the letter for yourself as well as proof that the letter was received by the collection agency.

3. Give the Collection Agency Time to Fix the Problem
It may take a few days for the collection agency to remove your phone number from their system. Allow four to five days after sending your request for the behavior to stop.

4. Let Us Know If the Behaviour Continues After Following the Above Steps
If you have followed the steps above and the behavior of the debt collector continues, you can fill out a Debt Collection Complaint Form and submit it to us by mail, fax, or email. Please include a copy of the information sent in step two.

Other Complaints About Collection Agencies
We may be able to assist you with other complaints about collection agencies where the collector:

- Was threatening and/or intimidating
- Was using excessive pressure

(10)

- Published or is threatening to publish your inability to pay
- Did not send you anything in writing prior to receiving calls
- Will not send details of the debt upon request
- Will not disclose his/her identity
- Called you at work more than once after you provided your home contact information
- Has called your acquaintance and has asked for information other than your home address and phone number and you have not authorized the collector or creditor to do so.
- Has called you before 7 am or after 9 pm Monday to Saturday, or before 1 pm or after 5pm on a Sunday, or on a statutory holiday
- Is attempting to collect more than you owe
- Is attempting to collect without a proper license
- Was asking you to send the money by a method that includes charges to you, i.e. wire transfers, etc
- Talked to your employer without your permission, unless to confirm your employment.

If you have a complaint about any of these issues, you can complete the Debt Collection Complaint Form and submit it to us by mail, fax, or email. We will require documentation to support your complaint. This could include a picture of your phone showing what time the collector called, a taped phone conversation, a letter from your employer or co-worker confirming contact at work, or any other information you may have.

(11)

Date: Sent by Registered Mail

To: [Name and address of Collection Agency]

Dear Madam/Sir:

On _____ (date), you phoned me to say I owe $_____. I dispute that I owe this debt. I have not received a written notice of the debt as required by section 115(1) of the Business Practices and Consumer Protection Act. Please do not call me again until you have notified me in writing of:

- the name of the person or company with whom this debt was originally incurred,
- the particulars of the debt,
- the exact identity of the person or collection company you work for who is now seeking to collect this debt,
- the authority of this person or collection company you work for to collect this debt.

You can send your letter to me c/o:_____.

Yours truly,

Name:_____

(12)

Debt Collection Form — Request For Communication in Writing Only

Please complete the form and send to the collection agency. It is best to keep a copy for your records and proof that the form has been sent (fax receipt, registered letter, receipt etc.)

1. Print clearly, using black or blue ink.
2. Provide as much information as possible.

A.) Contact Information

Full Name _____ Home Phone (with area code) _____

Street Address _____ Mailing Address (if different) _____

City _____ Postal Code _____

B.) Collection Agency Name

Collection Agency Name _____ Collector Name(s) _____

City Agency is Located In _____ Phone Number (including extension) _____

Person At Collection Agency Who I Have Contacted About Problem: (If Applicable) _____

B.) Request For Communication in Writing Only

(if known) Amount Owed: _____ Owed to: _____ Account #: _____

Pursuant to section 116 (4) (a) of the *Business Practices and Consumer Protection Act*, which states "*A collector must not continue to communicate with a debtor*
(a) except in writing, if the debtor
(i) has notified the collector to communicate in writing only, and
(ii) has provided a mailing address at which the debtor may be contacted,

I am requesting that you communicate with me in writing only at my mailing address provided above.

Signature _____ Date _____

By signing I am acknowledging that the information contained on this form is true and accurate to the best of my knowledge.

Debt Collection Form — Dispute of Debt

Please complete the form and send to the collection agency and creditor. It is best to keep a copy for your records and proof that the form has been sent (fax receipt, registered letter, receipt etc.)

1. Print clearly, using black or blue ink.
2. Provide as much information as possible.
3. You must provide a copy of the dispute of debt form to the creditor

A.) Contact Information

Full Name _____ Home Phone (with area code) _____

Street Address _____ Mailing Address (if different) _____

City _____ Postal Code _____

B.) Collection Agency Name

Collection Agency Name _____ Collector Name(s) _____

City Agency is Located In _____ Phone Number (including extension) _____

Person At Collection Agency Who I Have Contacted About Problem: (If Applicable) _____

C.) Dispute of Debt

(if known) Alleged Amount Owed:_____Owed to: _____Account #:_____

Pursuant to section 116 (4) (c) of the *Business Practices and Consumer Protection Act*, which states "*A collector must not continue to communicate with a debtor*
(c)if the debtor has notified the collector and the creditor that the debt is in dispute and that the debtor would like the creditor to take the matter to court."

I am disputing the debt you are attempting to collect and would like the creditor to take me to court. As required, a copy of this dispute of debt form has also been sent to the creditor.

Signature_____ Date_____

By signing I am acknowledging that the information contained on this form is true and accurate to the best of my knowledge.

CONSUMER PROTECTION BC

Debt Collection Complaint Form

Please be aware that lling out a complaint form does not guarantee that Consumer Protec on BC will undertake a formal inves ga on on your behalf. Depending on the nature of the complaint, BC consumer protec on laws may not apply and your complaint may be referred to another agency for review.

1. Always try to resolve your complaint with the business before ling a complaint with Consumer Protec on BC.
2. Print clearly, using black or blue ink.
3. Provide as much informa on as possible.
4. A ach copies of relevant documents (correspondence, phone logs, taped telephone transcripts, pictures, etc.)
5. Read both pages of the form, sign and return the form to the Consumer Protec on mailing address.

Debtor's (your) Full Name

Home Phone (with area code)

Street Address

Work Phone (op onal)

City

Fax

Postal Code

Email Address

If wri ng on behalf of another individual, your name and phone number

Collec on Agency Name

Collector Name(s)

City they are contac ng you from

Phone number (including extension)

Descrip on of the complaint (Use the checklist on the 2nd page as a guide.)

Evidence I have to support my posi on (circle those that apply and a ach **proof/copies** with this document):

Taped Phone Calls Phone Log Statements from Witness Past Correspondence (le ers/faxes/emails) None

Consumer Protection BC
PO Box 9244 Victoria BC V82 9J2
Telephone: 604-320-1667
Toll Free: 1-866-564-9963
Fax: 250-920-7181
Website: www.consumerprotec onbc.ca

Nature of the complaint (tick off those that apply – these should be detailed in your complaint description):

- ☐ Dispu ng the amount of the debt
- ☐ Not my debt
- ☐ Collector was threatening and/or in mida ng
- ☐ Collector was using excessive pressure
- ☐ Published or threatening to publish my inability to pay
- ☐ Did not receive anything in wri ng prior to receiving calls
- ☐ Collector will not disclose his/her iden ty
- ☐ Collector called me at work more than once and I have provided contact informa on for how to reach me at home
- ☐ I have submi ed a request in wri ng asking to be contacted in wri ng only and they are con nuing to call me
- ☐ The collector has called my acquaintance and has asked for informa on other than my home address and phone number and I have not authorized the collector or creditor to do so in the past
- ☐ The collector has called my employer and has asked for more informa on other than con rming my employment, business tle, and address and I have not authorized the creditor to do so in the past
- ☐ The collector has called me before 7 am or a er 9 pm Monday to Saturday, or before 1 pm or a er 5 pm on a Sunday, or on a statutory holiday
- ☐ The collector is a emp ng to collect more than I owe

Who at the agency have you discussed the problem with to date?

_____

Have you communicated with someone at Consumer Protec on BC about this problem in the past? If yes, please provide details

_____

_____

NOTE: We may share a copy of your complaint or the informa on in this form with the business involved to facilitate resolu on of your complaint. By signing and forwarding this form to Consumer Protec on BC you are authorizing the release of this informa on for sta s cal purposes and the a empt to resolve your complaint. By signing you are also acknowledging that the informa on contained on this form is true and accurate to the best of your knowledge. Please be aware that Consumer Protec on BC is not ac ng as your a orney nor providing legal advice.

Signature_____ **Date**_____

Return this form along with copies of relevant documents to:

CONSUMER PROTECTION BC
A en on: Inquiry Centre
PO Box 9244
V8W 9J2

Toll Free: 1-888-564-9963
Fax: 250-920-7181
Email: info@consumerprotec onbc.ca

Consumer Protec on BC administers the Business Prac ces and Consumer Protec on Act, the Crema on, Interment and Funeral Services Act and associated regula ons. Consumer Protec on BC is unable to resolve general complaints regarding quality of product or service and cannot determine the outcome of contractual disputes.

2. Debt and Consumer Issues

- **Benefits protected by statute from garnishment and setoff**
  - Stat Protected Benefits updated November 21, 2012
  - Ontario Court Decision in Metropolitan Toronto v. O'Brien
  - Ontario Court Decision in McIntosh v. Laronde

THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

Benefits protected by statute from attachment and set-off

*Prepared by Alison Ward, lawyer, Community Legal Assistance Society, updated November 21, 2012

*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?"

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:

***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 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 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 in writing 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#section29

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#section20

3. CPP benefits: refer to section 65(1.1) 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

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 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 MSD 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), MSD has a financial interest in assuring that wrongful set offs against welfare benefits do not occur. At least in Vancouver, the MSD Community Relations and Service Quality Manager at MSD 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 your MSD CRSQ aware of any wrongful set off against welfare benefits by copying MSD'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.

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.

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.

2. Debt and Consumer Issues

- **Student Loans**
  - Student Loans presentation
  - Extract from the Canada Student Financial Assistance Regulation

THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

Student loans

*****Prepared by Alison Ward, lawyer, CLAS, and last updated November 21, 2012

1) Effect of bankruptcy

Bankruptcy normally erases most (but not all) debts.

Student loans are treated differently than most debts in bankruptcy. Until July 8, 2008, the federal *Bankruptcy and Insolvency Act* provided that a person could not receive a discharge (i.e. forgiveness of) their student loans through bankruptcy until 10 years after the debtor ceased to be a student.

That rule was changed on July 8, 2008. Sections 178(1)(g) and 178(1.1) of the *Bankruptcy and Insolvency Act* now 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 for students who file for bankruptcy within seven years of leaving school, that 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 *Bankruptcy and Insolvency Act*, which was also introduced on July 8, 2008. 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 has not been a full-time or part-time student for at least five years;
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, experience financial difficulty to such an extent that the person will be unable to pay the student loan debt.

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 usually be protected from further court action by the student loan provider, unless the student loan provider gets special permission from court to still 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 been out of school for at least 5 years.

2) Limitation periods

For federal student loans: see 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.

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.

For BC student loans: see sections 3(5), 5 and 9 of the BC *Limitation Act*

The BC government cannot sue on BC student loans after **6 years** from date when right to sue on the debt arose (subject to acknowledgment of the debt within the 6 years).

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 not revive the government's right to sue.

However, note that a new Limitation Act will come into force in BC on June 1, 2013. **It remains to be seen what limitation period will apply to the collection of BC student loans on and after June 1, 2013.**

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.

3) 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 provincial student loans, 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 section 9 of the provincial *Limitation Act*, and the following definition of "action" in section 1 of the current BC *Limitation Act*:

> ***"action"*** *includes any proceeding in a court and any exercise of a self help remedy"*

4) Loan forgiveness and other options

In July 2012, all BC student loans (including ones for the current academic year and any BC student loans in repayment) 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 BC and Canada student loans are now managed as a single Canada-B.C. integrated loan by the NSLSC.

This integration has produced some uncertainty. While Canada Student Loans are clearly governed by the *Canada Student Financial Assistance Act* and *Regulation,* which provides specific terms on which loans can be forgiven, reduced or managed, there is no legislation that applies specifically to student loans issued by BC. That is, all debt forgiveness and reduction/repayment programs that apply to BC student loans, are determined only by *policy* set by the BC government.

The BC government's current policies regarding repayment terms for BC student loans is on the Student Aid BC website at https://www.aved.gov.bc.ca/studentaidbc/repay/

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.

BC student loans and disability forgiveness

- In 2009, the BC government eliminated the prior program that allowed people receiving PPMB or CPP disability benefits, or with the PWD designation, to have their student loans eliminated based on their permanent disability. Forgiveness for BC student loans based on disability was not available after that point.

- However, with the integration of BC and Canada student loans, it appears from the Student Aid BC website that forgiveness for BC student loans based on permanent disability is once again available.

- Disability forgiveness for BC student loans based on permanent disability now appears to be available by policy if:

    A) the debtor is a resident of Canada
    B) the debtor has signed a new consolidated loan agreement (sent out to all people with outstanding BC student loans when integration with Canada student loans took place); and
    C) the debtor has a "severe permanent disability" that prevents the person from repaying their student loans
    D) "severe permanent disability" is defined in BC Student Aid's policy as "a functional limitation caused by a physical or mental impairment that restricts the person's ability to participate in post-secondary studies or in the labour force, and that is expected to remain for the person's natural life."
    E) People who wish to apply for forgiveness of their BC student loans are directed to apply to the NSLSC
    F) Note that the definition of "severe permanent disability" contained on Student Aid BC's website, is slightly different that the one found in the *Canada Student Financial Assistance Act* and *Regulation.*

Canada student loans and disability forgiveness

On August 1, 2009, there were some quite major changes to the rules regarding both collection and forgiveness of Canada Student Loans.

- Until August 1, 2009, the rules that applied to people wanting to have Canada Student Loans forgiven based on permanent disability varied, according to when their loan was granted. For loans negotiated between August 1, 1995 and July 31, 2000, a disabled student previously had to show that their permanent disability arose within a particular period in order to qualify them for student loan forgiveness. For those loans, the length of the particular "window of opportunity" varied depending on exactly when the loan was taken out. However for loans negotiated August 1, 2000 or after, the disability could have arisen at any time.

- These rules changed as of August 1, 2009. Now, people with a severe permanent disability who received loans between 1995 and 2000 are eligible for loan forgiveness based on severe permanent disability, regardless of when that disability occurred, if they meet the eligibility criteria and their loan is still held by the financial institution that issued it. People in this 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.

- Further, as of August 1, 2009, if a person is "unable to repay their student loan and will never be able to repay it", due to a "severe permanent disability," then the student is eligible for immediate and total forgiveness of their loan. This is true of <u>all</u> federal loans negotiated on or after August 1, 1995, no matter when the person's permanent disability

arose, and regardless of whether their Canada Student Loan is in good standing or not. It may also be true of federal student loans taken out before August 1, 1995; that is not yet clear to me. People with student loans taken out on or after August 1, 2009 directly from Canada Student Loans (i.e. not through a financial institution) should make their application for disability forgiveness directly to the National Student Loans Service Centre at 1 888 815 4514. The application form can be obtained by calling the NSLSC and asking for an application form to be sent to the person.

- "Severe permanent disability" with respect to Canada student loans is now defined (in section 2 of the *Canada Student Financial Assistance Regulation*) as:

> *"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 is a more rigorous test than the test of "disability" before August 1, 2009 (which required instead that the person be "restricted" in performing the daily activities described above .... not "prevented" from performing them, as is currently required).

Repayment Assistance Plan ("RAP") for borrowers with low incomes

Also on August 1, 2009, major changes were made to programs for people who are having trouble repaying their Canada Student Loans. The former 'interest relief' and 'debt reduction in repayment' programs were 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.

BC Student Aid's website now indicates that the federal rules regarding Repayment Assistance Plan also apply to integrated BC – Canada student loans.

Note that the rules for RAP are complicated; I have been able to review them only briefly. You should review the regulations yourself before recommending any particular step to any particular client.

Most of the rules regarding RAP are found in sections 1 and 2 (definitions) and sections19 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

You must apply to be eligible for the RAP; enrollment is not automatic, it is optional. If a borrower does not apply for RAP, then they will have to repay their student loan at the monthly rate calculated in their loan agreement. I understand that eligibility for RAP is approved in 6 months increments, so an application to renew RAP may have to be made every 6 months.

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.

To qualify for RAP, you must:

a) Be a resident of Canada;
b) Have signed a consolidated loan agreement; and
c) Be unable to afford the required monthly payment on your integrated BC - Canada Student Loan, as calculated on a standard loan repayment period (i.e. amortization period).

Can Learn's website states that "the RAP is available for periods of 6 months up to a maximum of 180 months at any point during the repayment of a loan."

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

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/50/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 printouts describe 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 is explained in the attached extract from the CanLearn website (also found at http://www.canlearn.ca/eng/after/repaymentassistance/rppd.shtml).

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).

- 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 disability –related expenses) 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.

5) 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

Canada Student Financial Assistance Regulations

SOR/95-329

Current version: in force since Aug 1, 2012 (and extracted from Canlii November 21, 2012)

CANADA STUDENT FINANCIAL ASSISTANCE ACT

Registration 1995-07-17

Regulations Respecting the Making of Loans and the Provision of Other Forms of Financial Assistance to Students

P.C. 1995-1121 1995-07-17

His Excellency the Governor General in Council, on the recommendation of the Minister of Employment and Immigration and the Treasury Board, pursuant to section 15 of the *Canada Student Financial Assistance Act*[*], is pleased hereby to make the annexed *Regulations respecting the making of loans and the provision of other forms of financial assistance to students*, effective August 1, 1995.

[*]S.C. 1994, c. 28

SHORT TITLE

1. These Regulations may be cited as the *Canada Student Financial Assistance Regulations*.

INTERPRETATION

2. (1) In the Act and these Regulations,

“borrower”

> “borrower” means a person to whom a loan is made pursuant to the Act; (*emprunteur*)

“consolidated student loan agreement”

> “consolidated student loan agreement” means a consolidated risk-shared loan agreement or a consolidated direct loan agreement, except in section 5 of the Act where it means a consolidated risk-shared loan agreement only; (*contrat de prêt consolidé*)

“course”

> “course” means formal instruction or training that constitutes, or is determined by a designated educational institution to be equivalent to, an essential element of a program of studies at a post-secondary school level at that institution, but does not include any formal instruction or practical training required for acceptance in a professional corporation or for the practice of any trade or profession unless that formal instruction or practical training is necessary to obtain a degree, certificate or diploma from that designated educational institution; (*cours*)

“family income”

“family income” means the aggregate income — including income from employment, social programs, investments and monetary gifts — of

(*a*) the borrower or student and their spouse or common-law partner, in the case of a borrower or student who is married or has a common-law partner,

(*b*) the parents of the student, in the case of a full-time student who
(i) has never been married or in a common-law relationship,
(ii) has never had children,
(iii) is pursuing education at a post-secondary level within four years of leaving secondary school,
(iv) has not been in the labour force for more than two periods of 12 consecutive months since leaving secondary school, and
(v) is not applying for assistance under Part V or VII; and

(*c*) the borrower or student, in any other case; (*revenu familial*)

“financial assistance”

“financial assistance” means any form of financial aid provided under the Act, including student loans; (*aide financière*)

“financial institution”

“financial institution” means

(*a*) a bank or authorized foreign bank within the meaning of the *Bank Act*,
(*b*) a credit union, caisse populaire or other cooperative credit society,
(*c*) a company within the meaning of the *Trust and Loans Company Act*, or
(*d*) Canada Post Corporation; (*institution financière*)

“full-time student”

“full-time student” means a person

(*a*) who, during a confirmed period within a period of studies, is enrolled in courses that constitute

(i) at least 40 per cent and less than 60 per cent of a course load recognized by the designated educational institution as constituting a full course load, in the case of a person who has a permanent disability and elects to be considered as a full-time student, or
(ii) at least 60 per cent of a course load recognized by the designated educational institution as constituting a full-time course load, in any other case,

(*b*) whose primary occupation during the confirmed periods within that period of studies is the pursuit of studies in those courses, and

(*c*) who meets the requirements of subsection 5(1) or 7(1) or section 33, as the case may be. (*étudiant à temps plein*)

“loan year”

“loan year” means the period commencing on August 1 in any year and ending on July 31 in the following year; (*année de prêt*)

“part-time student”

“part-time student” means a person

(*a*) who, during a confirmed period within a period of studies, is enrolled in courses that constitute at least 20 per cent and less than 60 per cent of a course load recognized by the designated educational institution as constituting a full course load and, where that person has a permanent disability and is enrolled in courses that constitute at least 40 per cent of such a full course load, elects to be considered as a part-time student, and
(*b*) who complies with the requirements of subsection 12(1), 12.1(1) or 12.2(1) or section 33, as the case may be; (*étudiant à temps partiel*)

“period of studies”

“period of studies” means the length of time that a designated educational institution considers to be a normal school year for the program of studies in which the qualifying student or the borrower is enrolled and that, where the period between the day on which that person ceased to be a full-time student pursuant to section 8 or a part-time student pursuant to section 12.3, as the case may be, and the first day of the first confirmed period of the current school year is less than six months, includes that period; (*période d’études*)

“permanent disability”

“permanent disability” means 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; (*invalidité permanente*)

“post-secondary school level”

“post-secondary school level” means education at a university or college level, including education of a technical or vocational nature; (*niveau postsecondaire*)

“program of studies”

“program of studies” means the series of periods of studies

(*a*) that is considered by the designated educational institution to be necessary to obtain a degree, certificate or diploma,
(*b*) that is recognized by the appropriate authority which designated that institution under the Act or the *Canada Student Loans Act*, or any successor to that authority, and
(*c*) the aggregate of which is at least 12 weeks within a period of 15 consecutive weeks; (*programme d’études*)

“severe permanent disability”

“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; (*invalidité grave et permanente*)

“student loan”

“student loan” means a risk-shared loan or a direct loan except

(*a*) in sections 5, 10 and 11 and paragraph 15(*l*) of the Act, where it means a risk-shared loan only,

(*b*) in subsection 14(2) of the Act, where it means a guaranteed student loan. (*prêt d'études*)
(*c*) [Repealed, SOR/2012-41, s. 1]

"student loan agreement"

"student loan agreement" means a contract entered into before August 1, 2000 between a qualifying student and a lender pursuant to subparagraph 12(1)(*d*)(i) or 12.1(1)(*e*)(i) and

(*a*) that is in the prescribed form, and
(*b*) that includes the student's social insurance number. (*contrat de prêt simple*)

(2) In these Regulations,

"Act"

"Act" means the *Canada Student Financial Assistance Act*; (*Loi*)

"common-law partner"

"common-law partner" in relation to a borrower, means a person who is cohabiting with a borrower in a conjugal relationship, having so cohabited for a period of at least one year; (*conjoint de fait*)

"confirmation of enrolment"

"confirmation of enrolment" means a prescribed form, which may or may not form part of a certificate of eligibility, and where it does not, includes the qualifying student's or borrower's social insurance number; (*confirmation d'inscription*)

"confirmed period"

"confirmed period" means a period of studies, or part thereof, which is at least six consecutive weeks and which

(*a*) in the case of a confirmation of enrolment forming part of a certificate of eligibility, begins on the first day of the month specified by the designated educational institution and ends on the last day of the last month of the period of studies specified by the appropriate authority, and
(*b*) in the case of a confirmation of enrolment not forming part of a certificate of eligibility, begins on the first day of the month specified by, and ends on the last day of the other month specified by, the designated educational institution; (*période confirmée*)

"consolidated direct loan agreement"

"consolidated direct loan agreement" means a contract in the prescribed form that is entered into between the Minister and a borrower who has ceased to be a full-time student pursuant to section 8 and who is indebted to the Minister under any full-time direct loan agreement and that includes the borrower's social insurance number; (*contrat de prêt direct consolidé*)

"consolidated guaranteed student loan agreement"

"consolidated guaranteed student loan agreement" has the same meaning as subsection 2(2) of the *Canada Student Loans Regulations*; (*contrat de prêt garanti consolidé*)

"consolidated risk-shared loan agreement"

"consolidated risk-shared loan agreement" means a contract that is entered into between a borrower who has ceased to be a full-time student pursuant to section 8 and the lender to whom the borrower is indebted under any full-time risk-shared loan agreement and

(*a*) that is in the prescribed form,
(*b*) that includes the borrower's social insurance number,
(*c*) in which the principal amount is the aggregate of the outstanding principal amounts under those agreements,
(*d*) that replaces those agreements, and
(*e*) that includes the terms and conditions of repayment of the principal amount of the loan and the interest payable thereunder; (*contrat de prêt à risque partagé consolidé*)

"direct loan"

"direct loan" means a debt obligation incurred by a qualifying student on entering into a direct loan agreement and which is owed to Her Majesty in right of Canada, as represented by the Minister; (*prêt direct*)

"direct loan agreement"

"direct loan agreement" means a full-time direct loan agreement, a direct student loan agreement or a consolidated direct loan agreement; (*contrat de prêt direct*)

"direct student loan agreement"

"direct student loan agreement" means a contract entered into after July 31, 2000 between a qualifying student and the Minister pursuant to subparagraph 12(1)(*d*)(ii) or 12.1(1)(*e*)(ii) and that

(*a*) is in the prescribed form, and
(*b*) includes the student's social insurance number; (*contrat de prêt direct simple*)

"full-time direct loan agreement"

"full-time direct loan agreement" means a contract that is entered into after July 31, 2000 between a qualifying student and the Minister under paragraph 5(1)(*d*) and

(*a*) that is in the prescribed form; and
(*b*) that includes the student's social insurance number. (*contrat de prêt direct à temps plein*)

"full-time loan agreement"

"full-time loan agreement"[Repealed, SOR/2000-290, s. 1]

"full-time risk-shared loan agreement"

"full-time risk-shared loan agreement" means a contract that was entered into before August 1, 2000 between a qualifying student and a lender under these Regulations. (*contrat de prêt à risque partagé à temps plein*)

"guaranteed student loan"

"guaranteed student loan" has the same meaning as under the *Canada Student Loans Act*; (*prêt garanti*)

"guaranteed student loan agreement"

"guaranteed student loan agreement" has the same meaning as under the *Canada Student Loans Regulations*; (*contrat de prêt garanti*)

"loan agreement"

"loan agreement" means a risk-shared loan agreement or a direct loan agreement; (*contrat de prêt*)

“officer of the designated educational institution”

“officer of the designated educational institution” means a person authorized by a designated educational institution to sign confirmations of enrolment on behalf of the institution and who

(*a*) is the registrar of that institution or a person authorized by the registrar to act on behalf of the registrar,
(*b*) is a student aid officer in that institution, or
(*c*) has the *de facto* capacity of the registrar of or a student aid officer in that institution;
(*agent de l’établissement agréé*)

“participating province”

“participating province” means a province other than one that has chosen not to participate in the financial assistance plan in accordance with section 14 of the Act; (*province participante*)

“part-time guaranteed loan agreement”

“part-time guaranteed loan agreement” has the same meaning as in subsection 2(2) of the *Canada Student Loans Regulations*; (*contrat de prêt garanti à temps partiel*)

“part-time loan agreement”

“part-time loan agreement”[Repealed, SOR/2000-290, s. 1]

“provincial loan”

“provincial loan” means a loan issued by a province for the purpose of assisting a student in the pursuit of studies at a designated educational institution. (*prêt provincial*)

“risk-shared loan”

“risk-shared loan” means a debt obligation incurred by a qualifying student on entering into a risk-shared loan agreement and which is owed to a lender or Her Majesty in right of Canada, as represented by the Minister; (*prêt à risque partagé*)

“risk-shared loan agreement”

“risk-shared loan agreement” means a full-time risk-shared loan agreement, a student loan agreement or a consolidated risk-shared loan agreement and includes agreements entered into under subsection 14(3) of the Regulations, whatever the date they are entered into; (*contrat de prêt à risque partagé*)

“spouse”

“spouse”[Repealed, SOR/2001-230, s. 1]

……

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:

$0.2A$

$1.5[(X - Y) / 100Z + 0.01]A$

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

(*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,

(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) / 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

(*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.

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
(*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]

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).

Debt Session Links:

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 factsheet about the *Wage Earner Protection Program Act:* http://www.hrsdc.gc.ca/eng/labour/employment_standards/wepp/factsheet.shtml.

New BC *Limitation Act* information on the Ministry of Justice website: http://www.ag.gov.bc.ca/legislation/limitation-act/2012.htm. Could this please be printed and then photocopied?

3. Employment

- **EI Workshop**
  - Service Canada Materials
  - PDF of EI Materials

THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

New Working While on Claim Pilot Project

How it works
What does the pilot project mean for me?
Examples of how the new pilot project works
What if I work or live outside Canada?
Information about the previous pilot project

Changes to Working While on Claim

Changes are being made to the Employment Insurance (EI) Working While on Claim pilot project, which helps you stay connected with the labour market.

The new Employment Insurance (EI) Working While on Claim pilot project is a way to help individuals like you stay connected with the labour market. The pilot project will change the way we deduct earnings from your EI benefits to ensure you always benefit from accepting work, since it is an important way to find a permanent job.

Starting August 5, 2012, this three-year pilot project will apply to you if you earn money while you are collecting any of the following types of EI benefits:

- regular benefits
- fishing benefits
- parental benefits
- compassionate care benefits

The new pilot project begins on August 5, 2012, and runs until **August 1, 2015**.

How it works

Under the new pilot project, you will be able to keep 50 cents of your EI benefits for every dollar you earn, up to 90% of the weekly insurable earnings that we used to calculate your EI benefit amount. This 90% amount is called the **earnings threshold**. If you earn any money above this threshold, we will deduct it dollar for dollar from your benefits.

For example, Christine's weekly insurable earnings are $800. Her earnings threshold would therefore be **$720** ($800 x .90 = $720). If Christine is collecting EI benefits based on weekly insurable earnings of $800, we would deduct the equivalent of 50% of her earnings from her EI benefits, until those earnings reach $720 (the earnings threshold). Any money Christine earns that is more than $720 (the earnings threshold) will be deducted from her EI benefits dollar for dollar.

We have provided more examples below to demonstrate how the earnings threshold works.

Important reminders

If you are receiving EI **sickness** benefits or EI **maternity** benefits, this pilot project does not apply to you. Any earnings you have will continue to be deducted dollar for dollar from benefits.

If you work a full work week, the rules do not change - you will **not** receive any EI benefits, regardless of the amount you earn.

The new Working While on Claim pilot project will automatically apply to your EI claim - you do not need to apply for it. As soon as you complete the two-week EI waiting period, the pilot project will automatically apply to any money you earn while you are collecting EI benefits.

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What does the pilot project mean for me?

To give you a better idea of what this means for you, the table below compares the previous method (ends August 4, 2012) of calculating EI payments with the new pilot-project method:

Comparison table of the previous pilot project and the new pilot project

Previous method		New method	
Weekly insurable earnings	$600	Weekly insurable earnings	$600
EI weekly benefit amount (55% of $600)	$330	EI weekly benefit amount (55% of $600)	$330
Gross earnings declared during a week while on EI benefits	$450	Gross earnings declared during a week while on EI benefits	$450
Earnings amount (40% of the benefit amount: $330 x .40 = $132)	$132	**Earnings amount (50% of gross earnings: $450 x .50 = $225)**	$225
Net EI benefit payment for that week ($330 + $132 – $450 = $12)	$12	Net EI benefit payment for that week ($330 + $225 – $450 = $105)	$105
Combined earnings and EI benefits ($450 + $12 = $462)	**$462**	Combined earnings and EI benefits ($450 + $105 = $555)	**$555**

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Examples of how the new pilot project works

The following three examples show how the new pilot project could work for claimants who earn different amounts while receiving EI benefits.

Example 1
Mario is collecting EI benefits, which are based on weekly insurable earnings of $825. This means that his **earnings threshold is $743**. While receiving EI benefits, he finds a temporary job where he earns $500 for that week, which is **less than the earnings threshold of $743**.

In the following chart, we show how we calculate Mario's EI benefit for that week:

Mario's weekly insurable earnings	$825
Earnings threshold ($825 x .90 = $743)	$743
50% of earnings threshold ($743 x .50 = $372)	$372
EI benefit amount ($825 x .55 = $454)	$454
Mario's gross declared earnings for that week	$500
Since Mario earned less than the earnings threshold, we calculate the amount to deduct from his EI benefit by multiplying his earnings by 50% ($500 x .50 = $250).	$250
Net EI benefit ($454 – $250 = $204). This amount is Mario's weekly EI benefit.	$204
Mario's combined earnings and EI benefit for that week ($500 + $204 = $704)	$704

Example 2
Anna is collecting EI benefits, which are based on weekly insurable earnings of $825. This means that her **earnings threshold is $743**. While receiving EI benefits, she finds a temporary job where she earns $790 for that week, which is **more than the earnings threshold of $743**.

In the following chart, we show how we calculate Anna's EI benefit for that week:

Weekly insurable earnings	$825
Earnings threshold ($825 x .90 = $743)	$743
50% of earnings threshold ($743 x .50 = $372)	$372
EI benefit amount ($825 x .55 = $454)	$454
Anna's gross declared earnings for that week	$790
Since Anna earned more than the earnings threshold, we calculate the amount to be deducted from her EI benefit by multiplying her earnings up to the threshold amount by 50% ($743 x .50 = $372), and then adding the amount dollar for dollar that she earned over the earnings threshold ($790 – $743 = $47)).	$47
Net EI benefit ($454 – ($372 + 47) = $35). This amount is Anna's weekly EI benefit.	$35
Anna's combined earnings and EI benefit for that week ($790 + $35 = $825)	$825

Example 3
Emad is collecting EI benefits, which are based on weekly insurable earnings of $825. This means that his **earnings threshold is $743**. While receiving EI benefits, he finds a temporary job where he earns $825 for that week, which is **exactly the same amount as his weekly insurable earnings, and more than his earnings threshold.**

In the following chart, we show how we calculate Emad's EI benefit for that week:

Weekly insurable earnings	$825
Earnings threshold ($825 x .90 = $743)	$743
50% of earnings threshold ($743 x .50 = $372)	$372
EI benefit amount ($825 x .55 = $454)	$454
Emad's gross declared earnings for that week	$825
Since Emad has earned more than the earnings threshold, we calculate the amount to be deducted from his EI benefit by multiplying his earnings up to the threshold amount by 50% ($743 x .50 = $372), and then adding the amount dollar for dollar that he earned over the earnings threshold ($825 - $743 = $82).	$82
Net EI benefit ($454 – ($372 + $82) = $0). Emad is therefore not entitled to receive any EI benefits that week.	$0
Emad's combined earnings and EI benefit for that week ($825 + $0 = $825).	$825

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What if I work or live outside Canada?

If you are living in the United States and worked in Canada, or if you crossed the Canada–United States border between your residence and workplace and you are receiving EI benefits, this pilot project will also apply to you. Visit the Employment Insurance and Workers and/or Residents outside Canada Web page for more information.

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Information about the previous pilot project

The new Working While on Claim pilot project replaces the previous pilot project, which ends on August 4, 2012.

Date Modified: 2012-10-10

Service Canada Canada

Service Canada

Changes to the Working While on Claim Pilot Project

Changes are being made to the Employment Insurance (EI) Working While on Claim pilot project, which helps you stay connected with the labour market.

What does this change mean for me?

The change will provide more flexibility by allowing you to revert to the previous method used to deduct earnings from your EI benefits, if specific criteria are met, ensuring you always benefit from accepting work.

Eligible claimants

Regular, Parental and Compassionate Care claimants (including fishing) will have the option of reverting to the provisions of the previous pilot if, in the year before the current pilot project was introduced, they received one week of regular, parental or compassionate care benefits during which earnings were declared or allocated.

Claimants receiving regular benefits must indicate that they are/were unable to secure any additional employment (i.e. more than 1 day of employment per week).

The option to revert to the previous pilot project does not apply to Self-Employment Benefits.

How does it work?

Previous pilot project

Under the previous method, you were entitled to earn $75 per week or 40% of your weekly benefit, whichever was higher, without having your benefits reduced. Any money earned above that amount would be deducted dollar for dollar from your benefits.

If you are working part time (approximately one day a week) and are unable to secure additional work it may be more beneficial to have your claim reverted to the previous pilot project.

> Once you decide to revert to the provisions of the previous pilot, it will apply for the entire duration of your claim. Your decision will be irreversible, even if your personal circumstances change.

Current pilot project

Currently, once the waiting period is served earnings are deducted at a rate of 50% of each dollar earned up to the point where a client's earnings equal 90% of the weekly insured earnings used to establish the benefit rate. After this 90% threshold is reached earnings are deducted dollar for dollar from benefits.

If you are working more than one to two days a week and there is the possibility that you may work more, then the current pilot project may be more beneficial for you.

When will this change begin?

Starting January 6, 2013, if you are an eligible EI claimant, you will have the option of reverting to the provisions of the previous pilot project if it is more beneficial to you. The option to revert will be available to eligible claimants who request it for any claims during the period of August 5, 2012 to

August 1, 2015.

Individuals whose benefits end before January 6, 2013 will have until February 4, 2013 to request a reversion on that claim. Individuals whose benefits end after January 6, 2013 will have until 30 days from the date of last payment or notice of non-payment to request a reversion on that claim. For eligible claimants who do not request to be considered under the previous pilot rules, all current and future claims will be subject to the new Working While on Claim pilot rules.

You are encouraged to contact us near the end of your claim, when more detailed information is known about how much you worked while receiving EI benefits. This will ensure that you choose the option that helps you keep more of your EI benefits.

Date Modified: 2012-10-05

Human Resources and Skills Development Canada / Ressources humaines et Développement des compétences Canada
Canada
Human Resources and Skills Development Canada

Defining "Suitable Work" and "Reasonable Job Search"

Through Economic Action Plan 2012 (EAP 2012), the Government of Canada is making significant improvements to better connect unemployed Canadians with job opportunities in their local area.

Part of these improvements includes clarifying what is expected of Canadians who are claiming EI while they search for work—including clarifying the definition of "suitable employment" and what constitutes a "reasonable job search."

Under the existing Employment Insurance Act, Canadians who are collecting EI are required to look for work. The Act states that claimants are obligated to search for and accept suitable employment, but it does not define the term. The Act only defines what is "not suitable employment."

As indicated in Bill C-38, it is the Government's intention to implement clear definitions for "suitable employment" and "reasonable job search." Should the Jobs, Growth, and Long-term Prosperity Act receive Royal Assent, the Government will define both terms in new regulations as outlined below.

PLEASE NOTE: These improvements apply only to Canadians receiving EI Regular Benefits and Fishing Benefits. They do not apply to Canadians receiving EI special benefits (i.e. maternity, parental, compassionate care and sick leave).

"Suitable employment"

Several factors will determine what will be considered suitable employment. These factors include:

- **personal circumstances**—the personal circumstances of a Canadian receiving EI benefits will be taken into consideration when determining what is considered suitable employment. A person receiving EI will not have to accept work if:
    - they have a health problem that prevents them from taking a particular job;
    - they have family obligations that prevent them from working at certain times of the day;
    - they have limited transportation options in terms of commuting to and from work; or
    - they are not physically capable of performing the work.
- **Working conditions** (i.e., position offered is not vacant due directly to a strike, lockout or other labour dispute);
- **Hours of work** (i.e., all available hours of work, including hours per day and available outside the previous work schedule, are deemed to be suitable for employment)
- **Commuting time** (i.e., workplace is within a one hour commute—could be higher taking into account previous commuting history and community's average commuting time).

There are two additional criteria that will determine suitable employment. These will vary based on the claimant's EI history and the duration of the claim. They are:

- type of work (i.e. responsibilities, tasks, qualifications, experience); and
- wages.

In determining these criteria, EI claimants will be placed in one of three categories:

- **long-tenured workers** would be those who have paid into the EI system for the past 7 of 10 years and who, over the last 5 years, have collected EI Regular or Fishing Benefits for 35 weeks or less.
- **frequent claimants** would be those who have had three or more claims for EI Regular or Fishing Benefits and have collected benefits for a total of more than 60 weeks in the past 5 years.
- **occasional claimants** would be all other claimants.

Long-tenured workers

Long-tenured workers would include claimants who have paid into the EI system for the past 7 of 10 years and who, over the last 5 years, have received 35 or fewer weeks of EI Regular or Fishing Benefits.

Long-tenured workers would be provided with time to search for a job within their usual occupation and at a similar wage (starting at 90 percent of their previous hourly wage). After receiving EI benefits for 18 weeks, long-tenured workers would be required to expand their search to include jobs similar to the one they normally perform and to accept wages starting at 80 percent of their previous hourly wage.

Frequent claimants

Frequent claimants would include claimants who had three or more claims for EI Regular or Fishing Benefits and who received over 60 weeks of such benefits in the past 5 years.

During the first six weeks of their claim, frequent claimants would be required to expand their search to jobs similar to the one they normally perform, and accept wages starting at 80 percent of their previous hourly wage. After receiving benefits for seven weeks, they would be required to accept any work they are qualified to perform (with on-the-job training, if required) and to accept wages starting at 70 percent of their previous hourly wage, but not lower than the prevailing minimum wage.

Occasional claimants

Occasional claimants would include those who do not meet the definition of frequent claimants or long-tenured workers.

These claimants have limited experience of being unemployed and looking for work.

For the first six weeks of their claim, occasional claimants would be allowed to limit their search to jobs in their usual occupation that pay at least 90 percent of their previous hourly wage. After receiving benefits for seven weeks, they would be required to expand their search to jobs similar to the one they normally perform and that pay at least 80 percent of their previous earnings.

After 18 weeks, they would be required to further expand their job search to include any work they are qualified to perform (with on-the-job training, if required) and to accept wages starting at 70 percent of their previous earnings, but not lower than the prevailing minimum wage.

"Reasonable job search"

The Government is providing clarity on what constitutes a reasonable job search. The job search efforts of EI claimants would be assessed based on:

- **Job search and employability activities –** Canadians receiving EI benefits will be required to complete the following job search activities while collecting benefits:

- Researching and assessing job prospects;
- Preparing for job application (i.e. preparing resume);
- Searching for job vacancies;
- Applying for positions;
- Attending interviews; and
- Other efforts to improve employability (e.g. workshops, employment agencies, job fairs, networking, etc.).

- **Intensity of job search effort –** Canadians receiving EI benefits will be required to look for a job every day they receive benefits. The frequency of their job search and the diversity of the search should be consistent with the opportunities available. For example, in a city or community with few job openings or opportunities, the job search should focus on identifying opportunities (i.e., researching and searching) and not applying to the same job or business every day. In comparison, a job search in an area with numerous job opportunities should focus on both identifying and applying for available positions.
- **Type of work being sought –** when looking for work, the work being sought by a Canadian receiving EI benefits will have to align with the definition of suitable employment.
- **Evidence of job search efforts –** Canadians receiving EI benefits would be required to keep a

record of their job search activities and submit, when requested, evidence supporting all job search activities undertaken.

EI claimants who do not comply with job search requirements risk losing their benefits until such time as they comply.

Annex A: Suitable Employment

This annex provides information that could be considered by the Canada Employment Insurance Commission in developing definitions for the new regulations once Bill C-38 receives Royal Assent.

"Suitable employment" would be defined based on six criteria, two of which (type of work and hourly wage) would vary according to the claimant's EI history and duration of claim.

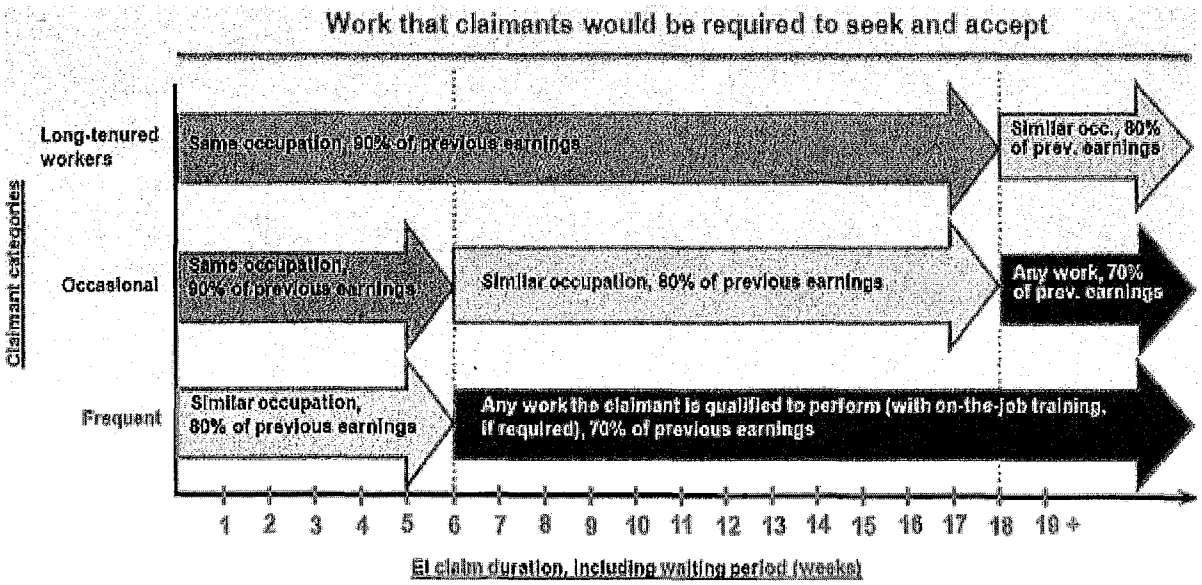
Remains constant throughout the EI claim period:.

- personal circumstances
- working conditions
- hours of work
- commuting time

Varies as the duration of the EI claim increases and by type of claimant:

- type of work
- hourly wage*

As the duration of their EI claim increases, claimants would be required to expand what is considered suitable employment in terms of type of work and hourly wage. As is currently the case, Canadians would not be required take jobs with unsafe working conditions. The time intervals for when this would happen would vary for each category of EI claimant.



* The hourly wage could not be lower than the minimum wage effective in the province or territory where employment is being sought.

** Long-tenured workers (LTW) are individuals who have worked and paid EI premiums for a significant period of time and have previously made limited use of EI Regular Benefit

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Date Modified: 2012-06-26

EMPLOYMENT INSURANCE

TYPES OF BENEFITS

- Regular Benefits – paid when workers lose job for reasons beyond their control
- Special Benefits
  - Pregnancy
  - Parental
  - Medical (sickness)
  - Compassionate care
- Employment (Training) benefits – assistance to help workers get back to work

Who is covered by EI?

- Workers employed in “insurable employment” are automatically covered.
- Self-employed people are not automatically covered, but can voluntarily op-in for special benefits only.
- Separate scheme for self-employed fishers.

QUALIFYING FOR REGULAR BENEFITS

Interruption of Earnings

- 7 days during which no work in performed and no earnings are received
- Severance pay does not delay the interruption of earnings

Qualifying Period

- Period in which the claimant must accumulate enough insurable hours to qualify for EI.
- Generally 52 weeks before the later of:
  a. the week the person loses their job; or
  b. the week the application for EI is made
- Can be extended in certain circumstances such as illness, pregnancy, or jail
- Max length of qualifying period is 104 weeks

Laid-off and applies
Jan 1, 2012

2012
Jan Feb Mar Apr May June July Aug Sept Oct Nov Dec

2011
Jan Feb Mar Apr May June July Aug Sept Oct Nov Dec

2010
Jan Feb Mar Apr May June July Aug Sept Oct Nov Dec

Red = Qualifying Period (52 weeks)

Laid-off and applies
Jan 1, 2012

2012
Jan Feb Mar Apr May June July Aug Sept Oct Nov Dec

2011
Jan Feb Mar Apr May *June* *July* Aug ~~Sept~~ Oct Nov Dec

(4 weeks sick leave)

2010
Jan Feb Mar Apr May June July Aug Sept Oct Nov Dec

Red = Qualifying Period (extended to 56 weeks)

Antedates

- Basically means back-dating an application to the week claimant was laid-off
- Commission will automatically antedate any application made within 4 weeks of lay-off
- Beyond 4 weeks, must show “good cause” for the delay



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

New Entrants and Re-entrants

- People who are new to the work force or re-entering workforce need more hours to qualify
- New Entrants need 910 hours to qualify for EI
- Claimant is a new entrant if they had less than 490 hours of workforce attachment in year prior to the qualifying period

Laid-off and applies
Jan 1, 2012

2012
Jan Feb Mar Apr May June July Aug Sept Oct Nov Dec

2011
Jan Feb Mar Apr May June July Aug Sept Oct Nov Dec

2010
Jan Feb Mar Apr May June July Aug Sept Oct Nov Dec

Red = Qualifying Period (52 weeks)

Blue = New Entrant (52 weeks, less than 490 hours)

DISQUALIFICATIONS

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?

Benefit Period

- Period during which claimant must claim whatever benefits they are entitled to.
- Generally 52 after the later of:
  a. the week the person loses their job; or
  b. the week the application for EI is made.
- Can be extended in certain circumstances:
  a. In jail
  b. Receiving severance
  c. Receiving workers compensation



2013

Jan Feb Mar Apr May June July Aug Sept Oct Nov Dec

Laid-off and applies Jan 1, 2012

2012

Jan Feb Mar Apr May June July Aug Sept Oct Nov Dec

(4 weeks severance)

2011

Jan Feb Mar Apr May June July Aug Sept Oct Nov Dec

2010

Jan Feb Mar Apr May June July Aug Sept Oct Nov Dec

Green = Benefit Period (52 weeks)

Red = Qualifying Period (52 weeks)

Blue = New Entrant (52 weeks)

Weeks of Benefits

- Determined by number of insurable hours in qualifying period and unemployment rate in region
- More hours, more weeks
- Higher unemployment rate, more weeks
- Must all be claimed before benefit period ends

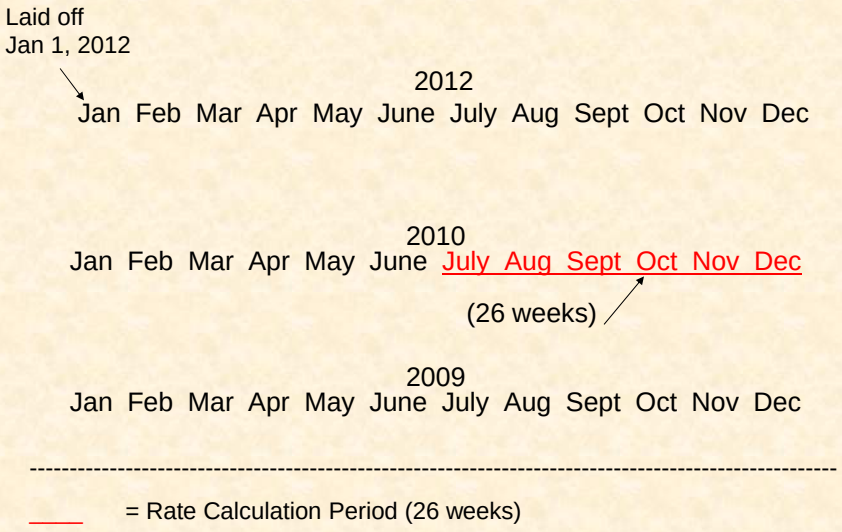
Waiting Period

- All claimants must serve a 2 week waiting period during which they cannot receive benefits.

How Much Do I Get?

RATE CALCULATION PERIOD

- The 26 weeks before the week in which the claimant lost their job
- Earnings in this period determine how much person gets each week
- 55% of average weekly earnings
- This may change in April of 2013! Depending on where the claimant lives, average earnings will be based on the highest 14 – 22 weeks of earnings in qualifying period.



PUTTING IT ALL TOGETHER

Laid off and applied
Jan 1, 2012

2012
Jan Feb Mar Apr May June July Aug Sept Oct Nov Dec

2011
Jan Feb Mar Apr May June July Aug Sept Oct Nov Dec

2010
Jan Feb Mar Apr May June July Aug Sept Oct Nov Dec

Green = Benefit Period (52 weeks)

Red = Qualifying Period (52 weeks)

Blue = New Entrant Period (52 weeks)

____ = Rate Calculation Period (26 weeks)

STAYING ON REGULAR BENEFITS

- Be available and looking for work.
- Accept suitable employment.
- Remain in Canada.
- Follow directions from EI staff.
- Report to EI.

Accepting Suitable Employment

- Changes coming soon that will make this requirement more strict for people who make frequent claims.
- People who make frequent claims will be required to broaden their job search and accept lower paying jobs.

Earnings while on EI

- New Pilot Project as of August of 2012
- A claimants “earnings threshold” is 90% of average weekly earnings.
- For earnings *below* earnings threshold, 50% of earnings are deducted from benefits
- For earnings *above* earnings threshold, 100% of earnings are deducted from benefits.
- Claimant can use old pilot project ($75 or 40% of benefit rate) if it would be more beneficial to them.

Example

- Average weekly earnings before EI claim = **$400**
- Claimant now getting **$220** from EI each week
- Claimant finds part time work for **$380** per week.

Example Continued

- Earning threshold is 90% of $400 = $**360**
- Earnings below “earnings threshold” (i.e. below $360) will be deducted at 50%.
  - »$180 deducted
- Earnings above “earnings threshold” (i.e. above $360) deducted 100%
  - »$20 deducted
- $220 – $180 - $20 = **$20** EI cheque

SPECIAL BENEFITS

4 kinds of “special benefits”

- Sickness (medical) benefits
- Pregnancy
- Parental
- Compassionate Care

- 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 begin collecting benefits 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
- Available to adoptive parents

Compassionate Care Benefits

- Payable if claimant is caring for a family member who faces a significant risk of death in the next 26 weeks.
- “Family” is broad an includes anyone who considers you part of their family.
- Maximum 6 weeks

PENALTIES AND VIOLATIONS

Penalties

- Can be imposed if claimant knowingly provided false or misleading information
- Generally a monetary penalty, however, Commission may impose a “warning” instead

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

APPEALS

Board of Referees

- First level of appeal
- Oral hearing before 3 person panel
- Can submit new evidence and make submissions

The Umpire

- Second level of appeal
- Generally no new evidence
- Most common grounds for appeal
  - Error of law
  - Perverse findings of fact
  - Procedural fairness

New Social Security Tribunal

- Starting April 1st, 2013 (we think) the Board of Referees and the Umpire will be replaced by the new Social Security Tribunal.
- Please note the details may change before the SST starts operating, so it is important to check most recent information.

New Social Security Tribunal

Old System	New Social Security Tribunal
2 tribunals (Referees and Umpire)	1 tribunal with 2 divisions (General and Appeal)
Only hears EI appeals	Also deals with other federal benefits (although there is a separate EI section)
No formal reconsideration process with the Commission	Claimant may ask Commission to reconsider decision
30 days to appeal to Referees 60 days to appeal to Umpire	30 days for all appeals and reconsiderations
No leave to appeal require	Leave to appeal required for appeals to the Appeal Division only
3 person panel for Referees appeals	1 person for all appeals

Insurability Appeals

- The Canada Revenue Agency has exclusive power to determine certain EI matters, such as:
  - Whether the employment is covered by EI
  - How many hours and earnings the person had
- Appeals from CRA decisions go to the Minister of National Revenue, then to the Tax Court.
- The Referees, the Umpire and the new SST have no power over these matters.

Research Resources

- Digest of Benefit Entitlement Principles
- Service Canada website
- Board of Referees Website
- CUBs (Decisions by the Umpire)
  - EI Jurisprudence Library
  - Decisions favorable to workers

4. Family

- **The New Family Law Act: an Overview and Analysis**
  - The New Family Law Act PowerPoint presentation
  - A Very Brief Introduction to the Family Law Act for Justice System Workers and Advocates
- **Understanding Mobility Issues in Family Law**
  - On the Move: Relocation under the FLA
- **Helping Self-Represented Clients in Family Law**
  - Helping Self-Represented Clients in Family Law Powerpoint presentation
  - Sample Affidavit on Cancelling Arrears
- **Financial Issues and Separation**
  - Financial Issues Workshop
  - Financial Statement Scenario
  - Worksheet
- **Changing FMEP Orders: for Recipients and Payors**
  - Introduction to FMEP
  - Summary of Relevant Legislation
- **Family Violence: Helping Clients under the new Family Law Act**
  - CLE Materials
  - Protection and Conduct Orders Powerpoint presentation
- ***Mothers without Legal Status (listed under Immigration)***

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4. Family

- **The New Family Law Act: an Overview and Analysis**
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THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

An introduction to the *Family Law Act*

John-Paul Boyd
Aaron Gordon Daykin Nordlinger

20 November 2012
Law Foundation / Legal Services Society

In force and coming into force.

Coming into force

- FLA became law on 24 November 2011
- Bulk of act, including all of the really important parts, not presently in effect
- FLA to come into force on 18 March 2013

Presently in force

- FRA ss. 90 and 120.1 repealed November 2011
- References to "father" and "mother" changed to parent in *Mental Health Act*, *Property Transfer Tax Act*, *School Act* etc.
- References to "husband and wife" or "a man and a woman" changed to spouse or two people in *Industrial Roads Act*, *Law and Equity Act*, *Marriage Act* etc.

An overview of
the new act.

Determining parentage, guardianship, the care of children, relocation.

CHILDREN

Parentage

- FLA determines parentage for all purposes within province except adoption, and therefore binds Vital Statistics Agency (s. 23)
- Parents are presumed to be biological father and birth mother (s. 26)
- Presumptions of paternity carried forward from FRA (s. 26)

Parentage

- Donor is not parent, unless artificial reproduction agreement to contrary (ss. 24, 30)
- Surrogate mother is parent, unless artificial reproduction agreement to contrary (ss. 29, 30)
- Agreement may name all of intended parents, donors and surrogate mother as parents; act does not mark distinctions as to quality or rights of parenthood

Best interests of child

- Best interests of child are only consideration not "paramount" consideration (s. 37)
- Expanded list of factors includes: views of child, history of care, capacity of person to exercise responsibilities for child, impact of family violence, and any civil or criminal proceedings relevant to the child's safety or well-being (s. 37)

Best interests of child

- Presumption that views of children will be heard in determining children's best interests "unless inappropriate" (s. 37)
- Additional factors prescribed to determine impact of family violence on child and on person's capacity to care for child (s. 38)
- Court *must* consider family violence factors if violence is an issue

Guardianship

- Parents living together at child's birth are both guardians of child; parent may lose this status by agreement or order (s. 39)
- Parent never living with child is not guardian without appointing agreement or order unless regularly cares for child (s. 39)
- Non-parent may only be appointed guardian by court order (s. 50)

Guardianship

- Guardians have parental responsibilities, the duty to make decisions respecting a child in the best interests of the child (s. 41)
- Parental responsibilities may be allocated among or shared between guardians (s. 40)
- Guardians have duty to consult each other unless consultation would be unreasonable or inappropriate (s. 40)

Guardianship

- The time a guardian is with a child is parenting time (s. 42)
- During parenting time, guardian has care and control of child and responsibility for day to day decision-making (s. 42)
- Parenting time may be on terms and conditions, including supervision (s. 45)

Guardianship

- Parenting arrangements are arrangements for parental responsibilities and parenting time under agreement or order; does not include contact (s. 1)
- No presumptions that parenting time should be shared equally or that parenting responsibilities should be allocated equally or shared equally (s. 40)

Guardianship

- Guardian can temporarily authorize a person to handle limited parental responsibilities if unable to act (s. 43)
- Guardian may appoint a guardian in anticipation of permanent incapacity and in will in case of death (ss. 53, 55)
- Parent who is not a guardian does not become a guardian on guardian's death (s. 54)

Persons without guardianship

- People who are not guardians, including parents who are not guardians, have contact with a child (s. 59)
- Contact may be agreed to by all guardians, or may be granted by court (ss. 58, 59)
- Contact may be on terms and conditions, including supervision

Children's property

- Guardian is not trustee of child's property, except for property in prescribed class or of value less than prescribed amount (s. 176)
- Trustee may be appointed by court order or by trust agreement (ss. 175, 179)
- Trustee must deliver property and accounting to child at age 19 unless order or trust agreement says otherwise (s. 180)

Relocation

- Guardians wishing to relocate with or without child must give 60 days' notice to guardians and persons with contact (s. 66)
- If objection, moving guardian must show that 1 move is made in good faith, 2 reasonable arrangements are proposed to preserve relationship with other guardians (s. 69)
- May be opposed on basis move is not in child's best interests (s. 69)

Relocation

- If guardians have equal time, moving guardian must show that 1 move is made in good faith, 2 reasonable arrangements are proposed to preserve relationship with other guardians, and 3 move is in child's best interests (s. 69)
- Good faith measured in relation to reasons for the move, whether move will enhance quality of life of guardian or child (s. 69)

Making changes: orders

- Orders about parenting arrangements and contact may be varied if there has been a change in needs or circumstances of child, including as a result of a change in circumstances of another person (s. 47)

Making changes: agreements

- Portions of agreements on parenting arrangements and contact may be set aside if agreement not in best interests of child (s. 44)

Minors who lose entitlement, ranked obligations, order requiring insurance to be maintained, making support binding on payor's estate.

CHILD SUPPORT

Disqualifying minor children

- Entitlement may terminate where minor becomes a spouse or voluntarily withdraws from parental charge, for reasons other than family violence or objectively intolerable living circumstances (s. 147)
- Minor may requalify for support on returning to charge of parents (s. 147)

Ranked priorities

- Duty of non-parent guardians secondary to obligation of parents (s. 147)
- Duty of stepparents secondary to both (s. 147)
- Stepparent's liability assessed considering length of time child and stepparent cohabited and standard of living enjoyed by child during relationship (s. 147)

The not-so-sweet hereafter

- Where payor has insurance policy, court may order that policy be maintained and that child or spouse be named as beneficiary (s. 170)
- Support obligation may be made binding on payor's estate, either at making of original child support order or upon recipient's application post-mortem (s. 170)
- Payor's personal representative may apply to vary or cancel order binding on estate (s. 171)

Test to bind the payor's estate

1. Will need of recipient survive the payor's death? (s. 171)
2. Is payor's estate sufficient to meet support obligation, taking into account beneficiaries and creditors? (s. 171)
3. Are there any other means by which recipient's need may be addressed? (s. 171)

Making changes: orders

- Orders for child support may be varied upon a change in circumstances under Child Support Guidelines, if, since hearing, evidence of a substantial nature has become available or if evidence of lack of disclosure has become available (s. 152)

Making changes: orders

- Portions of agreements on child support may be set aside if court would make a different order (s. 148)

Who is a spouse, effect of agreements, insurance to secure obligation, making support binding on estate.

SPOUSAL SUPPORT

Standing

- "Spouses" are 1 married spouses, 2 persons cohabiting in marriage-like relationship for more than two years, and 3 persons cohabiting in marriage-like relationship shorter than two years who have had a child together (s. 3)
- Claim must be brought within two years of divorce or nullity for married spouses or separation for unmarried spouses (s. 198)

Entitlement, duration and quantum

- Entitlement determined by *Divorce Act* objectives (ss. 160, 161)
- If entitlement, quantum and duration determined by *Divorce Act* factors (ss. 160, 162)
- Spousal Support Advisory Guidelines not referenced

Misconduct

- Court must not consider misconduct …except misconduct that 1 unreasonably causes, prolongs or aggravates need for support, or 2 unreasonably affects ability to pay (s. 166)

Review provisions

- Orders and agreements can provide for review of spousal support obligation upon fixed date or occurrence of defined event (s. 168)
- Review provisions may address manner of review and considerations on review (s. 168)
- Order or agreement may be reviewed upon party becoming eligible to receive pension benefits if silent as to effect (s. 169)

Support from the afterlife

- Payor can be required to maintain life insurance policy to secure spousal support obligation in same manner as for child support
- Spousal support can be made binding on payor's estate in same manner and on same test as for child support
- Payor's personal representative has same standing as with child support (s. 171)

Making changes: orders

- Orders for spousal support may be varied upon a change in the needs, means and other circumstances of a spouse, or if, since hearing, evidence of a substantial nature has become available or evidence of lack of disclosure has become available (s. 167)

Making changes: agreements

- Agreements on spousal support may be set aside where there is a lack of procedural fairness at the negotiation and execution of the agreement or if agreement turns out to be significantly unfair (s. 164)
- Until agreement is set aside, court may not make order on spousal support (s. 165)

Setting aside agreements

164 (1) This section applies if spouses have a written agreement respecting spousal support, with the signature of each spouse witnessed by at least one person.

(3) On application by a spouse, the court may set aside or replace with an order made under this Division all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:

(a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;

(b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;

Setting aside agreements

(c) a spouse did not understand the nature or consequences of the agreement;

(d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.

(4) The court may decline to act under subsection (3) if, on consideration of all of the evidence, the court would not replace the agreement with an order that is substantially different from that set out in the agreement.

(5) Despite subsection (3), the court may set aside or replace with an order made under this Division all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:

Setting aside agreements

(a) the length of time that has passed since the agreement was made;

(b) any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse;

(c) the intention of the spouses, in making the agreement, to achieve certainty;

(d) the degree to which the spouses relied on the terms of the agreement;

(e) the degree to which the agreement meets the objectives set out in section 161.

(6) Despite subsection (1), the court may apply this section to an unwitnessed written agreement if the court is satisfied it would be appropriate to do so in all of the circumstances.

Family property, family debt, excluded property, valuing property.

PROPERTY AND DEBT

Standing

- "Spouses" are 1 married spouses, 2 persons cohabiting in marriage-like relationship for more than two years (s. 3)
- Claim must be brought within two years of divorce or nullity for married spouses or separation for unmarried spouses (s. 198)

Excluded property

- All property owned by a spouse prior to the commencement of the spousal relationship is excluded property (s. 85)
- Includes gifts and inheritances, certain court awards, certain insurance proceeds, certain trusts received during the relationship (s.85)
- Includes property bought during relationship with excluded property (s. 85)

Family property

- All property owned by either party at the date of separation is family property, including assets acquired after separation with family property (s. 84)
- Includes corporate interests, ventures and partnerships, bank accounts, annuities, RRSPs and private pensions (s. 84)

Family property

- Family property doesn't include the value of excluded property brought into the relationship (s. 85)
- Family property does include the increase in value of excluded property (s. 84)

Family debt

- All debt incurred by a spouse during the spousal relationship is family debt, including debt incurred after separation to maintain family property (s. 86)

Presumptions

- Spouses are presumed to be entitled to half of family property and be half liable for family debts, regardless of use or contribution (s. 81)
- Excluded property is presumed to remain the property of the owning spouse (s. 96)

Triggering event and valuation

- One-half of all family assets vests in each spouses as tenants in common on separation, as well as responsibility for one-half of family debt (s. 81)
- Value of family property is fair market value of property (s. 87)
- Valuation date is date of agreement or trial dividing property or allocating debt (s. 87)

Unequal division

- The court may divide family property or family debt unequally if equal division would be significantly unfair (s. 95)
- Factors include length of spousal relationship, spouse's contribution to other's career, family debt exceeding family property, spouse's responsibility for increase or decrease in value of property or debt (s. 95)

Division of excluded property

- The court may divide excluded property if it cannot divide family property located outside province or if it would be significantly unfair not to divide excluded property (s. 96)
- Factors are length of spousal relationship and spouse's direct contribution to excluded property (s. 96)

Agreements

- Spouses may make property agreement dividing what should be divided, dividing what shouldn't be divided, dividing unequally what should be divided equally, valuing property other than it should be valued (s. 92)

Making changes: orders

- No provisions to vary orders on division of property or debt; only option is to appeal

Making changes: agreements

- Agreements on property and debt may be set aside where there is a lack of procedural fairness at the negotiation and execution of the agreement or if agreement turns out to be significantly unfair (s. 93)
- Court may not make order on property or debt in face of agreement unless agreement is set aside (s. 94)

Setting agreements aside

93 (1) This section applies if spouses have a written agreement respecting division of property and debt, with the signature of each spouse witnessed by at least one other person.

(3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:

(a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;

(b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;

Setting agreements aside

(c) a spouse did not understand the nature or consequences of the agreement;

(d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.

(4) The Supreme Court may decline to act under subsection (3) if, on consideration of all of the evidence, the Supreme Court would not replace the agreement with an order that is substantially different from the terms set out in the agreement.

(5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:

Setting agreements aside

(a) the length of time that has passed since the agreement was made;

(b) the intention of the spouses, in making the agreement, to achieve certainty;

(c) the degree to which the spouses relied on the terms of the agreement.

(6) Despite subsection (1), the Supreme Court may apply this section to an unwitnessed written agreement if the court is satisfied it would be appropriate to do so in all of the circumstances.

Protection orders, children's best interests, duty to screen for violence.

FAMILY VIOLENCE

Family violence

- Defined as including: physical abuse, sexual abuse and verbal abuse; psychological and emotional abuse, including harassment, stalking and restricting personal liberty; and, for children, exposure family violence (s. 1)

Screening for family violence

- New requirement on family dispute resolution professionals, including lawyers, mediators and family justice counsellors to screen for family violence (s. 8)
- Must assess impact on family violence on safety and capacity of party to negotiate fair settlement (s. 8)

Best interests of the child

- Factors include presence of family violence; if family violence, test is prescribed for court to asses impact of family violence (ss. 37, 38)
- Orders and agreements are not in the best interests of children unless they protect the well-being of children to the maximum extent possible (s. 37)

Protection orders

- Variety of orders may be made to protect "at-risk family member" from family violence
- Application may be made by at-risk family member, a person on behalf of at-risk family member or court on its own motion (s. 183)
- Application for protection order may be brought ex parte and independent of any other action or application (ss. 183, 186)

Protection orders

- Orders include: restraints on communications, attending or entering place, following person, possessing weapons; directions to police to remove person from property, accompany person to remove belongings, seize weapons; requirement to report; other terms (s. 183)
- Protection orders expire in one year unless otherwise ordered (s. 183)

Protection orders

- Other FLA orders suspended to extent of conflict with protection order, including protection order from another jurisdiction and no-contact and non-communication orders under *Criminal Code* (s. 189)
- Only enforceable under s. 127 of *Criminal Code*; no other remedy under FLA available and *Offence Act* inapplicable (s. 188)

Duties of dispute resolution professionals, duties of parties to disclose.

DISPUTE RESOLUTION PROCESSES

Dispute resolution processes

- New emphasis on and support for dispute resolution processes out of court (s. 4)
- New duty to make full and frank disclosure imposed on parties not litigating (s. 5)
- Better legislative support of agreements generally, and significantly strengthened support for agreements on property and spousal support (ss. 6, 7, 93, 164)

Family dispute resolution

- "Family dispute resolution" means services of family justice counsellor or parenting coordinator; mediation, collaborative law and arbitration; other processes prescribed by regulation (s. 1)
- "Family dispute resolution professionals" includes family justice counsellors, mediators, arbitrators, parenting coordinators, and lawyers (s. 1)

Duties of professionals

- Family dispute resolution professionals must assess for family violence and extent to which it impairs party's capacity to bargain (s. 8)
- Must inform party of dispute resolution processes and other resources (s. 8)
- Must advise that agreements and orders about children must be made in children's best interests only (s. 8)
- Lawyers must certify compliance (s. 197)

Family dispute resolution

- Parties required to comply with any mandatory dispute resolution processes prescribed by regulation (s. 9)
- Court may require parties to engage in dispute resolution process (s. 224)
- Court may adjourn proceeding while parties attempt to resolve issues before court (s. 223)
- Time limits on definition of "spouse" suspended during dispute resolution (s. 198)

Parenting coordinators

- Parenting coordinators may assist with implementation of parenting arrangements or contact when appointed by order or agreement (s. 15)
- Renewable maximum term of two years (s. 15)
- May resolve disagreements by consensus or by making binding determinations (ss. 17, 18)
- Court may enforce, vary or set aside (s. 19)

Arbitration

- *Commercial Arbitration Act* amended to better accommodate family law disputes (ss. 306-313)
- Award inconsistent with FLA of no effect (s. 309)
- Leave not required to enforce award under CAA s. 29 (s. 310)
- May appeal award on question of law, or law and fact, under CAA s. 31 (s. 312)
- Party may apply to vary award on same grounds as could vary order under FLA (s. 311)

Conduct orders, general provisions for enforcement of orders, extraordinary enforcement provisions.

COURT PROCESSES

Conduct orders

- Court may make conduct orders for reasons including to: manage behaviour frustrating resolution, prevent misuse of court process, and facilitate settlement (s. 222)
- Orders include: dismiss or strike pleadings or application, adjourn proceeding, judge seizing self, attend counselling, attend dispute resolution, restrict communications, restrict contact, maintain family home (ss. 223-226)

Specific enforcement powers

- Withholding of or failure to exercise parenting time or contact enforceable by referral to dispute resolution or counselling, make-up time, reimbursement of expenses (ss. 61, 63)
- Agreements on children and support can be filed and enforced as orders (ss. 44, 58, 148, 163)

General enforcement powers

- Where no specific enforcement provision, may order may be enforced by requiring security, payment of party's expenses, or payment of up to $5,000 (s. 230)
- Where nothing else will secure compliance, court may order party be jailed (s. 231)
- Provisions not applicable to protection orders, only enforced by *Criminal Code*, s. 127 (s. 188)

Finally, a summary of the highlights of the new act.

Children

- New provisions on parentage addressing assisted reproduction and parental status for all purposes
- Expanded best interests test
- Parents cohabiting during child's life are guardians with parental responsibilities and have parenting time with child
- Non-guardians have contact with child

Children

- New powers to enforce parenting time and contact for both provincial court and supreme court
- New test to determine mobility with shifting burden to establish best interests; only guardians may object
- New scheme for management of children's property, guardians not automatically trustees

Child support

- Statutory authority to terminate support for minors who leave home or marry
- Nifty ranking of obligations of parents, non-parent guardians and stepparent
- New criteria to establish extent of stepparent liability
- Obligation may be made binding on estate

Spousal Support

- Regime applies to unmarried couples in short cohabiting relationships who have a child
- Consideration of misconduct, in a limited way
- Remarkable new deference to agreements on spousal support; two tests to set aside assess fairness at different moments in time
- Obligation may be made binding on estate
- Advisory Guidelines not referenced

Property and debt

- Regime also applies to unmarried couples cohabiting for at least two years
- New regime exempts assets brought into relationship and certain classes of assets acquired during relationship
- Shared assets are those acquired during relationship and increase in value of exempt assets

Property and debt

- Regime presumes equal liability for debts incurred during relationship
- New deference to agreements on property and debt; two tests to set aside assess fairness at different moments in time

Dispute resolution processes

- New power of court to compel parties to enter dispute resolution process …and to take counselling
- Out-of-court processes supported with disclosure requirement
- Statutory support for parenting coordination, may make binding determinations
- Renewed role for arbitration

Court processes

- New enforcement powers applicable in provincial court, including some with teeth
- New suite of conduct orders and protection orders enabling better control of parties
- Improved recognition of foreign orders and declarations

An introduction to the *Family Law Act*

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A Very Brief Introduction to the *Family Law Act* for Justice System Workers and Advocates

John-Paul Boyd
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I. Introduction

A. Who does the new law apply to?

The *Family Relations Act* is the main law on family breakdown in British Columbia. Although there is also the federal *Divorce Act*, the *Divorce Act* only applies to married spouses. The *Family Relations Act* applies to everyone in a family relationship in British Columbia, including people who:

a) are married spouses;
b) are in unmarried "common-law" relationships;
c) are dating, or maybe didn't date at all, but have a child together;
d) want custody or guardianship of someone else's child; and,
e) want access to someone else's child.

The *Family Relations Act* has been the law in British Columbia since 1972, but on 18 March 2013 it will be cancelled and replaced by the new *Family Law Act*. The new law applies to the same people as the old law, and will also apply to people who:

f) are at risk of family violence;
g) are having a child through artificial reproduction; and,
h) want to manage a child's property.

The *Family Law Act* doesn't change the *Divorce Act*. After the new law comes into effect, the *Divorce Act* will still also apply to married spouses.

B. How will family law problems be resolved under the new law?

The *Family Law Act* will try to change how people solve family law problems. The new law will:

a) encourage people to find solutions outside of court;
b) promote negotiation, mediation, collaborative processes and arbitration;
c) make financial disclosure mandatory, even outside of court;
d) make family law agreements more difficult to change; and,

e) promote the use of parenting coordinators when there is a final agreement or order about the care of children.

When people have to go to court, the *Family Law Act* will give the court new ways to:

a) protect people who are at risk of family violence;
b) enforce court orders and agreements; and,
c) manage court processes and manage the behaviour of people in court.

C. What does the new law cover?

The *Family Law Act* talks about all of the things covered by the *Family Relations Act* and a lot of new things. The new law will deal with:

a) family violence and protecting adults and children from violence;
b) determining who is a child's parent;
c) having children through artificial reproduction;
d) who is the guardian of a child and how guardians are appointed;
e) how guardians share responsibility for the care of children;
f) the time someone who isn't a guardian has with a child;
g) what happens when a guardian wants to move with a child;
h) enforcing scheduled time with a child;
i) paying child support and how child support is calculated;
j) paying spousal support;
k) preserving property so that it can be divided;
l) dividing property and dividing responsibility for debt; and,
m) management of children's property.

D. The new law online and other resources

The new law makes a lot of changes and it's going to take justice system workers, lawyers and judges a while to get used to the new way of doing things. In the meantime, don't assume that anything in the new law is like it was in the old law. If you have to assume anything, assume that the new law is different.

In the meantime, you can find the new law online at the Legislature's website at:

www.leg.bc.ca/39th4th/3rd_read/gov16-3.htm

When the new law comes into force, you will be able to find the new law on the website of the Queen's Printer at:

www.bclaws.ca

The provincial government has published a lot of information about the new law, including a section-by-section explanation of all of the changes, at:

www.ag.gov.bc.ca/legislation/family-law/index.htm

More information is available on my blog at:

bcfamilylawresource.blogspot.ca/

Click on the "Family Law Act " label or read the "Family Law Act Information & Resources" page. The Legal Services Society has published a booklet on the new act that is available in print or online at:

resources.lss.bc.ca/pdfs/pubs/Guide-to-the-New-BC-Family-Law-Act-eng.pdf

This booklet is written in plain language and will be helpful for people involved in a family law problem as well as justice system workers.

II. The Law About Children

A. How are decisions about children made?

The new law says that parents, judges and other decision-makers must make decisions about children considering only the children's best interests and nothing else.

1. Determining the best interests of children

To decide what is in a child's best interest, parents and judges must consider all of the needs and circumstances of the child, and number of factors that are listed at section 37. These factors include:

a) the child's health and emotional well-being;
b) the views of the child, unless it wouldn't be appropriate to consider them;
c) the history of the child's care and the child's need for stability;
d) the child's relationships with other important people;
e) any court actions that are relevant to the child's safety and well-being; and,
f) the impact of any family violence.

2. The best interests of children and family violence

When family violence is an issue, parents and judges must consider an additional list of factors, set out at section 38, to help assess the impact of the family violence on the child and on a person's capacity to care for the child.

The new law also says that an agreement or order is presumed not to be in the best interests of a child unless it protects the child's safety and well-being to the greatest extent possible.

3. How are children's views heard?

Under section 211 of the new law, the court can order that a family justice counsellor, a social worker or another person, like a clinical counsellor or a psychologist, assess:

a) the needs of a child;
b) the views of a child; and,
c) the ability of a person to meet the child's needs.

These assessments replace reports made under section 15 of the *Family Relations Act*.

➔ *Note that views of the child reports can be ordered under section 37(2)(b) of the new law. These reports usually just describe the child's views without making an assessment or recommendations.*

B. Who is a parent?

Under the *Family Law Act*, a child's parents are the child's birth mother and biological father. If the court is not sure who the child's father is, the court can order medical tests to determine who the father is.

When people have a child through artificial reproduction, a person who donates eggs or sperm is not presumed to be a parent. However, a woman who is a surrogate mother is presumed to be a parent.

The new law lets people make agreements when they have a child through artificial reproduction. These agreements can say who is a parent and who isn't. They can say that a donor of eggs or sperm is a parent, or that a surrogate mother isn't a parent.

➔ *The courts will have to figure out how child support will work when a child has more than two parents.*

C. Guardianship

The new law describes the people who are responsible for caring for a child as "guardians." A child can have one guardian, two guardians or more than two guardians.

D. Who is a guardian?

Most of the time, a child's parents will be the child's guardians, as long as the parents have lived with the child. A parent who never lived with a child isn't a guardian unless:

a) the court makes an order that the parent is a guardian;
b) the parent and the child's other guardians make an agreement that the parent is a guardian;
c) the parent "regularly cares" for the child; or,
d) the parent is a parent because of an artificial reproduction agreement.

➔ *The courts will have to figure out what "regularly cares" for a child means.*

The court can make an order that someone who isn't a parent be a guardian of a child. The court can also make an order that someone who is a guardian is no longer a guardian. Both the Provincial Court and the Supreme Court can make orders about guardianship.

The new partner or spouse of a guardian doesn't become a guardian just because of his or her relationship with the child's guardian.

E. Parental responsibilities

The different ways that guardians care for a child and the decisions guardians have to make are called "parental responsibilities." Parental responsibilities are listed at section 41 of the new law and include:

a) making decisions about the day to day care of the child;
b) deciding where the child will live;
c) making decisions about the child's schooling and extracurricular activities;
d) making decisions about the child's health care; and,
e) deciding how the child will be raised, including decisions about things like religion, language and culture.

When a child has more than one guardian, the guardians must usually make these decisions together. The guardians can agree or the court can order that only one guardian should have a particular parental responsibility. Both the Provincial Court and the Supreme Court can make orders about parental responsibilities.

If the child's guardians can't agree on a particular decision, they can go and see a family justice counsellor, a mental health professional or a mediator to help them make the decision, or they can go to court.

➔ *Remember that only guardians have parental responsibilities and the right to make decisions for a child.*

F. What happens if a guardian can't exercise parental responsibilities?

If a guardian is temporarily unable to exercise parental responsibilities, the guardian can authorize someone else to manage certain responsibilities. This person doesn't become a guardian but can:

a) make decisions about the day to day care of the child;
b) make decisions about the child's schooling and extracurricular activities;
c) make decisions about the child's health care; and,
d) give or withhold permission on behalf of a child, like about going on a school field trip or having a medical treatment.

This will be useful when a guardian is going to be sick or will be out of town for a period of time and someone else needs to care for the child, or if a child from outside British Columbia will be going to school here and an adult is needed to care for the child.

G. What happens if a guardian has a terminal illness or dies?

Under the new law, a guardian can appoint someone to take over and act as the child's guardian if:

a) the guardian has a terminal illness;
b) the guardian is going to permanently unable to care for the child because of a mental illness; or
c) the guardian dies.

The new person takes over as guardian when the first guardian dies or becomes unable to exercise parental responsibilities.

A parent who is not a guardian does not automatically become the child's guardian when a guardian dies. If that parent wants to become the child's guardian, he or she will have to get a court order.

H. Parenting time and contact

The time a guardian has with a child is called "parenting time." During a guardian's parenting time, the guardian is responsible for the care of the child and has the right to make day-to-day decisions for the child.

The time that someone who isn't a guardian has with a child is called "contact." Parents who aren't guardians, other relatives of a child and people who aren't a child's relatives can have contact with the child.

Agreements about parenting time and contact can be made by the child's guardians. The court can make orders about parenting time and contact. Both the Provincial Court and the Supreme Court can make orders about parenting time and contact.

A guardian's parenting time and a person's contact with a child can be on terms, like that the parenting time or contact must be supervised.

➔ *Remember that only guardians have parenting time. Everyone else has contact with a child.*

I. How are parenting time and contact enforced?

The new law gives the court the power to enforce parenting time and contact when:

a) parenting time or contact has been wrongfully withheld from a person entitled to parenting time or contact; or,
b) a person with parenting time or contact fails to use his or her parenting time or contact.

The court can make orders a number of orders to enforce parenting time and contact, including requiring:

a) make-up time, when parenting time or contact was withheld;
b) that a person or child to attending counselling;
c) that the parties to try to resolve their dispute outside of court;
d) payment of a party's expenses; or,
e) payment of up to $5,000 to a person or as a fine.

An application about the wrongful withholding of parenting time and contact must be brought within a year of when the parenting time or contact was withheld.

J. What happens if a guardian wants to move?

If a guardian wants to move and the move will have an impact on a child's relationship with another guardian or someone who has contact with the child, the guardian must usually give 60 days' notice of the move, in writing. The notice must say where the guardian plans on moving to and when the guardian plans on moving.

Only other guardians can object when a guardian plans on moving. If a guardian objects, the guardian has 30 days to go to court to get an order preventing the move.

When a guardian objects, the guardian who wants to move must show the court that:

a) he or she has proposed to move in good faith; and,
b) he or she has proposed reasonable plans to preserve the child's relationship with the child's other guardians, with people who have contact with the child and with other people who have an important role in the child's life.

The guardian who objects to the move must show that the move is not in the best interests of the child or the move will be allowed.

When a guardian objects and the moving guardian and the objecting guardian share the child's time equally or almost equally, the guardian who wants to move must show the court that:

a) he or she has proposed to move in good faith;
b) he or she has proposed reasonable plans to preserve the child's relationship with the child's other guardians, with people who have contact with the child and with other people who have an important role in the child's life; and,
c) the move is in the child's best interests.

"Good faith" means that the guardian isn't planning on moving just to take the child away from another guardian and that the move will likely improve the child's quality of life or the guardian's quality of life.

➔ *Remember that only a guardian can object to a proposed move.*

➔ *The courts will have to figure out what "reasonable plans" to preserve the child's relations with other people means, and what it means to say that a proposed move is or is not in a child's best interests.*

III. The Law About Child Support

A. Who is entitled to get child support?

Child support is usually paid to support children who are under the age of 19, or who are 19 or older but are unable to support themselves, including because they are going to school.

Under the *Family Law Act*, children who are younger than age 19 can stop being entitled to child support if:

a) they become a spouse; or,
b) they withdraw from the care of their parents or guardians, as long as they didn't withdraw because of family violence or because of poor living conditions.

Child support is usually paid to the person who the child mostly lives with. Child support can sometimes be paid directly to the child, usually if the child is 19 or older and living away from home.

B. Who is required to pay child support?

All of a child's parents and guardians are required to support the child. The person who pays child support is either a parent who is not a guardian or the guardian who the child lives with the least.

Stepparents can also be required to pay child support. A "stepparent" is the married or unmarried spouse of a parent, as long as that person has contributed to the child's costs for at least one year and the claim for child support is made within one year of the person's last contribution to the child's costs.

The person who pays child support is called the "payor." The guardian who gets child support is called the "recipient."

➔ *The courts will have to figure out how child support works when a child has more than two parents.*

C. How is the amount of child support calculated?

Child support is determined by the Child Support Guidelines. Most of the time, child support is simple to figure out by looking up the amount payable in the Guidelines tables based on the payor's income and the number of children support is being paid for. Child support can get more complicated when:

a) a child is 19 or older;
b) the payor has an income of more than $150,000 per year;
c) one more children live mostly with each guardian, called "split custody;"
d) the guardians share the children's time equally or almost equally, called "shared custody;" or,
e) the payment of the tables amount would cause "undue hardship" to either the recipient or the payor.

The *Family Law Act* doesn't change how any of these problems are handled. What the new law does change is the calculation of child support for guardians who are not parents and for stepparents.

Under the new law, the child support obligations of guardians who are not parents come second to the obligations of parents. The child support obligations of stepparents come second to both parents and guardians, and the amount of support a stepparent should pay is based on:

a) the child's standard of living when he or she lived with the stepparent; and,
b) the length of time the child lived with the stepparent.

➔ *The courts will have to figure out how to calculate child support for stepparents. The Child Support Guidelines don't calculate child support in the way required by the new law.*

D. How is child support paid?

People can make agreements and the court can make orders about who should pay child support and about how much support should be paid. Both the Provincial Court and the Supreme Court can make orders about child support.

Most of the time, child support is paid every month, usually on the first day of the month. It is possible for child support to be paid in a single lump sum, but this is very rare. Payors can be required to pay by giving the recipient a series of post-dated cheques.

E. Are there tax consequences?

Child support is tax neutral. The payor does not get to deduct child support in his or her income tax return and the recipient doesn't have to pay income tax on the child support he or she receives.

F. What about if the payor dies?

If the payor has a life insurance policy, the parties can agree and the court can order that the payor keep the policy up to date and name a person, usually the recipient, as the beneficiary of the policy. This way, the child will still be supported if the payor dies.

The parties can agree and the court can order that the payor's obligation to pay child support will continue after the payor's death and be paid from his or her estate. Court orders about this can be made at the time the child support order is made or after the payor's death.

IV. The Law About Spousal Support

A. Who is entitled to ask for spousal support?

Only spouses can ask for spousal support. Under the new law, "spouse" includes people who:

a) are married to each other;
b) have lived together in a "marriage-like relationship" for at least two years; and,
c) have lived together in a marriage-like relationship for less than two years and have had a child together.

A spouse's entitlement to spousal support is determined based on factors taken from the *Divorce Act*, set out at section 161 of the new law.

➔ *Remember that no one is automatically entitled to get spousal support the way a child is automatically entitled to benefit from child support. Anyone who is a "spouse" can ask for spousal support, but being able to ask doesn't mean they'll get it. They must also show that they are entitled to spousal support.*

B. When do claims for spousal support have to be made?

Under the new law, married spouses stop being "spouses" able to ask for spousal support two years after they get divorced or their marriage is annulled. Unmarried spouses stop being "spouses" two years after their separation. Since only people who are spouses can ask for spousal support:

a) married spouses have to start a court action for spousal support within two years of their divorce or the annulment of their marriage; and,
b) unmarried spouses have to start a court action for spousal support within two years of the date they separated.

➔ *Remember that there are no limits to when married spouses can ask for spousal support under the Divorce Act.*

The two-year countdown from the date of divorce or separation is suspended while the spouses are trying to resolve their dispute outside of court with the help of a family justice counsellor, a mediator, a lawyer or an arbitrator.

C. How are the amount and duration of spousal support calculated?

When a spouse is entitled to receive spousal support, the amount payable and the length of time support should be paid for, called "duration," is determined based on factors taken from the *Divorce Act*, set out at section 162 of the new law.

The amount of spousal support payable and the duration that it support is paid for is often determined using the Spousal Support Advisory Guidelines. The Advisory Guidelines is not a law like the Child Support Guidelines and is not mandatory. The *Family Law Act* does not mention the Advisory Guidelines.

➔ *Remember that the Advisory Guidelines wasn't mentioned in the Family Relations Act either. The Advisory Guidelines will continue to be used under the new law as it was under the old law.*

The spouse who pays spousal support is called the "payor." The spouse who gets spousal support is called the "recipient."

D. Is a spouse's conduct taken into account?

Under the *Divorce* Act, the court is not allowed to consider a spouse's behaviour when making an order about spousal support. The same thing is generally true under the *Family Law Act*, except that the new law allows the court to take into account misconduct that:

a) unreasonably prolongs a spouse's need for support; or,
b) unreasonably undermines a spouse's ability to pay support.

In other words, the court can look at whether a spouse is being unreasonable in not becoming financial self-sufficient and whether a spouse has reduced work hours, quit a job or refused to take a job in order to avoid paying support.

➔ *The courts will have to figure out how to address these types of misconduct when they are asked to make orders for spousal support.*

E. How is spousal support paid?

People can make agreements and the court can make orders about who should pay spousal support and about how much support should be paid. Both the Provincial Court and the Supreme Court can make orders about spousal support.

Most of the time, spousal support is paid every month, usually on the first day of the month. It is possible for spousal support to be paid in a single lump sum. Payors can be required to pay by giving the recipient a series of post-dated cheques.

F. Are there tax consequences?

There are tax consequences when spousal support is paid on a regular basis. Spousal support is tax neutral when it is paid as a single lump sum.

The recipient of regular payments of spousal support must declare the support received in his or her income tax return and pay tax on it, just as if the support payments were employment income. The payor can deduct the spousal support paid from his or her taxable income, like how RRSP contributions can be deducted from taxable income. This usually means that the recipient has to pay tax at the end of the year while the payor gets a tax refund.

➔ *Remember that taxes should be taken into account when figuring out spousal support. At a minimum, recipients should be reminded to put money aside for taxes.*

G. Reviews

It can sometimes be very difficult to figure out when spousal support should end. The person getting support wants support to continue for as long as possible. The person paying support wants support to end as soon as possible. It is hard to settle on an end date if, for example, it's not known when a spouse will finish job training, become self-sufficient or recover from an illness.

People often duck this problem by agreeing that spousal support will be paid for now, but will be reconsidered, called a "review," in the future after a certain amount of time has passed or when a certain event has happened.

The new law says that agreements and orders for spousal support can be reviewable. Agreements and orders for reviewable spousal support can specify:

a) what will trigger the review;
b) the dispute resolution process that will be used at the review; and,
c) the factors that will be considered at the review.

The new law says that a review can also be triggered when someone begins to receive a pension, even if the agreement or order for spousal support doesn't call for the review.

H. What about if the payor dies?

If the payor has a life insurance policy, the parties can agree and the court can order that the payor keep the policy up to date and name a person, usually the recipient, as the beneficiary of the policy. This way, the spouse will still be supported if the payor dies.

The parties can agree and the court can order that the payor's obligation to pay spousal support will continue after the payor's death and be paid from his or her estate. Court orders about this can be made at the time the spousal support order is made or after the payor's death.

➔ *Note that the rules about life insurance and support when the payor dies are the same for spousal support as they are for child support.*

V. The Law About Dividing Property and Debt

A. Who is entitled to ask to divide property and debt?

Only spouses can ask to divide property and debt. Under the new law, "spouse" includes people who:

a) are married to each other; and,
b) have lived together in a "marriage-like relationship" for at least two years.

➔ *Note that the people who are "spouses" for the division of property and debt are different than the people who are "spouses" for child support and spousal support.*

B. When do claims for the division of property and debt have to be made?

Under the new law, married spouses stop being "spouses" able to ask to divide property and debt two years after they get divorced or their marriage is annulled. Unmarried spouses stop being "spouses" two years after their separation. Since only people who are spouses can ask to divide property and debt:

a) married spouses have to start a court action to divide property and debt within two years of their divorce or the annulment of their marriage; and,
b) unmarried spouses have to start a court action to divide property and debt within two years of the date they separated.

The two-year countdown from the date of divorce or separation is suspended while the spouses are trying to resolve their dispute outside of court with the help of a family justice counsellor, a mediator, a lawyer or an arbitrator.

C. Excluded property

"Excluded property" is the property each spouse has on the date they began to live together or got married, whichever was first.

➔ *The courts will have to figure out how to decide when a couple have started to live together. The date of cohabitation is much more important under the new law than it was under the old law.*

Excluded property includes certain property received by a spouse during the spouses' relationship, such as:

a) gifts;
b) inheritances;
c) court awards for injury or loss, except for awards relating to both spouses or for lost income;
d) insurance payments, except for payments relating to both spouses or for lost income;
e) certain kinds of trust interests; and,
f) property bought with excluded property.

➔ *The courts will have to figure out how to deal with the problem of valuing property bought during the spouses' relationship with excluded property.*

D. Family property

"Family property" is the property either or both spouses get after the date they begin to live together or get married, whichever is first. "Ordinary use for a family purpose," the test under the *Family Relations Act*, doesn't matter any more. Family property includes:

a) real estate;
b) bank accounts;
c) interests in companies and businesses;
d) debts owed to a spouse;
e) pensions and RRSPs; and,
f) other personal property.

Most importantly, the increase in value of excluded property over the course of the spouses' relationship is also family property.

➔ *Remember that excluded property includes property bought during the relationship with excluded property.*

E. Family debt

"Family debt" is all debt incurred by either or both spouses after the date they begin to live together or get married, whichever is first, up to the date of separation.

Family debt includes debt incurred after the date of separation if the debt was incurred for the upkeep of family property, like repairing the family home or paying the mortgage.

F. How are property and debt divided?

Spouses can make agreements and the court can make orders about how property and debt should be divided. Only the Supreme Court can make orders about the division of property and debt.

Agreements and orders about debt under the *Family Law Act* don't affect the rights of creditors.

1. Family property and family debt

Under the new law, spouses are presumed to:

a) each be entitled to one-half of family property, regardless of how they contributed to or used the property; and,
b) each be responsible for one-half of family debt.

When spouses separate, they each become one-half owners of all family property as tenants in common and one-half liable for all family debt. Under the *Family Relations Act*, spouses didn't become owners of family assets as tenants in common until they signed a separation agreement, got divorced or the court made a declaration under section 57. Now all it takes is separation.

➔ *The courts will have to figure out how to decide when a couple have separated. The date of separation is much more important under the new law than it was under the old law.*

The court can divide family property and family debt unequally if an equal division would be "significantly unfair." The court can take into account a number of reasons why an equal division could be unfair including:

a) the length of the spouses' relationship;
b) a spouse's contribution to the other spouse's career;
c) whether the amount of family debt is more than the value of family property;
d) whether a spouse reduced the value of family property or got rid of family property to avoid sharing the property or the full value of the property with the other spouse; and,
e) taxes owing from dividing the property.

➔ *The courts will have to figure out what "significantly unfair" means. The old law doesn't use this term.*

2. Excluded property

Each spouse's excluded property is presumed to remain his or her separate property and not be shared with the other spouse.

However, the court can divide excluded property between spouses if:

a) it can't divide family property or family debt located outside British Columbia; or,
b) it would be "significantly unfair" not to share the excluded property because of the length of the spouses' relationship or because of the contributions made by the spouse who doesn't own the property.

➔ *The courts will have to figure out what "significantly unfair" means.*

3. Value of property

The value of property is what a stranger would reasonably pay for the property in its current state. This is called the property's "fair market value."

The date property is valued is the date of the agreement or court hearing dividing the property.

G. How are pensions divided?

Spouses can make agreements and the court can make orders about how pensions and assets that are like pensions are divided. Only the Supreme Court can make orders about the division of pensions.

1. Equalizing RRSPs

RRSPs are family property. If RRSPs are divided, the *Income Tax Act* allows them to be equalized without any taxes being paid.

2. Workplace pensions

In general, the part of the pension accumulating between the date the spouses began living together or got married and the date of separation is family property and is divided equally. This is true whether the pension is being paid out or not.

Agreements and orders about dividing pensions are carried out by the people who administer the pension plans, not by the spouses who own the pensions.

➔ *Note that pensions division can be very, very complicated. It is always best to refer people with problems about pensions to a lawyer.*

3. Canada Pension Plan credits

Spouses are entitled to equalize the CPP credits they each accumulated between the date they began living together or got married and the date of their separation or divorce.

Agreements and orders about the equalization of CPP credits are carried out by the people who administer the Canada Pension Plan in Ottawa.

H. Foreign property

Under the *Family Law Act*, the court can make orders about family property that is located outside of British Columbia, including about the:

a) safekeeping of the foreign property;
b) possession of the property; and,
c) ownership of the property.

The court can decide to divide property or family debt inside British Columbia to compensate for property outside of British Columbia instead of trying to divide it.

➔ *Remember that the court can also divide excluded property between spouses if it can't divide property outside of British Columbia.*

I. Children's Property

Children sometimes get large amounts of money or property from inheritances or court awards. Under the new law, a child's guardians are not automatically the trustees of the child's property, except for property below a certain value or of a certain type that will be decided by regulation.

However, a guardian may apply to court to be appointed as trustee for the child's property. Only the Supreme Court can make orders about children's property.

VI. Family Violence and Protection Orders

A. What is family violence?

"Family violence" is defined in very broad terms in section 1 of the new law, and includes obvious things like physical abuse as well as:

a) sexual abuse;
b) attempts to physically or sexually abuse someone;

c) psychological and emotional abuse, including by harassing, stalking or intimidating someone, or by restricting their liberty; and,
d) in the case of children, being exposed to family violence.

Family violence does not include a person's use of force to protect him- or herself, or someone else, from family violence.

B. Duties of professionals

Family justice counsellors, mediators, lawyers, arbitrators and parenting coordinators are required to assess for family violence and the extent to which family violence affects someone's safety or ability to negotiate, and to discuss how different family dispute resolution processes may or may not be appropriate.

C. Determining children's best interests

To decide what is in a child's best interest, parents and judges must consider all of the needs and circumstances of the child and a number of factors that are listed at section 37 of the new law. The best interests factors include the impact of any family violence on the child.

When family violence is an issue, parents and judges must consider an additional list of factors to assess the impact of the family violence on the child and on a person's capacity to care for the child. The family violence factors are set out at section 38 and include:

a) the nature and severity of the family violence;
b) the recency and frequency of the family violence;
c) whether the family violence is situational or suggests a pattern of coercive and controlling behaviour;
d) whether the family violence was directed to the child and the extent to which the child was exposed to the family violence; and,
e) the harm caused to the child's safety and well-being.

The new law also says that an agreement or order is presumed not to be in the best interests of a child unless it protects the child's safety and well-being to the greatest extent possible.

D. Protection orders

1. What are protection orders?

The court can make an order against one family member to protect another family member. Protection orders can include orders:

a) restricting contact and communications;

b) requiring a person to stay away from someone else's home, school, place of employment or place of business;
c) prohibiting stalking;
d) prohibiting a person from possessing weapons; and,
e) requiring the police to remove a person from the family home.

Protection orders remain in force for one year, unless the protection order says otherwise, and can be renewed.

2. Who can ask for a protection order?

A person at risk of family violence, or someone on that person's behalf, can ask the court for a protection order.

Applications for protection orders can be made without notice to anyone else, and may be made whether there is an existing family law court action or not.

3. What happens when a protection order conflicts with another order?

If a protection order conflicts with another order made under the *Family Law Act*, like an order for parenting time or contact with a child, the parts of the earlier order that are conflict with the protection order are suspended until either order is changed to remove the conflict or until the protection order expires.

This rule applies to orders that are like protection orders and are made under the *Criminal Code* or under the laws of another jurisdiction.

4. How are protection orders enforced?

Protection orders cannot be enforced under the *Family Law Act* or the provincial *Offence Act*. They can only be enforced under section 217 of the *Criminal Code*, which makes breach of a court order a criminal offence.

The new law directs police officers to take action to enforce a protection order, and to use reasonable force if necessary.

VII. Out of Court Processes

A. What are the alternatives to going to court?

Under the new law, processes that help people resolve family law problems outside of court are called "family dispute resolution" processes. Family dispute resolution processes include:

a) assistance from family justice counsellors;

b) mediation, collaborative processes and arbitration; and,
c) parenting coordination.

People can make an agreement that they will resolve a family law problem, or family law problems that may arise in the future, using a family dispute resolution process.

B. How are family dispute resolution processes supported?

1. Duties of professionals

Family justice counsellors, mediators, lawyers and arbitrators are required to tell people about the different ways that family law disputes can be resolved outside of court.

Lawyers are also required to certify that they have told their clients about family dispute resolutions processes when they start court actions.

2. Duties of parties making agreements

People who are trying to resolve family law problems outside of court are required to provide each other with "full and true information." Agreements about spousal support and the division of property and debt can be set aside for a number of reasons, including if:

a) a spouse did not make full disclosure of financial information; or,
b) a spouse took advantage of the other spouse's lack of knowledge or emotional upset.

However, when full disclosure is made, agreements about spousal support and the division of property and debt that were fairly negotiated are harder to set aside under the new law than they were under the old law.

3. Status as a "spouse"

Court actions about child support paid by stepparents, spousal support or the division of property and debt must be started within two years of the date of divorce for married spouses, and two years of the date of separation for unmarried spouses.

Under section 198 of the new law, the counting of time for two-year limit is suspended while the spouses are involved in a family dispute resolution process with a family justice counsellor, mediator, lawyer or arbitrator.

➔ *Remember to tell people that they will not lose their status as a "spouse" while they are involved in a family dispute resolution process with a family dispute resolution professional. As long as they were a "spouse" when they began the dispute resolution process, they will be a spouse able to make a claim about child support paid by*

stepparents, spousal support or the division of property and debt if the dispute resolution process does not resolve these issues.

C. Mediation

Family justice counsellors, mediators and lawyers who have special additional training can help people resolve a family law dispute through mediation.

In mediation, the mediator helps people reach a settlement. Although some mediators also give information about the law and may offer an opinion about a person's position, mediators do not make decisions for people and do not have the power to impose a settlement.

When mediation is successful, the parties will usually sign a separation agreement to document their settlement. Separation agreements can be filed in court and be enforced like court orders.

➔ *Note that the government is making new rules about the training people have to have to work as family law mediators. The rules will be released around the time that the new law comes into effect.*

D. Collaborative processes

Lawyers who have special additional training can help people resolve a family law dispute through collaborative processes. When people agree to use a collaborative process, they and their lawyers sign an agreement that they will use their best efforts to resolve the dispute outside of court, and that if the parties do have to go to court they will hire new lawyers.

Collaborative processes work like negotiation but involve other professionals when their participation will help the parties to reach a settlement:

a) clinical counsellors or psychologists can be involved as "divorce coaches," helping the parties work through their emotions;
b) clinical counsellors or psychologists can be involved as "child specialists," giving advice about parenting schedules and how the children are experiencing the parties' separation; and,
c) accountants, appraisers and tax specialists can be involved to help people figure out complicated financial problems.

When a collaborative process is successful, the parties will usually sign a separation agreement to document their settlement. Separation agreements can be filed in court and be enforced like court orders.

E. Arbitration

In arbitration, a person with special training, often a lawyer, resolves a family law dispute by making a decision, called an "award," that is binding on the parties like a court order.

Although arbitration can be a lot like going to court, it has a few advantages:

a) the arbitration hearing can be scheduled whenever everybody is available without having to wait on trial scheduling;
b) arbitration hearings happen in private, often in the arbitrator's office boardroom;
c) the parties can choose the rules of the arbitration process; and,
d) the arbitrator can decide a dispute without hearing from witnesses if the parties want, for example by hearing the parties' arguments, by reading the parties' documents or by reading the parties' affidavits.

The result of an arbitration process is the arbitrator's written award. The arbitrator's award can be filed in court and be enforced like a court order.

➔ *Note that the government is making new rules about the training people have to have to work as family law arbitrators. The rules will be released around the time that the new law comes into effect.*

Arbitration in British Columbia is governed by the *Commercial Arbitration Act*. The *Family Law Act* will make a number of changes to this law to improve how it deals with family law problems.

F. Parenting coordination

Social workers, counsellors, psychologists, mediators and lawyers who have special additional training can help people resolve disputes about the care of children through parenting coordination. Parenting coordinators are appointed by the parties' agreement or by a court order, and are appointed for terms ranging from six months to two years. A parenting coordinator's appointment can be renewed.

Parenting coordination is only used where the parties have an agreement or a final court order about parental responsibilities, parenting time and contact, and is meant to help with:

a) implementing the parts of the agreement or order about children;
b) improving how the parties deal with conflict about their children; and,
c) improving how the parties communicate with each other.

Parenting coordinators try to resolve disputes about children by helping the parties find a settlement, like a mediator. However, when a settlement cannot be reached or the dispute is urgent, the parenting coordinator may make a decision resolving the dispute, called a "determination," like an arbitrator. A parenting coordinator's determination can be filed in court and be enforced like a court order.

Parenting coordinators cannot help with child support, spousal support or the division of property and debt.

➔ *Note that the government is making new rules about the training people have to have to work as parenting coordinators and about the problems parenting coordinators can help with and those that they can't. The rules will be released around the time that the new law comes into effect.*

VIII. Court Processes

A. Which court deals with which family law problem?

The powers of the Provincial Court are pretty much the same under the *Family Law Act* as they are under the *Family Relations Act*. The Supreme Court can deal with all family law problems, but the Provincial Court can only deal with problems about the care of children, child support and spousal support.

	Provincial Court	**Supreme Court**
Divorce Act claims		✓
Family Law Act claims	✓	✓
Divorce		✓
Parentage of children	limited	✓
Care of children	✓	✓
Time with children	✓	✓
Child support	✓	✓
Spousal support	✓	✓
Property and debt		✓
Children's property		✓
Protection orders	✓	✓
Asset restraining orders		✓
Enforcing agreements	limited	✓
Enforcing orders	limited	✓

As a result, the Provincial Court can make declarations about the parentage of a child, but only if necessary to handle a claim within its jurisdiction. The Provincial

Court can also enforce agreements and orders, but only the parts of agreements or orders that are within its jurisdiction.

B. What happens when there's an action in each court?

Starting an action in one court doesn't stop an action being started in other court, unless the claims made in the second action have already been dealt with by the court in the first action. Section 194 of the new law talks about what happens when there is an action in each court:

a) the making of an order by one court doesn't stop an application in the other court, unless the application is about the same thing as the order made by the first court;
b) a court can refuse to deal with a claim until the claim has been dealt with by the other court; and,
c) the Supreme Court can consolidate a Provincial Court action with its own action so that both are handled as a single action in the Supreme Court.

The Supreme Court can change a Provincial Court order to accommodate an order it is making. The Supreme Court cannot otherwise change Provincial Court orders except as the result of an appeal.

C. Managing people in court and court processes

1. Guiding principles

The new law says that court actions should be run with as little delay and formality as possible, and in a way that promotes cooperation between parties and protects adults and children from family violence.

The court is required to encourage parties to focus on the best interests of their children and minimize the effect of conflict on their children.

2. Preventing misuse of court processes

If a party is frustrating or misusing the court process, the court can make an order prohibiting the party from making further applications without permission. When making such orders, the court can also:

a) make the order last for a specific period of time, or until the party has complied in another order;
b) require the party to pay another person's expenses; and,
c) make the party pay up to $5,000 to a person or as a fine.

➔ *Note that these orders are a lot like the orders available to the Supreme Court under section 18 of the Supreme Court Act for "vexatious litigants."*

3. Conduct orders

Under section 222 of the new law, the court may make a "conduct order" to:

a) encourage settlement;
b) manage a party's behaviour that is frustrating settlement; and,
c) prevent misuse of the court process.

Conduct orders include orders:

a) that the parties participate in a family dispute resolution process;
b) that one or more of the parties, or a child, attend counselling;
c) restricting communication between the parties; and,
d) that a party continue to pay for debts and services related to the family home, like paying the mortgage or paying the gas bill.

➔ *Note that conduct orders restricting communication can also be made as protection orders.*

4. Case management orders

Conduct orders include "case management orders." Case management orders include orders:

a) striking out all or part of a claim or application;
b) delaying a court action while the parties participate in a family dispute resolution process; and,
c) requiring that all other applications be heard by the same judge.

D. How are orders enforced?

Some orders, like orders about parenting time and contact, have their own enforcement procedures.

Where an order under the new law doesn't have a specific enforcement procedure, the general enforcement provisions of the new law are used. Under section 230, the court may enforce an order by requiring a party to:

a) post security in court to guarantee his or her future good behaviour;
b) cover the expenses of the other party resulting from his or her conduct; or,
c) pay up to $5,000 to another person or as a fine.

Where no other order will get a party to obey a court order, the court may order that the party be imprisoned for up to 30 days.

Both the Provincial Court and the Supreme Court can enforce orders.

IX. Transitional Provisions

A. Children

If an agreement or order, made before the new law comes into force, gives someone custody or guardianship, that person is a guardian under the *Family Law Act* with parental responsibilities and parenting time.

If an agreement or order gives a person access without giving that person custody or guardianship, that person is not a guardian and has contact with the child.

B. Dividing property and debt

Unless married spouses agree otherwise, after the new law comes into force:

a) an action to divide assets under the *Family Relations Act* should be continued as if the law had not been cancelled; and,
b) an action to enforce or set aside an agreement made when the *Family Relations Act* was in effect should be made under that law as if the law had not been cancelled.

➔ *Note that these provisions will not apply to unmarried spouses since unmarried spouses have no property rights under the Family Relations Act.*

4. Family

- **Understanding Mobility Issues in Family Law**
  - On the Move: Relocation under the FLA

THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

ON THE MOVE…

(Relocation under the Family Law Act)

Presentation by Agnes Huang
for the Provincial Training Conference

November 20, 2012

The Goal

The [Relocation] Division's goal is to introduce some **certainty** to this area of law by mandating **notice** of a proposed move, defining what constitutes **relocation** and directing courts about both circumstances that **should be considered** and those that **should not**.

The introduction of certainty will reduce the need for lengthy litigation and, thus, reduce the costs associated with disputes over relocation.

Ministry of Justice, The Family Law Act Explained

What law applies?

Depends…

a) Are the parties married?
b) Is the proceeding in the Supreme Court or the Provincial Court?

In general, if the parties are married and the proceeding is in the Supreme Court, the provisions in the *Family Law Act* will not apply.

Guardianship is Key

- No more *de facto* guardianship or custody, as under the *Family Relations Act*

Under the *Family Law Act*

- Parents are the guardians of the child, unless an agreement or Order provides otherwise: s. 39
- Only guardians may have parental responsibilities: s. 40, which includes decisions about where a child resides or with whom the child lives or associates: s. 41
- Only guardians have the right to challenge a relocation: s. 69

Changing a Child's Residence

section 46(1)

Applies if:

- No written agreement or Order respecting parenting arrangements;
- Application is made for an Order (under s. 45); and
- A guardian plans to change the child's residence and that change can reasonably be expected to have a significant impact on that child's relationship with another guardian.

Informal Parenting Arrangements

section 48

Applies if

- No agreement or Order respecting parenting arrangements; and
- Guardians have had an informal parenting arrangement in place for a period of time, establishing a **normal routine** for the child.

Guardian must not change the informal parenting arrangements without consultation with the other guardians, unless consultation would be unreasonable or inappropriate in the circumstances.

Notice of Application

section 52

Notice of the application must be given to:

- each parent or guardian of the child affected by the application;
- each adult person with whom the child usually lives and who generally has care of the child; and
- any other person to whom the court considers it appropriate to serve with notice.

The exception is if there are CFCSA (child protection) Orders

The Court can grant an exemption from the notice requirement if the Court considers it appropriate.

Yes or No to Change of Residence

section 46(2)

Determined along with parental arrangements (parenting responsibilities and parenting time) and contact.

Factors:

- Best interests of the child: s. 37(2);
- Reasons for the change in location of the child's residence; and
- *Must not* consider whether the moving guardian would do so without the child (the improper double-bind question).

Part 4, Division 6 – Relocation

sections 65 to 71

Applies if

- Written agreement or Order respecting parenting arrangements or contact; and
- Guardian plans to relocate himself or herself or the child, or both.

section 65(2)

Definition of Relocation

section 65(1)

“Relocation" means a change in the location of the residence of a child or child's guardian that can reasonably be expected to have a **significant impact** on the child's relationship with

- a guardian, or
- one or more **other persons** having a **significant role** in the child's life.

Notice of Relocation

section 66

Requirements:

- To all other guardians and persons having contact with the child;
- At least 60 days in advance; and
- In writing, with the date of the relocation and the name of the proposed location.

Court can grant exemption if

- Notice cannot be given without incurring a risk of family violence; or
- No ongoing relationship between the child and other guardian or contact person.

Application for exemption can be brought *ex parte.*

Resolving Relocation Issues

section 67

After notice is given:

- Guardians and contact persons must use **best efforts** to cooperate in resolving any issues relating to the proposed relocation.

However, nothing prohibits:

- A guardian from bringing an application for an Order respecting relocation (under s. 69); or
- A person with contact from bringing a application for an Order respecting contact (under ss. 59 or 60).

Objecting to Relocation

section 68

If the other guardian objects to the relocation of a child, that guardian must

- File an application for an Order to prohibit the relocation (under s. 69),
- Within 30 days after receiving notice of the plan to relocate the child.

Kicker:

If the other guardian does not initiate an application in Court objecting to the relocation within 30 days of being given notice, then the relocation may occur on or after the date stated in the written notice.

Orders Respecting Relocation

section 69

Court can make an Order permitting or prohibiting the relocation.

Test:

- Best interest of the child: s. 37(2);
- Good faith; and
- Reasonable and workable arrangements to preserve the relationship between the child and the other guardians, persons entitled to contact, and other persons who have a significant role in the child's life.

Who has the Onus of proof? Depends on whether or not there is **substantially equal** parenting time.

Not Substantially Equal Parenting Time

section 69(4)

Relocating guardian must satisfy the Court that

- The proposed relocation is made in good faith; and
- She/he has proposed reasonable and workable arrangements to preserve the relationships.

If Court is satisfied of the above, then relocation **must** be considered to be in the best interest of the child unless other guardian satisfies the Court otherwise.

Onus is on the other guardian.

Substantially Equal Parenting Time

section 69(5)

Relocating guardian must satisfy the Court that

- The proposed relocation is made in good faith;
- She/he has proposed reasonable and workable arrangements to preserve the relationships; and
- The relocation is in the best interests of the child.

Onus is on the relocating guardian.

Factor *Not* to be Considered

section 69(7)

The Court *must not* consider whether a guardian would still relocate if the child's relocation were not permitted (the improper double-bind question).

Other Orders

section 70

If the relocation is permitted, the Court can make other orders

- allocating parenting arrangements between the guardians (see s. 41 – parental responsibilities); and
- if necessary, requiring the relocating guardian to post security in any form the Court directs, or transfer specific property to a trustee.

In making such an Order, the Court **must seek to preserve**, to a reasonable extend, parenting arrangements under the original agreement of Order.

BUT, if the relocation is not permitted, that does not constitute a change of circumstance for the purpose of applying to vary the parenting arrangements: s. 71.

Good Faith

section 69(6)

In determining "good faith", the Court must consider all of the relevant factors, including:

- The reasons for the proposed relocation;
- Whether the proposed relocation is likely to enhance the general quality of the child's life and of the relocating guardian's life, including increasing emotional well-being or financial or educational opportunities;
- Whether proper notice was given; and
- If there are any restrictions on relocation in the written agreement or Order

Best Interests of the Child

section 37(2)

To determine the "best interests of a child", the Court must consider all of the child's needs and circumstances, including the following:

(a) the child's health and emotional well-being;

(b) the child's views, unless it would be inappropriate to consider them;

(c) the nature and strength of the relationships between the child and significant persons in the child's life;

(d) the history of the child's care;

(e) the child's need for stability, given the child's age and stage of development;

(f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;

Best Interests of the Child

section 37(2)

[Family Violence factors]

(g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;

(h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;

(i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;

(j) any civil or criminal proceeding relevant to the child's safety, security or well-being

Assessing Family Violence

section 38

Court must consider:

- Nature and seriousness of the family violence
- How recent
- Frequency
- Psychological or emotional abuse - a pattern
- Directed towards child
- Exposure by child
- Harm to child's physical, psychological and emotional safety
- Steps person responsible for family violence has taken to prevent further family violence
- Other relevant matters

Some Factors

The relevant factors depend on the circumstances of each case, but here is a sampling of factors:

- Relative parenting capabilities of each parent
- Parent's ability to discharge parenting responsibilities (including cooperating with other parent)
- Child's relationship with parent and parent's new partner
- Access to and support of extended family
- Child's connection cultural, linguistic or religious community
- Difficulty in exercising proposed access
- Quality of proposed access if move is allowed

Some Factors (cont.)

- Psychological and emotional well-being of the child
- Effect on child's academic situation
- Disruption of child's existing social and community support and routines
- Child's needs re medical, psychological or educational assistance (for example), and availability of such services.
- Desirability of proposed new family unit for child
- Separation of siblings
- Retraining/educational/work opportunities for the moving parent
- Age of the child and the child's views

Cautions/Considerations

- Timing
- Process
- Cost
- Evidence

4. Family

- **Helping Self-Represented Clients in Family Law**
  - Helping Self-Represented Clients in Family Law Powerpoint presentation
  - Sample Affidavit on Cancelling Arrears

THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

Provincial Advocates Training Conference 2012

HELPING SELF-REPRESENTED CLIENTS WITH FAMILY LAW ISSUES

Kathryn J. Ferriss

Who are Representing Themselves?

Justice Access Centre Stats

- Approximately equal number of men and women
- About 70% have some post-secondary education
- Over 70% are dealing with family issues
- About 80% make $40,000 per annum or less (over 40% make less than $20,00 per annum)
- Top three family issues:
  divorce – 25%
  child support – 19%
  custody/access – 22%

The Self-represented

- Those who **cannot** afford a lawyer
- A few who **will not** pay for a lawyer
- Those who have paid for a lawyer and can no longer afford one
- Those who do not qualify for legal aid because their problem is not one that is covered or whose legal aid referrals have run out
- Many who really cannot navigate the court system because of language difficulties or depression and other mental health issues.

What are they looking for?

- They are usually in a state of panic
- Advice may not be heard exactly as it is said or meant.
- Usually they want someone to at least prepare their court documents for them. They can't concentrate enough to prepare their own documents.
- Often they have appointments set up with more than one advocacy or self-help program and it seems that the busier they are looking for just the right help, the less time they have to work on the problem.

Minnesota Judicial Branch Self-Help Center Website

You need a lawyer if: (these are only examples)

- You want legal advice.
- You do not fully understand papers you received from the other party side or from the court. (Court administration may be able to answer *some* questions for you.)
- You cannot afford to lose your case.
- You have a complicated case.
- You want to appeal a case.
- You are charged with a crime.
- You want to sue someone, but you don't know the legal theory or basis for your claim.

Minnesota Judicial Branch Self-Help Center Website

You may not need a lawyer if: (these are only examples)

- You understand your case well enough to explain it to a judge.
- You don't get overly nervous speaking in public, like a courtroom.
- You are organized and keep accurate records.
- You can write neatly or type.
- You have time to prepare papers, make copies, learn the required steps, file papers with the court, do legal research and attend court hearings.

Minnesota Judicial Branch Self-Help Center Website

You may not need a lawyer if:

- You have time to respond (right away) to papers you receive from the other party.
- You are able to read, understand, and respond promptly to all papers you get from the Court.
- Your case is relatively simple and no one will come forward to argue against what you want.
- You are comfortable negotiating with the other side or their lawyer, if represented.
- You speak, read, and write English well.
- When you read state laws and court rules and cases, you understand what you have read.

Additional Requirements for Family Law Cases

- You are able to speak and listen calmly to your estranged partner and his or her lawyer, even if derogatory comments are made about you.
- You are comfortable cross-examining your estranged spouse in court before a judge
- You are comfortable examining or cross-examining family and friends at court in front of a judge and your estranged partner.
- You are able to be objective about the merits of your own case.

What can we do for them?

Role of Advocate

- Make sure client has legal advice.
- Make sure you know what the client has to do.
- Make sure the client knows what you cannot do.
- Help the client do the ground work where possible.
- Offer suggestions on how the client can do the next steps.
- Help the client prepare the paper work for court if possible.

Role of Lawyer

- Review the entire case and consider all of the options that the client may have.
- Advise the client as to the most appropriate path or paths to pursue.
- Clearly explain to the client what he or she needs to do and to write it down for the client.

Deciding whether a Client needs Legal Advice

- Do **you** meet the requirements in the Minnesota Judicial Branch Self-Help Centre website?
- Do you know what court it should be in?
- Is it a complex case?
- Are there jurisdictional issues?
- Set your own boundaries.
- If you have any doubts or questions, you should get the client legal advice right away.

Jurisdictional Issues

- Supreme Court vs. Provincial Court
- Family Relations Act applications and CFCSA proceedings
- Applications regarding children who are not habitually resident in British Columbia
- Applications where there is a foreign or out of province order or one of the parties lives outside of the province

Choice of Court

- Telling someone where to commence an application is legal advice.
- Giving someone information about options is legal information.
- Be careful not to inadvertently give legal advice by making Provincial Court sound like it is "cheaper, faster and easier" than Supreme Court because sometimes it is not true.

Choice of Court (Continued)

- If the parties have already started an action in Supreme Court, it may be faster to proceed in Supreme Court.
- If property and spousal support are issues then it should likely be in Supreme Court.
- If client is seeking a divorce and the only outstanding matter is child support, it may be quicker to apply in Supreme Court and the cost may be about the same.

Complex Issues

For example:

- Property division
- Pension division
- Preparation for trial

Don't get sucked in by trying to be helpful.

Support

- Applications for Spousal support
- Applications for Child support
- Applications for reduction or cancellation of child or spousal support under the *Divorce Act* or the *Family Relations Act*, sometimes where one party does not live in BC
- *Family Maintenance Enforcement Act* issues

Applications for Support

- Child and spousal support orders can be made by either the Supreme or Provincial Courts
- Spousal Support Guidelines are available on www.mysupportcalculator.ca
- Spousal support guidelines are not mandatory and clients should get legal advice about their rights.

Tips for filling out forms

- On the Supreme Court Notice of Family Claim (Form F3), estimate the amount of income the client believes the spouse is making and indicate the amount of support sought.
- If you don't do this, and the Respondent does not file a Response to Family Claim, the court may not make a desk order.

Applications for Support

- Most clients applying for support or to change support will need to file a Financial Statement in Form 4 (Provincial Court) or Form F8 (Supreme Court).
- Attachments are set out on the form but include:
  - personal income tax returns for past three years
  - notices of assessment for the past three years
  - proof of income for the current year

Income Tax Returns

- T-4's are available from CRA
- Income tax printouts are available from CRA
- Full tax returns are usually kept by tax service
- CRA provides clinics for filing the current year's income tax returns as long as the client is eligible
- Some service agencies also help with tax returns such as 1st United Mission.

Applications to Reduce or Cancel Support or Arrears

- Application must be made in the same court as support order was made
- FMEA proceedings may be in Provincial Court even though order was originally made in Supreme Court.
- The laws about cancelling or reducing arrears or support are the same in both courts but the procedure is different.

Applications to Reduce or Cancel Arrears and Support

Best ways to assist the client:

- Collect copies of all original orders
- Get a copy of the FMEP Account Statement from when the support started
- Make sure the client has submitted income tax returns for at least the past three years – more if the arrears began to accumulate before that.

Applications to Reduce or Cancel Arrears and Support

- Collect documents showing why there has been a change in the client's financial circumstances
- If possible, help client prepare a draft Financial Statement in Form 4 for Provincial Court and in Form F8 for Supreme Court.
- Write out a chronology of events since the Order was made, if possible.

Applications to Reduce or Cancel Arrears and Support in Supreme Court

- Draft Affidavit - Handout

Applications to Reduce or Cancel Arrears

- Good idea to make a chart listing annual income, amount ordered to be paid, amount guidelines would require, amount actually paid, and the amount owing or overpaid for the period.
- Check if there are some periods where the client would have to pay more. The Judge can always adjust upwards!

Applications under FMEA

- FMEP Outreach Workers are often a great help if there is a problem dealing with the Enforcement Officer
- Most applications are made in Provincial Court using a Notice of Motion in Maintenance Enforcement Proceedings and an Affidavit to explain the situation.
- Statement of Finances may be needed as well.

Custody, Guardianship and Access

Range in complexity

- **Simpler**: The child has been living with the parent for some time and there has been limited involvement by the other parent.
- **Complex:** There is family violence, the Ministry is involved, the child has been brought to BC by one parent, or the family is high conflict.

Custody, Guardianship and Access

- Set boundaries on your role.
- For complex matters, try to get the client legal aid, pro bono or duty counsel to assist.
- Pick the areas you are competent to help with and resist the rest.

Family Violence

- Safety planning
- Try to get a lawyer from legal aid
- Referrals to agencies who assist victims of family violence
- Family Justice Counsellors are trained to assist with safety planning

Divorce

- The court will not grant a divorce order if it is not satisfied that adequate provisions have been made for the children.
- If Notice of Family Claim is to be served outside of the country, get a lawyer to check over the form to make sure it does not have to be served twice.

Property

- Orders restraining the other party from disposing of property
- Division of property where parties are not married
- Family property in other provinces or countries
- Property issues are more complex and should be handled by a lawyer.
- More liability if a mistake is made.

Questions and Discussion

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

[Rule 21-1 of the Supreme Court Family Rules applies to all forms.]

I, [name], of [address], [occupation], SWEAR (OR AFFIRM) THAT:

1. I am the [Claimant/Respondent] in this matter and as such have personal knowledge of the facts and matters hereinafter deposed to save and except those facts and matters stated to be made on information and belief and where so stated, I verily believe the same to be true.

BACKGROUND

2. I was born on _____ and am _____years old. The Claimant/Respondent was born on _____ and is _____years old.
3. The [Respondent/Claimant] and I began to live together in or about _____.
4. We were married on _____.
5. There are ____ [number] children of the marriage, namely:

_____, born _____

_____, born _____

_____, born _____

www.DIVORCEmate.com

6. The [Respondent/Claimant] and I separated on or about _____ and have not resided together since.
7. The [Respondent/Claimant] and I were divorced on or about _____.
8. After our separation, the children lived with _____.

COURT ORDERS [List all Orders made]

9. On _____ an interim order was made by Master/the Honourable Judge/the Honourable ___Justice _____granting _____. Attached hereto and marked as Exhibit "__" is a true copy of the interim order.

10. On _____, a final order was made by the Honourable Mr./Madam Justice _____ granting a divorce and _____. Attached hereto and marked as Exhibit "__" is a true copy of the final order.

11. I am currently in arrears in the amount of $_____ including interest. I also owe $_____ to the Province of British Columbia in default fees. Attached hereto and marked as Exhibit "__" is a true copy of the Statement of Account from the Family Maintenance Enforcement Program dated _____.

EDUCATION AND TRAINING

12. The highest level of education I have completed and the dates of completion are as follows:

    _____

    _____:

13. My employment history is as follows:

    _____

    _____

14. My workplace skills are as follows:

    _____

FINANCIAL SITUATION AT THE TIME THE ORDER WAS MADE

15. When the final order was made, I was employed as a _____ and earned $_____ per annum gross. Attached hereto and marked as Exhibit "__" is a true copy of my Financial Statement filed at the time of the order.

CHANGES TO MY FINANCIAL SITUATION SINCE THE ORDER WAS MADE

16. There has been a significant and long lasting change in my ability to pay child support since the final order was made as follows:

_____

_____

_____

17. I was unable to pay the child support as it became due because:

_____

_____

_____

_____.

18. I have made efforts to find employment, specifically

_____

_____

_____

_____

19. I have made the following efforts to pay the support as ordered:

_____

_____

_____

_____

_____.

Attached hereto and marked as Exhibit " " is a true copy of my resume.

20. It would grossly unfair not to cancel or reduce the arrears of support because:

[You cannot use hearsay evidence such as letters from employers attached to your affidavit. You will need to have an affidavit sworn by the person giving the information to the court.]

[Attach any documentation proving your case such as medical records and letters, records of employment, etc]

SWORN (OR AFFIRMED) BEFORE ME at
[Sworn City]
British Columbia,
on [dd/mmm/yyyy]

A commissioner for taking
affidavits for British Columbia

[print name or affix stamp of commissioner]

[The following endorsement must be completed if required under Rule 10-4 (7) of the Supreme Court Family Rules.]

ENDORSEMENT OF INTERPRETER
[if applicable]

I, [name], of [address], [occupation], certify that:

1. I have a knowledge of the English and [specify] 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 [specify] 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 language and the person swearing or affirming the affidavit appeared to fully understand the contents.

Date: [dd/mmm/yyyy].

Signature of interpreter

4. Family

- **Financial Issues and Separation**
  - Financial Issues Workshop
  - Financial Statement Scenario
  - Worksheet

THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

Financial Issues in Family Law



1

West Coast LEAF's mission is to achieve equality by changing historic patterns of discrimination against women through BC based equality rights litigation, law reform, and public legal education.



2

West Coast LEAF's Family Law Program

West Coast LEAF has a long standing interest in family law and the impact of this area of law on women's equality.

The goals of the FLP are:

- To identify family law issues that create barriers to women's right to equality;
- To address systemic inequalities that result from the family law justice system;
- To advocate for the rights of women to access the justice system;
- To develop resources on family law issues for advocates, community groups, and women navigating family law;
- To bring together community advocates and family law lawyers to work together in the delivery of family law services to women most in need;
- To make submissions to the provincial government to recommend changes to the law that will support the substantive equality rights of women;
- To ensure BC families are healthy and safe by providing a voice for reform of the family law system when needed.

Separation Agreements: *Your Right to Fairness*



- **Changing or cancelling a separation agreement**
- Based on *Rick v. Brandsema*, 2009 SCC 10
- Very difficult – courts do not like interfering in private contracts
- Better to help your clients avoid signing unfair separation agreements in the first place!

Jurisdiction over family law matters

Provincial Court

- Custody, guardianship and access
- Child support
- Spousal support
- Personal protection orders

Provincial court does not have the jurisdiction to make orders for the division of property.

No filing fees or court hearing fees

BC Supreme Court

- Divorce
- Division of family property and debts
- Both *Divorce Act* and *Family Law Act*

Divorcing spouses must go to the BCSC to obtain their divorce, but may use the provincial court to deal with other family issues prior to divorce

Property Division under the new BC *Family Law Act*

- The **presumption** is for an equal, 50-50 split of family property and family debt, regardless of which spouse paid for the property or incurred the debt (s. 81)
- ***NEW*** - definition of "spouse" include common law couples who've lived together at least 2 years

Equal entitlement and responsibility

81 Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 *[Pension Division]*,

(a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and

(b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

"…on separation…"

Triggering Event

• Right to half interest in property / Responsibility for half of debt is "triggered" upon separation

•Important because actions of one spouses AFTER triggering event (unilateral decision to sell an asset, incurring a big debt, bankruptcy) should not affect other spouse's rights

•Spouses may be separated even though they are still living in the same house. If there is a dispute about when separation occurred, the courts will look at communications or actions taken by the spouses that indicate an intention to separate (s. 3(4))

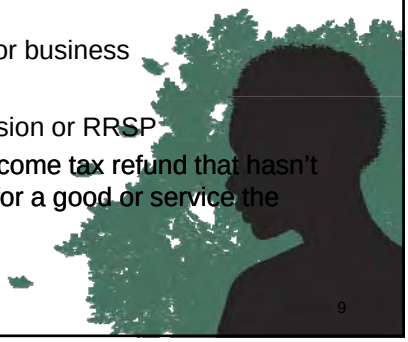
Time line: Unmarried parties must bring a claim for property division within two years of separation; married couples must bring their claims within two years of divorce.

A note on debts

- ***NEW*** - "family debts" now included in the FLA
- Family debts are debts you take on during your relationship that:
  - are still owed on the date you separate, or
  - are taken on after your separation date to maintain family property
- Even though the FLA says debt is shared equally, if your name is the one on the debt, the creditor has the right to come after you alone for repayment (s. 82)

Family Property

- **Family property** is property that either or both spouses acquire while they are together, plus the increase in value of each spouse's excluded property.
- There is a **presumption** that spouses share family property **equally**. See section 84(2) for examples of assets that are considered family property:
  - a share or interest in a corporation or business
  - money held in the bank
  - a spouse's entitlement under a pension or RRSP
  - property owing to spouse (eg: an income tax refund that hasn't yet been received; payment owing for a good or service the spouse has provided)



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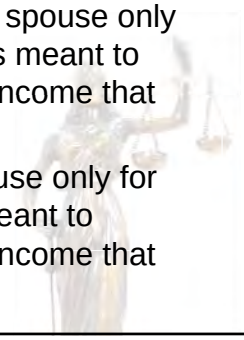
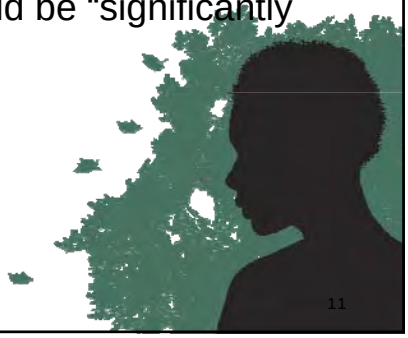
Excluded Property

- Remains the sole property of the owning spouse:
  - any property that a spouse **owned before the relationship** started
  - **gifts and inheritances** given to only one spouse during the relationship
  - **compensation** payments made to one spouse only for personal injury or loss (unless it was meant to compensate both spouses or involves income that was lost during the relationship)
  - **insurance** payments made to one spouse only for personal injury or loss (unless it was meant to compensate both spouses or involves income that was lost during the relationship)



Reapportionment

- The Court may order an **unequal** division of family property/debts if a 50-50 division would be “significantly unfair”
- Reasons an equal split would be “significantly unfair”?



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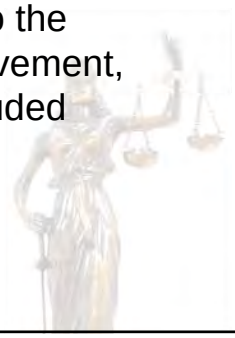
Unfairness factors (s.95)

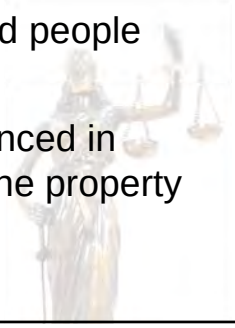
- the duration of the relationship
- a spouse’s contribution to the career or career potential of the other spouse
- whether family debt was incurred as part of the normal course of the relationship between the spouses (or was it incurred by one spouse alone to pay for things only they used and benefited from?)
- if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the debt
- whether a spouse contributed to a significant decrease or increase in the value of family property or debt after the date of separation
- the fact that a spouse sold or converted family property after separation in a way that adversely affected the other spouse’s rights

- Court may also divide **excluded property** if it would be unfair not to do so, considering (s. 96)
  - Duration of relationship
  - The spouse's direct contribution to the preservation, maintenance, improvement, operation or management of excluded property.



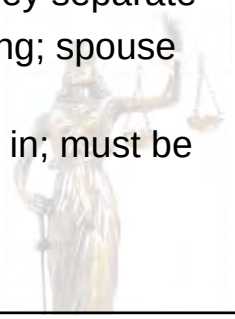
Protecting Family Property

- **Certificate of Pending Litigation**
  - Registered with the Land Title and Survey Authority against real property (eg: home)
  - Prevents transfer or re-mortgaging
  - Available to married and unmarried people
  - Property must be located in BC
  - Litigation must have been commenced in BCSC, must include claim about the property



Protecting Family Property

- **Entry under *Land (Spouse Protection) Act***
  - An entry against title of home; prevents sale
  - Now open to common law spouses
  - Available only while spouses are together; Act ceases to protect property once they separate
  - Helpful to women thinking of leaving; spouse not normally notified
  - Applies only to home spouses live in; must be located in BC



Protecting Family Property

- **Temporary orders protecting family property** (s.91 of FLA, s.67 of FRA)
  - Like a restraining order
  - Breach → contempt of court
  - Must have commenced litigation in BCSC
  - Must apply in Chambers; courts grant them almost automatically
  - Covers real property and personal property located in BC, as well as personal property located outside the province



Interim Orders

- S. 89: court may order “interim distribution of family property” to fund the cost of the litigation, including costs of investigations
- S. 90: court may order “exclusive occupation” of family home, or use of personal property stored at the home



Figuring out the Family’s Financial Picture

- Both spouses have a **duty to disclose**
- “A party to a family law dispute must provide to the other party **full and true information** for the purposes of resolving a family law dispute.” (FLA s.5)
- Failure to disclose can lead to an agreement being set aside by the courts



Financial Statements

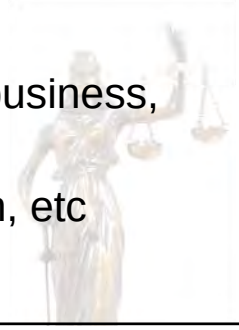
- A list of income, assets, expenses and debts
- A sworn document – must be complete and accurate
- A party's credibility can be challenged in court if their financial statement does not make sense, exaggerates, leaves out information, or contains untrue statements

Financial Statements

- Must contain…
  - Tax returns for last 3 years
  - Paystubs or EI/WCB/social assistance statements
  - Business records
  - Assessments for real property (house, land)
  - Breakdown of wages paid to non-arm's length employees (for self-employed people and people controlling corporations)

Helping your client prepare a financial statement

- Safety first!
- Bank statements, list of accounts, institutions
- Copies of credit card statements
- Copies of tax returns
- List of assets: home, vehicles, business, toys, etc
- List of debts: mortgage, car loan, etc



Scenario:

Your name is Aamina, and you have recently separated from your husband of 12 years, David. You are living in the family home, and David has temporarily moved in with his parents while he looks for an apartment. You have two children together: Shahin who is 3 years old and Leila who is 7 years old. David has always been kind to you, so long as you worked hard to keep the relationship together.

David works as an engineer. You're not sure what he earns as you don't have access to any of his financial records or information. You and a friend went online to look at engineering job postings and figure that, based on this information, his income must be around $100,000.

David pays all the bills for things like utilities, cable and telephone. You and David have a joint account for family expenses like groceries. David puts $700 in that account each month. David gave you a credit card to use for clothes and activities for the children, and for anything unexpected. You don't know the credit limit because you've never seen the bill. You're always very careful about using it because David gets upset if you spend too much money. Both the joint account and the credit card are with Royal Bank. You think David may have accounts with other banks because you've seen envelopes in the recycling with logos on them that match logos you've seen in TV advertisements for banks, but you're not sure which ones.

Recently, you started a job as a cashier on weekends and a few days during the week. During the week your mother takes care of Shahin and Leila. You would like to take a few night classes but don't really have a clear idea yet of what you would like to do for work.

David has been taking care of the kids on weekends. He took the car with him when he moved out, which is valued at $10,000. David told you there is still $3,000 outstanding on the car.

You and David purchased a three bedroom townhouse 5 years ago which is valued at 360,000. Since David moved out, you've discovered that the strata fees are $270 a month. Your mortgage payments are $2,200 a month.

Worksheet: Creating a Picture of Finances

To my knowledge we had money in the following banks or institutions:

Name of institution (or whatever you can remember: colour of logo, where it is located etc.)	Type of Account (Savings, Chequing, Credit Card, RRSP etc.)	Whose name is the account in (joint or solely held)	Amount

What assets do you and/or your spouse own? Circle all that apply

House
Vehicle
Vacation Home
Household appliances
Recreational property (eg: snowmobile, boat)
Antiques
Household furniture
Lawnmower/Gardening Equipment
Paintings
Other: _____

Does your spouse have any investments you're aware of?

_____

_____

Does your spouse own a business? Name and nature of the business: _____

_____

Do you know anything about the business's financial situation? Revenues, debts or assets? _____

_____

_____

If your spouse owns a business, does s/he employ anyone with whom s/he does not deal at arm's length? (eg: brother, new partner). If yes, what is their relationship? Do you know what they are paid?_____

_____

We made the following monthly or regular payments:

Item	**How often**	**Amount (estimate)**
Hydro		
Gas (utility)		
Telephone		
Cell phone(s)		
Credit card(s)		
Mortgage/Rent		
Gas (how much would a tank of gas cost)		
Student loan(s)		
Internet and/or cable		

How do you anticipate your expenses changing when you are no longer with your spouse? What additional expenses will you likely incur?

_____ _____

_____ _____

_____ _____

_____ _____

We typically went out to eat:

____ X/week _____X/ month ____rarely

and when we did we paid by: ☐ cash ☐ credit card ☐ debit card ☐ _____

I bought groceries:

____X/week _____ X/month ____rarely

and when I did I paid by: ☐ cash ☐ credit card ☐ debit card ☐ _____

Our monthly grocery bill was: _____

When buying school supplies or items for the children I/we would pay by:

☐ cash ☐ credit card ☐ debit card ☐ _____

List activities that your spouse participates in regularly by themselves or with friends (eg: watching hockey games with buddies at a local bar, playing on a rec soccer team every summer)

Activity	Estimate of how much spent at activity
Example: Watching hockey at friend's house	$10 for beer and snacks

How many days in an average week would your ex-partner work? ___ Approximate hours per day: _____

If the work was seasonal or fluctuated, how many hours would they work during the busy period? _____
During the slower period? _____

When was the busy period (months or weeks)? _____ The slow period? _____

4. Family

- **Changing FMEP Orders: for Recipients and Payors**
  - Introduction to FMEP
  - Summary of Relevant Legislation

THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

AN INTRODUCTION TO
THE FAMILY MAINTENANCE ENFORCEMENT PROGRAM

*The **Family Maintenance Enforcement Act** is an example of what is sometimes referred to as "social legislation". It is designed to address the evil of widespread default in payments required to be made by family maintenance payment orders. In essence it makes available to persons entitled to maintenance payments the power and the resources of the state to enforce payment and thereby alleviate the distress which is the frequent consequence of non-payment. It is of the class of enactment to which the court has traditionally given a "purposive" construction.*

***British Columbia (Maintenance Enforcement Director) v. I.W.A. Forest Industry Pension Plan (Trustees Of)** (1991), 61 B.C.L.R. (2d) 264 (B.C.C.A.)*

INTRODUCTION

1. The **Director of Maintenance Enforcement** (DOME) has been delegated by the Attorney General to carry out the purposes of the **Family Maintenance Enforcement Act** (FMEA), which purposes were aptly described by the BC Court of Appeal in the above-noted quote. The director carries out these purposes through the **Family Maintenance Enforcement Program** (FMEP).

2. In Court proceedings under the FMEA, legal counsel acting for the Director of Maintenance Enforcement appear for the benefit of a "**creditor**", meaning a person entitled under a support order to receive maintenance personally or on behalf of another. A person required to pay maintenance is referred to as a "**debtor**" under the FMEA.

3. Under the FMEA, "**maintenance**" means lump sum or periodic support, and includes special expenses under the Child Support Guidelines, orders for arrears, fines for failing to provide financial information (FMEA s. 14 and s. 22), fixed costs awarded under the regulations in favour of the director or a creditor, taxed costs awarded in relation to anything that comes within this definition, the costs of paternity tests, prescribed fees or expenses, and interest that is or may be imposed under FMEA s. 11.1.

4. An agreement that contains a support provision and is registered under s.121 or s. 122 of the **Family Relations Act** (FRA) is also enforceable as a support order.

PROVINCIAL COURT ENFORCEMENT

5. The FMEP usually enforces support orders through the Provincial Court to take advantage of the ability of the Provincial Court to hear matters summarily (FMEA s. 34) The Provincial Court in turn has established rules to deal with FMEP enforcement.

6. Pursuant to Rule 17 of the Provincial Court (Family) Rules, an applicant must complete a request in Form 23 for any of the following relief:

(a) a summons in Form 7 or a warrant under section 14 (2) of the FMEA;

(b) a garnishing order under section 18 of the FMEA;

(c) a summons in Form 7A to a default hearing under section 19 of the FMEA;

(d) a summons in Form 7 or warrant of arrest for failing to report in accordance with an order under section 22 (1) (a) or (b) of the FMEA;

(e) a summons in Form 7B to a committal hearing under section 23 (1) of the FMEA;

(f) a warrant of execution under section 27 of the FMEA;

(g) a warrant for the arrest of a debtor under section 31 (a) of the FMEA.

7. An applicant must complete a notice of motion in Form 24 for any of the following:

(a) an order for access to information under section 9 of the FMEA;

(b) an order extending the time for filing a statement of finances under section 13 (4) of the FMEA;

(c) an order requiring the debtor to file a statement of finances or prescribed documents or both under section 14 (1) (a) of the FMEA;

(d) an order requiring the debtor to pay an amount on failing to file a statement of finances or prescribed documents under section 14 (1) (b) of the FMEA;

(e) an order for payment by an attachee under section 16 (3) or 24 (6) of the FMEA;

(f) an order determining liability under a notice of attachment or determining a related issue under section 16 (5) of the FMEA;

(g) an order changing an order made under section 21 (1) or (2) of the FMEA;

(h) an order changing the amount exempt from attachment under an attachment order or notice of attachment;

(i) an order setting aside an attachment order made under section 24 of the FMEA;

(j) an order under section 26 (10) of the FMEA discharging or postponing the registration of a maintenance order registered against land;

(k) an order requiring an individual or authorized representative of a corporation, partnership or proprietorship to attend a default hearing or committal hearing and to file financial information under section 39 (1) of the FMEA;

(l) a restraining order under section 46 of the FMEA;

(m) an order that a corporation is jointly and separately liable with the debtor for payments required under the maintenance order under section 14.2 (2) of the FMEA;

(n) an order 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 under section 29.2 (2) of the FMEA.

8. If a support order is filed with the director, both the director and the opposing party must be served with any application.

DEFAULT HEARING AND COMMITTAL HEARING

9. The FMEP will most commonly take two forms of enforcement through the Courts, a default hearing or a committal hearing.

10. A default hearing is authorized under s. 21 of the FMEA. A debtor is summoned to court to show cause why a support order should not be enforced. There are two issues at a default hearing:

    (a) Are there any arrears? A statement of arrears or an affidavit of arrears may be used by the director to prove the arrears (FMEA ss. 40, 41) The onus is then on the debtor to show that the arrears are not as shown.

    (b) Whether the debtor is unable for valid reasons to pay the arrears in full or to make subsequent payments under the support order. The debtor has the onus of proving the inability to pay. FMEA. 36(1) creates a presumption of an ability to pay the arrears owing and the support payments as they become due. If a debtor fails to file a Statement of Finances or any prescribed financial documents, the Court may draw an adverse inference (FMEA s. 36(2))

11. In determining whether a debtor can pay the arrears in full, the Court shall take into account all of the debtor's circumstances, including the income and assets of the debtor's spouse: FMEA s. 21(4).

12. Section 37 of the FMEA states that debt owing to persons other than the creditor is not a defence.

13. As part of the court's powers to gather information on a debtor's finances, a court can order that the debtor file with the court a Statement of Finances or documents prescribed by the FMEA Regulation s. 7. If a debtor fails to file the required documents, he or she could face an order to pay an amount not greater than $5,000.00 for the benefit of the creditor or be imprisoned for a term of not longer than 30 days: FMEA ss. 14, 22. The court can also order a third party to attend a default hearing or a committal hearing and to file with the court certain specified financial information if the court is satisfied that a debtor's association with an individual, corporation, partnership or proprietorship affects the debtor's ability to pay maintenance: FMEA s. 39.

14. Upon finding that arrears exist and a debtor has the ability to pay the arrears in full, the court may make any of the following orders:

(a) that, by completing a statement of income and expenses in the prescribed form, the debtor report as directed by the court to (i) the court, (ii) the director, if the order is filed with the director, or (iii) a person, other than a family court counsellor, designated by name or position by the court;

(b) that the debtor provide, promptly, particulars of each change of residential address, place of employment or business address to (i) the court, (ii) the director, if the order is filed with the director, or (iii) a person, other than a family court counsellor, designated by name or position by the court;

(c) that the debtor either pay immediately an amount specified by the court or, despite section 82 of the *Offence Act,* be imprisoned immediately for a period of up to 30 days;

(d) that the debtor discharge the arrears (i) in one payment by a date the court specifies,

or (ii) by periodic payments in the amounts and on the dates the court specifies;

(e) that, despite section 82 of the *Offence Act* but subject to section 23 of this Act, the debtor be imprisoned for a period of up to 30 days each time the debtor fails to pay, by a date specified in an order under paragraph (d) or subsection (11) (a), (i) the amount due on that date under the order under paragraph (d) or subsection (11) (a), and (ii) the amount due by that date under the order being enforced under paragraph (d) or subsection (11) (a);

(f) that, as security for the payments in arrears and subsequent payments, the debtor provide security in any form that the court directs.

15. FMEA s. 21(1)(f) has been used as the basis for such forms of security as the requirement that a debtor surrender his driver's licence in the case of a payment default.

16. If there has been a previous order for payment of arrears under FMEA s. 21(1)(d), then the court, on a subsequent default hearing, must under s. 21(1)(e) require that the debtor be imprisoned for default unless the court is satisfied that the debtor could not have avoided defaulting again in the payment required under the maintenance order. The

maximum period of default time for any one default is 30 days (FMEA s. 21(1)(e)). A court can only commit a debtor for a total combined period of 90 days: FMEA s. 23(5).

17. On a default hearing alone, the Provincial Court has no power to cancel or reduce arrears. However, that ability can exist if the default hearing is joined with an application to vary or cancel arrears.

18. After a default hearing order has been made for payment of arrears, either the debtor or the director can apply to change the order if there has been a change in circumstances: FMEA ss. 21(7) and 21(8).

19. If there has been a default of an order to pay, which order provides for committal time upon default, a committal hearing may be required pursuant to FMEA s. 23. At this hearing, a debtor may be imprisoned unless:

(a) the arrears have been paid in full. The amount that must be paid is the amount ordered to be paid at the default hearing on arrears plus any regular support payments that have become due up to the date of the committal hearing (Defago v Defago (1993) 47 RFL (3d) 55 (BCSC));

(b) the debtor's circumstances have changed since the default hearing order was made, which change has resulted in an inability to pay the full amount required; or

(c) it would be a grave injustice to order imprisonment of the debtor.

20. If any of the above circumstances exist, the court may vary the default hearing order or set a new date for hearing.

21. The meaning of "grave injustice" as used in s. 23 was discussed in the decision **Arlene McGregor v Manfred Lohrentz**, February 4, 1997, Provincial Court, Kelowna Registry Number 2261, Judge Stansfield stated that if "*the debtor has made his 'best efforts' (as that term is understood in law) to comply with the order – he has attempted diligently and in good faith and used all of his resources to met his obligations – but has failed in part, that sort of bona fide inability likely suggests a change of circumstances from what was understood and anticipated by the judge making the [default hearing] order. Additionally, if a judge concludes at a committal hearing that the debtor has done everything that reasonably could be expected of him, would it not be a "grave injustice" to imprison him?*"

22. As stated above, a court can only commit a person for a maximum of 90 days: FMEA s. 23(5).

23. Imprisonment of a debtor does not discharge the arrears: FMEA s. 21(6)

ADMINISTRATIVE ENFORCEMENT AND COURT CHALLENGES

24. The FMEP also has other administrative means of enforcement, which a debtor may seek to challenge in court.

REGISTRATION IN THE LAND TITLE OFFICE

25. A maintenance order may be filed in the Land Title Office against land owned by a debtor: FMEA s. 26. The order serves as security for payment of any arrears and any support owing in future. On application, the court can make an order discharging the court order or an order to postpone the court order to allow for the registration of another charge in priority to the court order. In making such an order, the court may impose any conditions as to security or otherwise as it considers necessary and reasonable: FMEA s. 26(12).

REGISTRATION IN THE PERSONAL PROPERTY SECURITY REGISTRY

26. A maintenance order may be filed against the personal property of a debtor: FMEA s. 26.1. The FMEA does not set out any specific power on the part of the Provincial Court to remove such charges. In a recent judgment of Madam Justice Martinson, the court stated:

*[46] The **Family Maintenance Enforcement Act** permits the Director to register a claim against the personal property of the debtor, and doing so creates a lien against that property. The lien applies to maintenance arrears that accrued before the claim is registered and to maintenance arrears accruing while the claim is registered: s. 26.1(3). This lien has priority over most other liens: ss. 26.1(4) and 26.1(5)*

[47] The court has no authority to interfere with the Director's decision to register such a lien: s. 26.1. In any event, it is reasonable that money owing for child support should be paid when personal property of a debtor is sold.

***KJK v PBK** 2002 BCSC 1340*

DRIVER'S LICENCE HOLD

27. If a maintenance order is filed with the director and the arrears under that order total $3,000 or more, the director may give the debtor 30 days notice that a hold may be placed on the debtor's driver's licence: FMEA s. 29.1. After 30 days, the director may issue to ICBC a notice stating that the debtor is in default. Once the notice is received, ICBC is prohibited from issuing or renewing a debtor's driver's licence. In the case of a debtor whose driver's licence is not up for renewal for a number of years, the hold would normally have no effect until the time for renewal arrives.

28. If a debtor satisfies the director that the s. 29.1 notice is based on a material error, the director must notify ICBC to disregard the notice for a driver's licence hold. However, if the director refuses to do so, the debtor can apply to court for a determination of whether the director's refusal was unreasonable. If the refusal is found to be unreasonable, the court may order the director to direct ICBC to disregard the notice.

29. Under s. 29.2, there are other situations (ss. 29.1(1)(b) and (c)) where the director is required to have a driver's licence hold be lifted. situations to be reviewed by the Court. include all the above.

REPORT TO THE CREDIT BUREAU

30. Where a debtor is $2,000.00 in arrears, the Director may disclose the fact of the arrears to a credit reporting agency: FMEA s. 43 and FMEA Regulation s. 21

31. On whether there is any authority on the part of the court to require removal of a credit bureau report, Madam Justice Martinson stated in ***KJK v PBK***, supra:

> *[43] The **Family Maintenance Enforcement Act** allows the Director to disclose to a credit bureau the fact that the debtor is in arrears under a maintenance order filed with the Director, when the debtor is in arrears of at least $2,000: s. 43(3) of the **Act** and s. 21 of the **Regulations***
>
> *[44] The court does not have the authority to interfere with the decision of the Director to do so. In any event, it is not unreasonable to advise potential creditors that the person asking for credit is not meeting his or her legal obligation to pay child support.*

DEFAULT FEE

32. An annual default fee is charged to a debtor who is in default of payment of support filed with the director: FMEA s. 14.4 and FMEA Regulation s. 18.1. The maximum amount a debtor may be charged in a year is $400.00.

33. In a proceeding where a court reduces or cancels arrears, the court may order the cancellation or reduction of default fees: FMEA s. 14.4(6).

FEDERAL LICENCE DENIAL

34. Part III of the Family Orders and Agreements Enforcement Assistance Act (FOAEAA) provides the authority for the withholding, suspension or denial of federally issued licences, which include passports and pilots licences. The FOAEAA does not specifically provide the Provincial court with any authority to set aside a federal licence denial. In fact, s. 71 of the FOAEAA states that *"Notwithstanding the provisions of any other Act of Parliament, of any regulation or order made under any other Act of Parliament or of any order made pursuant to a prerogative of the Crown, no appeal lies from any action taken under this Part."*

35. In the decision **The Director of Maintenance Enforcement and Heather Joan MacNeill v Kenneth Paul Morrison**, April 14, 2000, BCSC Courtenay Registry Action Number E0241, Mr. Justice Shabbits held that the Provincial Court had no jurisdiction in an application to set aside a Federal Licence denial issued by the Director of Maintenance Enforcement.

NOTICE OF ATTACHMENT

36. FMEA s. 15 permits the director to issue a notice of attachment on any person that is indebted or likely to become indebted to a debtor. Service on the attachee binds the attachee in respect of any money or benefit that is due and owing on the date of service to the debtor by the attachee, or any money or benefit that becomes due and owing from time to time after the date of service.

37. The amount that is attached, or by converse the amount that is exempt from attachment, is calculated pursuant to s. 13 of the FMEA Regulations. Alternatively, Table 1 or Table 2 of the Regulations can be referred to. Table 1 applies in the case of maintenance orders that are deductible (non-CSG orders), while Table 2 relates to non-deductible maintenance orders (CSG orders).

38. Court challenges to a notice of attachment may seek to have the notice of attachment set aside or to increase the amount exempt from attachment.

39. On an application by a debtor to the director, the director must withdraw a notice of attachment if the director is satisfied that the notice contains or is based on a material error: FMEA s. 16(2).

40. On an application by an attachee to the director, the director must withdraw a notice of attachment if the attachee satisfies the director that the attachee does not owe any money to the debtor or that the director has not given the attachee sufficient information about the debtor to enable the attachee to make any deductions: FMEA s. 16(1).

41. If the director refuses to remove the notice, the attachee or debtor can apply to court for a determination of whether the attachee is liable or whether there is a material error.

42. If the court does not set aside a notice of attachment, a debtor can also apply pursuant to s. 13.1 of the FMEA Regulations to increase the amount exempt under the notice of attachment. S. 13.1 permits an increase in the exemptions only if the increase is necessary to enable the debtor to meet his or her basic needs for food, shelter and clothing.

43. Section 13.1(4) also permits the director to apply to court to decrease the amount exempt under a notice of attachment.

44. Where an attachee fails to pay monies owed pursuant to a notice of attachment, or if the attachee fails to respond to a notice of attachment as required under s. 15(6), the director can apply pursuant to s. 16(3) for an order that the attachee make payment.

LIABILITY OF PERSONAL CORPORATIONS

45. FMEA s. 14.1 deals with a debtor that is the sole shareholder in a corporation. Without any requirement for a court order, that corporation becomes jointly and separately liable with the debtor for payments required under a maintenance order if there has been a (1) default in a payment, (2) the corporation has been served with a notice of attachment for the amount owing by the debtor under a maintenance order, (3) and the amount of arrears exceeds $3,000.00.

46. Where a debtor and his immediate family members hold control of a corporation, an application may be made to court for an order declaring that the corporation is jointly and separately liable with the debtor for payments required under a maintenance order. The same three conditions found in section 14.1 must also exist.

LEGISLATION SUMMARY

This is a brief summary of the relevant legislation affecting FMEP.

FAMILY MAINTENANCE ENFORCEMENT ACT

Purpose: creates the position of Director of Maintenance Enforcement and gives to the Director, and its delegates, certain powers to enforce maintenance or support orders. The Director of Maintenance Enforcement has in turn created FMEP to handle the enforcement of the Orders, and Themis has in turn been contracted to operate FMEP.

Key Provisions:
s. 4 – the Director retains discretion to enforce maintenance orders, and must enforce the order when it is necessary and practicable to do so.
s. 5 – while an order is filed with the Director, only the Director can enforce that order. The "creditor " can only enforce the Order on written authorization from the Director.
s. 11.1 – interest is charged on arrears
s. 12 – Statement of Finances required by the Director
s. 13 – Statement of Finances required by the Court
s. 14 – if there is a failure to provide a Statement of Finances, the Court can order the debtor be committed to jail for up to 30 days
s. 14.4 – annual default fee
s. 15 – notice of attachment
s. 16 – withdrawal of notice of attachment, including court applications for withdrawal. A court can only set aside a NOA if the attachee is no longer liable to the debtor or there is a material error.
s. 21 – default hearing
s, 23 – committal hearing
s. 26 – land registration
s. 26.1 – registration in personal property registry
s. 27 – warrant of execution
s. 29.1 – drivers licence
s. 29.2 – withdrawing director's notice regarding the driver's licence

FMEA REGULATIONS

Purpose: provides additional details regarding the powers given under the FMEA.

Key Provisions:
s. 8 – service of NOA
s. 10 – proportional payment
s. 13.1 – power to increase or decrease exemptions
s. 13.2 – prescribed documents
s. 15 – costs to be awarded
s. 17 – discharge or postponement fee

Arrears in support that arise in the 12 months before a bankrupt files for bankruptcy are a preferred claim, which means they get paid out in priority to unsecured claims. Any other arrears are treated as unsecured claims. Classes of claims are paid out on a pro rata basis.

FAMILY ORDERS AND AGREEMENTS ENFORCEMENT ASSISTANCE ACT
Purpose: an Act that facilitates agreements entered into between Provinces and the Federal Government to collect support payments or attach Federal monies. Provincial legislation often does not affect the Federal Government and so this Act allows for Provincial enforcement agencies to attach or collect on Federal payments.

Key Provisions:
-collection of Federal information on payors
-garnishment of federal monies to satisfy support orders, which are binding on the Federal Government for 5 years
-federal licence denial
-s. 76 passport to be surrendered

GARNISHMENT, ATTACHMENT AND PENSION DIVERSION ACT
Purpose: allows garnishment of salaries or remuneration owing to Federal employees. It also allows pension benefits to be diverted to satisfy support orders

Key provisions:
s. 38 – maximum pension diversion – 50%
s. 39(2) – the Minister has the power to delay a pension diversion to give a Payor time (up to 90 days) to apply to change a support order
s. 40.1 – if the diversion is to pay arrears, the amount can exceed 50% of the pension

B.C. BENEFITS (INCOME ASSISTANCE) ACT
Purpose: provides for income assistance payments

Key Provisions:
Part 7 – assignment of maintenance rights

WORKERS COMPENSATION ACT
s. 98 - WCB benefits can be diverted to pay support obligations.

FMEA Administrative Enforcement Sections Most Commonly Challenged
- S. 16 re Notices of Attachment
- S. 29.1 re Driver License holds.

Notice of attachment

15 (1) If the debtor has at any time defaulted in a payment required under a maintenance order, the director may serve a notice of attachment in the prescribed form on a person who is indebted or likely to become indebted to the debtor.

(2) [Repealed 2011-5-18.]

(3) Service in accordance with the regulations of a notice of attachment on the attachee binds the attachee, without further service and to the extent limited by the regulations, in respect of

(a) any money or benefit that is due and owing on the date of service to the debtor by the attachee, and

(b) any money or benefit that becomes due and owing from time to time after the date of service to the debtor by the attachee.

(3.1) Subject to subsection (3.2), subsection (3) applies in respect of a notice of attachment served on a person that maintains a deposit account in the name of the debtor and one or more other persons as joint, or joint and several, account holders.

(3.2) For the purpose of subsection (3), if a notice of attachment is served in respect of a deposit account, each joint, or joint and several, account holder is presumed to own an equal share of the money credited to the deposit account and the attachee must, in the prescribed manner and within the prescribed time, provide the director and the joint, or joint and several, account holder with a notice that contains the prescribed information.

(3.3) Within 14 days of receiving the notice under subsection (3.2), a joint, or joint and several, account holder may apply to the court for an order that all or part of the money paid to the director by the attachee must be returned to the joint, or joint and several, account holder, and the court may make the order if satisfied that the joint, or joint and several, account holder owns all or part of the money paid to the director by the attachee.

(3.4) If the director receives a notice from an attachee under section (3.2), the director may release the money received with the notice, unless

(a) the director is served with notice of an application to the court under subsection (3.3), and

(b) the director receives an order under subsection (3.3) within 60 days of receiving the money attached under the notice of attachment.

(4) The director must deliver a copy of the notice of attachment to the debtor, but the inability of the director, after reasonable effort, to deliver the copy of the notice does not render the notice of attachment ineffective.

(5) Subject to subsection (7), a notice of attachment remains in effect without further service until whichever of the following occurs first:

(a) the date specified on the notice of attachment;

(b) a notice of withdrawal is served on the attachee under section 16 (1) (a);

(c) the court, on application by the director under section 16 (3) or by the attachee or the debtor under section 16 (4), orders otherwise;

(d) a notice of withdrawal is served on the attachee under section 16 (8).

(6) On receiving a notice of attachment, the attachee must

(a) deduct from the money or benefit then due and owing and from time to time becoming due and owing by the attachee to the debtor the amount required by the notice, and

(b) within 5 days after each amount is deducted in accordance with the notice of attachment, remit the amount deducted to the director in the manner specified in the notice of attachment.

(7) By serving an attachee with a notice of suspension, the director may suspend the attachee's duty to comply with subsection (6), either for a specified period or until further notified by the director.

(8) Payment by an attachee in accordance with the notice of attachment discharges the attachee's obligation to the debtor to the extent of the payment.

(8.1) In the case of a deposit account in the name of the debtor and one or more other persons as joint, or joint and several, account holders, payment by an attachee to the director discharges the attachee's obligation to the debtor and to the joint, or joint and several, account holder to the extent of the payment.

(9) In this section:

"benefit" means a benefit as defined in the *Pension Benefits Standards Act*;

"deposit account" includes a demand account, a time account, a savings account, a passbook account, a chequing account, a current account, an account for prepaid debit or credit card payments or another similar account at any one of the following:

(a) a bank that is set out in Schedule I or Schedule II of the *Bank Act* (Canada);

(b) a financial institution as defined in the *Financial Institutions Act*;

(c) an extraprovincial corporation as defined in the *Financial Institutions Act*;

(d) a financial institution similar to one mentioned in paragraphs (a) to (c);

(e) a deposit business as defined in the *Financial Institutions Act*.

Vellow v Vellow (1996) 19 BCLR (3rd) 322 (BCCA) – this case involved a Payor receiving a pension under Federal legislation. The Payor was also obligated to pay support under a separation agreement. The Court held that there existed an "entitlement" such that the BC Pension Benefits Standards Act applied, and that such pension benefits could therefore be attached pursuant to an attachment order. (See section 64 of the BC Pension Benefits Act).

Service of a notice of attachment on a bank is governed by the Regulations under the Bank Act, called the Support Orders and Support Provisions (Banks and Authorized Foreign Banks) Regulations, P.C. 2002-1245 17 July 2002, which can be found at http://laws.justice.gc.ca/en/B-1.01/SOR-2002-264/index.html. *It requires that every bank designate an office of the bank in respect of each province for the service of enforcement notices.*

Viking Fire Suppression Ltd. v Sertex Plumbing B.C. Ltd. and Degelder Construction Co. Ltd. 1996 CanLii 1230 (BCSC) (September 17, 1996, BCSC Action No. C964231 – Vancouver Registry)

-on a construction project, the owner Powell owed money to the general contractor Degelder, who owed money to the subcontractor Sertex. Sertex owed money to Viking Fire. Powell sold some units in the construction project, which funds would be paid to Degelder to settle a claim. The purchasers paid the money to Degelder's lawyers. Viking then issued a garnishing order to attach funds payable by Degelder to Sertex and served that garnishing order on Degelder and their lawyers.

-among other things, the Court held at paragraph 21 that the money paid to Degelder's lawyers by the purchasers were being paid on behalf of Powell and so it did not matter that the funds did not come direct from Powell. Further, the receipt of the funds by Degelder's lawyers was in effect a receipt of the funds by Degelder. There was no need to name Degelder's lawyers as a garnishee (an issue that was raised in paragraph 20)

Withdrawal of notice of attachment

16 (1) If the attachee responds in accordance with the regulations to a notice of attachment, the director must,

(a) by serving a notice of withdrawal on the attachee, withdraw the notice if the attachee satisfies the director that

(i) no money or benefit is due and owing or is likely to become, during the term of the notice of attachment, due and owing by the attachee to the debtor,

(ii) the director has not supplied the attachee with sufficient information with respect to the debtor to enable the attachee to make any deductions, or

(b) refuse to withdraw the notice if the director is not satisfied as to any matter referred to in paragraph (a).

(2) On application by the debtor, the director may withdraw a notice of attachment if the debtor satisfies the director that the notice contains or is based on a material error.

(3) If an attachee fails to pay in accordance with a notice of attachment served on the attachee or fails to respond in accordance with the regulations to the notice, on application by the director, the court may order payment by the attachee of the amount unpaid.

(4) If the director refuses to withdraw a notice of attachment, on application by the attachee or the debtor in accordance with the regulations, the court may

(a) summarily determine whether or not

(i) the attachee is liable under the notice, or

(ii) the notice contains or is based on a material error, or

(b) determine that an issue or question necessary for the determination of the liability of the attachee be tried.

(5) If the court determines that the attachee is no longer liable or determines that the notice contains or is based on a material error, the notice of attachment no longer has any effect and must be withdrawn.

(6) If the court determines that the attachee is liable, it must order payment by the attachee of the amount unpaid.

(7) An order under subsection (3) or (6) may be enforced by the director in any manner that a maintenance order may be enforced.

(8) The director must withdraw a notice of attachment by serving a notice of withdrawal of attachment on the attachee if

(a) the debtor enters into a voluntary payment arrangement that is satisfactory to the director,

(b) the debtor has fully satisfied his or her obligations under the maintenance order and no further payments will be due from the debtor to the creditor, or

(c) any other prescribed circumstances apply.

(9) The withdrawal of a notice of attachment by the director does not prevent the issue of another notice of attachment in respect of the same debtor and the same attachee.

(10) In this section, **"benefit"** means a benefit as defined in the *Pension Benefits Standards Act*.

***MacKechnie v MacKechnie** (July 15, 1998, BCSC Vancouver Registry No. D088999, Martinson J) -a notice of attachment stated that $20,049.71 was owed for arrears instead of the actual $11,786.83 - the amount in the Notice was in error but it did not affect the outcome. Mr. MacKechnie did not suffer any prejudice due to this error. Keeping in mind that the FMEA is social legislation, the notice of attachment was held to be valid.*

***KJK v PBK** 2002 BCSC 1340 (Madam Justice Martinson) – see paras. 49 and 50 on the requirement for a finding of material error.*

***K.L. v M.B.** 2002 BCPC 0220 – material error refers to an error that goes to the actual finding of fact as set out in the Notice of Attachment as it relates to the proceedings before this Court.*

***Director of Maintenance Enforcement v Prins** (July 25, 2005, BCPC Williams Lake Registry No. 03-2631, Bayliff J.) - the court stated that financial hardship was not a basis to set aside a notice of attachment. That the notices of attachment were filed in the wrong court registry (after the court file was transferred) was not a material error, and such an error did not adversely affect the Payor. If the Payor follows though with an application that cancels the arrears, then a material error would exist.*

Driver's license Hlds. s. 29.1 FME. A.

Debtor's driver's licence

29.1 (1) If a maintenance order is filed with the director and the debtor is in default and the arrears under the maintenance order total $3 000 or more, the director may do either or both of the following:

(a) forward to the Insurance Corporation of British Columbia a notice stating that the debtor is in default and that action under this section is to be taken in relation to the debtor's driver's licence;

(b) forward to the Insurance Corporation of British Columbia a notice stating that the debtor is in default and that action under this section is to be taken in relation to a licence and corresponding number plates for any motor vehicle or trailer owned by the debtor.

(2) At least 30 days before forwarding a notice to the Insurance Corporation of British Columbia under subsection (1) (a), the director must give the debtor notice that action under this section will be taken in relation to the debtor's driver's licence.

(2.1) At least 60 days before forwarding a notice to the Insurance Corporation of British Columbia under subsection (1) (b), and again at least 30 days before forwarding the notice under subsection (1) (b), the director must give the debtor notice, which must be in the manner prescribed by the regulations, that action under this section will be taken in relation to a licence and corresponding number plates for any motor vehicle or trailer owned by the debtor.

(3) On receipt of a notice under subsection (1) (a), the Insurance Corporation of British Columbia, for the applicable period under subsection (3.2), must not issue or renew a driver's licence of the debtor.

(3.1) On receipt of a notice under subsection (1) (b), the Insurance Corporation of British Columbia, for the applicable period under subsection (3.2), must not issue or renew a licence and corresponding number plates for a motor vehicle or trailer owned by the debtor.

(3.2) Subsections (3) and (3.1) apply in relation to a debtor from the date the Insurance Corporation of British Columbia receives the applicable notice under subsection (1) until the earliest of the following:

(a) the date the Insurance Corporation of British Columbia is advised by the director that the maintenance order

(i) has been withdrawn under section 6, or

(ii) is no longer in arrears;

(b) the date the director directs the Insurance Corporation of British Columbia under section 29.2 to disregard that notice.

(4) The director may, as a condition for acting under subsection (3.2)(a)(ii), require the debtor to give the director a deposit in a prescribed amount as security for future payments under the maintenance order in addition to paying the arrears.

(5) The director may hold a deposit received under subsection (4) until the debtor has not been in arrears under the maintenance order for at least 9 consecutive months since the deposit was given, in which case the deposit may be applied to future maintenance payments, or returned to the debtor, as the director considers appropriate.

(6) If the debtor gives a deposit under subsection (4) and subsequently falls into arrears for more than 10 consecutive days under the maintenance order filed with the director, the director may

(a) prepare and forward to the Insurance Corporation of British Columbia a further notice under subsection (1) without further notice to the debtor under subsection (2) or (2.1), as applicable, and

(b) apply the deposit to the payment of arrears under the maintenance order.

(7) Action by the Insurance Corporation of British Columbia under subsection (3) or the giving of a deposit under subsection (4) is not a bar to the bringing of other proceedings under this Part to enforce payment under the maintenance order.

Withdrawing the director's notice

29.2 (1) The director must direct the Insurance Corporation of British Columbia to disregard a notice given under section 29.1 if the debtor satisfies the director that

(a) the notice is based on a material error,

(b) the lack of anything referred to in section 29.1 (3) or (3.1) will significantly reduce the debtor's ability to pay under the maintenance order and the debtor has entered into an arrangement that is satisfactory to the director to report the debtor's financial circumstances from time to time, or

(c) the debtor has entered into a payment arrangement that is satisfactory to the director.

(2) If the director refuses to act under subsection (1), the court, on application by the debtor, may summarily determine whether the refusal was unreasonable and, if the refusal is found to be unreasonable, may order the director to act under subsection (1).

The FMEA was amended on July 23, 2004. Section 29.2(2) now permits a court to review DOME's reasons for not releasing a DL hold based on the requirements listed at section 29.2(1)(a)(b) or (c).

JM v DS, 2000 BCPC 0055 – the court set a requirement for a lump sum payment before a DL hold was released.

Gordon v Lee, (June 27, 2002, BCPC Richmond Registry No. F3915, Davis J.) - FMEA sec. 21(1)(f) can be used to deem a driver's licence as security for support payments

Adubofuor v Ontario (FRO) 15 RFL (5th) 245
McLarty v Ontario (FRO) 15 RFL (5th) 402
–two appeals of orders to remove a DL hold allowed.

Ontario (FRO) v Pennell (2002) 27 RFL (5th) 404 (Ont. Ct of Justice) – the Ontario Court considered the Ontario maintenance enforcement legislation and the right to take away a driver's licence. The Court held that it had no power under the legislation to order the return of the driver's licence. However the Court also made strong comments that the Director should exercise his discretion to return the licence because a failure to do so would make it next to impossible for the Payor to obtain a source of income by which support payments could be made.

4. Family

- **Family Violence: Helping Clients under the new Family Law Act**
  - CLE Materials
  - Protection and Conduct Orders Powerpoint presentation

THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

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If the application of the foreign legislation governing the plan would yield an unfair result, the court may require that the plan be treated as a matured plan.

4. DISABILITY BENEFITS [§1.65]

Disability benefits paid under a plan may be divided under s. 122 in the manner of a matured pension.

5. ORDERS AND AGREEMENTS DIVIDING PENSIONS [§1.66]

Where an agreement or final order on property is silent on the division of a spouse's pension benefits, including disability benefits, the benefits are deemed to be wholly allocated to the member under ss. 111(2) and 122(3). The parties may however subsequently agree to divide benefits under s. 112(2).

Under s. 127(1), an agreement may provide that a non-member will receive none or less than his or her proportionate share. Spouses may also elect not to equalize their Canada Pension Plan credits.

Under s. 129, the court may reapportion a member's benefits in favour of the non-member to provide the non-member with an income stream where the parties' circumstances would otherwise require an order for spousal support.

VIII. PROTECTION ORDERS UNDER THE FAMILY LAW ACT [§1.67]

Family violence is expansively defined in s. 1 of the *Family Law Act* as including:

(1) physical, sexual, psychological, and emotional abuse;

(2) intimidation, harassment, threats, and stalking;

(3) restricting a person's autonomy and withholding the necessities of life;

(4) damaging property; and

(5) in the case of children, direct or indirect exposure to family violence.

A person who is at risk of family violence, or another person on that person's behalf, may apply for a protection order under s. 183. Such applications may be brought independent of any other proceeding under the Act, and may be brought without notice.

"Family member" is defined at s. 1 and includes former spouses, relatives with whom a person resides, and the person's child.

A. FACTORS [§1.68]

In considering whether to make a protection order, the court must consider seven risk factors set out at s. 184(1), including:

(1) any history of family violence, and whether there is a pattern of repetitive or escalating violence;

(2) the presence of circumstances increasing the risk of violence, such as substance abuse and mental health issues; and

(3) the presence of circumstances increasing the vulnerability of a person, such as pregnancy and age.

A number of factors that are not relevant to the making of protection orders are set out at s. 184(4), and include:

(1) whether the person against whom the protection order is sought was previously protected by a protection order;

(2) whether criminal charges have be laid against the person against whom the protection order is sought; and

(3) whether the person sought to be protected by the protection order has a history of returning to live with the person against whom the protection order is sought after family violence has occurred.

B. PROTECTION ORDERS [§1.69]

The available protection orders are listed at s. 183(3) and include orders restricting communication, attendance at a place, and stalking behaviours; reporting requirements; removal from the family home; and seizure of weapons. The court may impose additional terms as may be necessary to protect a person or implement the protection order. Under s. 183(4), protection orders expire in one year unless otherwise ordered.

The court may, under s. 187(1), vary a protection order to shorten, extend, terminate, or otherwise change the order. Such applications must be brought prior to the expiry of the order.

Under s. 189(2), where a protection order, including a restraining order made under the *Criminal Code*, R.S.C. 1985, c. C-46 or a foreign order equivalent to a protection order, conflicts with another order made under the Act, the *Family Law Act* order is suspended to the extent of the conflict until the other order is varied to resolve the conflict or the protection order is terminated.

IX. ENFORCING ORDERS AND AGREEMENTS UNDER THE FAMILY LAW ACT [§1.70]

The Act contains a range of enforcement mechanisms available to both the Provincial Court and the Supreme Court. Special enforcement provisions are available for a number of matters, such as the withholding of parenting time or failure to comply with a production order. Where special provisions are not made, the Act's general enforcement provisions are available.

The Act's general enforcement provisions are set out at s. 230. Under s. 230(2), the court may enforce an order by requiring a party to:

(1) post security;

(2) pay expenses incurred by the other party as a result of the party's actions; or

(3) pay up to $5,000 for the benefit of person affected by the party's actions or as a fine.

The court may imprison a party for up to 30 days where no other remedy will secure the party's compliance, under s. 231(2). Imprisonment is available as an extraordinary remedy for all matters under the Act except protection orders.

The court may also, where a party has misused or frustrated the court process, make an order under s. 221 that a party be prohibited from making further applications or taking further steps in a proceeding until the party has complied with an order made under the Act.

Under s. 232, the *Offence Act*, R.S.B.C. 1996, c. 338 does not apply to matters under the *Family Law Act* except as provided at s. 244 in respect of the work of search officers.

the Act, it will be important for the lawyer to clarify the "period" of time they are engaged in such process. Collaborative participation agreements, agreements to mediate, parenting coordination contracts, and agreements to arbitrate should clearly define the period of time involved by delineating the beginning and end of the process if a limitation period is being suspended.

The *Family Law Act* has been carefully drafted to give people going through separation and divorce greater clarity about their substantive rights in order to facilitate settlement. The Act has removed statutory disincentives for out-of-court settlement and replaced these with a clear mandate to work towards out-of-court settlement. It strengthens the degree that parties can rely on agreements. The Act acknowledges the growth of out-of-court processes by enshrining the role of parenting coordinators, officially recognizing collaborative practice, and removing ambiguities surrounding the use of arbitration in family matters. Lawyers remain an integral part of the dispute resolution process. The true power of the Act to change the way family disputes are resolved lies in part with how lawyers will adapt the way they practise to conform with the objectives of the Act. This requires changes in the way files are managed from the first interview. Lawyers must build the necessary assessment skills to fulfill their duties under the Act, and to effectively assist clients in choosing the process option most useful for their particular case. Lawyers have always settled most of their cases. The greatest challenge for lawyers under the new Act will be to develop the necessary skills and file management processes to concentrate all efforts on settlement, as opposed to managing a file according to court rules and procedures, and then settling some time between examination for discovery and the first day of trial.

III. NEW DUTIES ON LAWYERS [§2.3]

A. FAMILY VIOLENCE [§2.4]

The Act imposes a positive duty on lawyers to assess "whether family violence may be present" and, having regard to the assessment, to perform an educational role about family dispute resolution options and the advisability of different options. In addition, lawyers must inform clients of facilities and other resources (known to the lawyer) that may be available to assist clients. These duties are set out in s. 8 of the Act:

> **Duties of family dispute resolution professionals**
>
> 8 (1) A family dispute resolution professional consulted by a party to a family law dispute must assess, in accordance with the regulations, whether family violence may be present, and if it appears to the family dispute resolution professional that family violence is present, the extent to which the family violence may adversely affect
>
> (a) the safety of the party or a family member of that party, and
>
> (b) the ability of the party to negotiate a fair agreement.
>
> (2) Having regard to the assessment made under subsection (1), a family dispute resolution professional consulted by a party to a family law dispute must
>
> (a) discuss with the party the advisability of using various types of family dispute resolution to resolve the matter, and
>
> (b) inform the party of the facilities and other resources, known to the family dispute resolution professional, that may be available to assist in resolving the dispute.
>
> ...

Under s. 197(1) of the Act, a lawyer who acts for a party in a proceeding must certify, when the proceeding is started, that the lawyer has complied with s. 8(2):

> **Complying with duties respecting family dispute resolution**
>
> 197 (1) If a lawyer is acting on behalf of a party in a proceeding under this Act, the lawyer must provide, at the time the proceeding is started, a statement, signed by the lawyer, certifying that the lawyer has complied with section 8(2) *[duties of family dispute resolution professionals].*

Assessing for family violence is a particular skill that not only involves significant knowledge about the dynamics of family violence but also requires the ability to conduct an interview in a manner that ascertains the necessary information. In addition to the assessment required, the Act also requires lawyers "if it appears ... that family violence is present" to then assess the impact this may have on both the client's safety and the client's ability to negotiate.

Research studies have shown that although lawyers are aware of domestic violence and abuse and able to define abuse broadly, the estimates lawyers give about the prevalence of abuse by either their own clients or their clients' partners are significantly lower than the abuse rates reported within the general population (Neilson, L. *Spousal Abuse, Children and the Legal System, Final Report for the Canadian Bar Association, Law for the Futures Fund* (2001), pp. 32 to 36, available online at www.unb.ca/fredericton/arts/centres/mmfc/_resources/pdfs/team2001.pdf). This research raises serious questions about lawyers' abilities to properly assess for violence and abuse without specific training in assessment. In order to properly meet their duties under the Act, lawyers must increase their knowledge of domestic violence and abuse, and develop sufficient sensitivity to be able to interview effectively in order to complete an assessment.

Once lawyers become sufficiently skilled in assessing for family violence, how do they then go on to satisfy s. 8(2) of the Act? To be able to educate clients about process options and assist clients in selecting a process that will best suit the resolution of their dispute, lawyers need to pay attention to a number of different factors. This includes the level of dangerousness, if any. In order to properly assess clients' ability to negotiate in different processes, lawyers must also be able to conduct client interviews in a manner that enables the lawyer to assess the degree of cooperation between partners, the level and type of conflict interaction between the parties, and the ability of clients to communicate with their partners. Each of these factors will give the lawyer information about process choices that may be suitable for a particular client.

B. DUTY OF DISCLOSURE [§2.5]

Under the Act, there is less discretion to vary agreements entered into between parties. The emphasis on strong, binding agreements brings with it obligations around disclosure as well as obligations to ensure that the best interests of children are being met. In working with clients to develop enforceable, lasting agreements, it is important for lawyers to educate clients about their obligations under the Act, which include the positive duty to disclose set out in s. 5(1):

> **Duty to disclose**
>
> 5 (1) A party to a family law dispute must provide to the other party full and true information for the purposes of resolving a family law dispute.

This section elevates disclosure to a statutory duty. This is a significant change from the prior framework, where disclosure was a process requiring demands, discoveries, and at times, court orders. This duty is a fundamental shift toward assisting lawyers in managing files for settlement. Instead of having to rely on procedural tools for discovery, disclosure becomes a statutory duty. This statutory duty should assist the process of disclosure in consensual dispute

"family property" means family property under section 84 *[family property]*;

> Commentary
>
> "family property"—the *FLA* introduces a new scheme in Part 5 for dividing family property on relationship breakdown. This definition directs the reader to the section that provides the detailed framework for determining what property is family property.

"family violence" includes

(a) 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,

(b) sexual abuse of a family member,

(c) attempts to physically or sexually abuse a family member,

(d) psychological or emotional abuse of a family member, including

  (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,

  (ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,

  (iii) stalking or following of the family member, and

  (iv) intentional damage to property, and

(e) in the case of a child, direct or indirect exposure to family violence;

> Commentary
>
> Family violence has been added to the legislation in the context of newly included risk factors the court must assess in consideration of the best interests of the child test when making parenting arrangements (s. 37 of the Act). The Act also imposes an obligation on family dispute resolution professionals to screen for family violence and assess whether certain dispute resolution processes are appropriate (s. 8 of the Act). Finally, the Act establishes several orders that are available to protect individuals from family violence.
>
> "Family violence" has been defined in the Act to assure that members of the family justice system have a "clear and common understanding of what constitutes family violence" (*White Paper on Family Relations Act Reform,* Ministry of Attorney General Justice Services Branch Civil Policy and Legislation Office, July 2010 (the "White Paper")). The Act offers a definition of family violence that expands beyond physical violence directed at a partner.
>
> Further, the definition provides that "reasonable force to protect oneself or others from harm" would not be deemed "physical abuse"—thereby providing consideration for self-defense.
>
> ... *continued*

The inclusion of "family violence" in the *FLA* follows the family laws in Ontario, Alberta, Newfoundland and Labrador, Nunavut, and Northwest Territories, all of which include family violence as a factor to be considered in the determination of the best interests of the child regarding parenting arrangements. The case law from these jurisdictions offers some insight into the treatment and interpretation of family violence. It should be noted that Alberta, Manitoba, Northwest Territories, Nunavut, Prince Edward Island, Saskatchewan, and Yukon also have specific family violence or domestic violence legislation.

"guardian" means a guardian under section 39 *[parents are generally guardians]* and Division 3 *[Guardianship]* of Part 4;

Commentary

"guardian"—the roles and responsibilities associated with the concept in Part 4 of the *FLA* are a significant change from the *FRA*. The roles and responsibilities associated with the concept are clarified with the list in s. 41 (§3.41)

"parent" means a parent under Part 3 *[Parentage]*;

Commentary

"parent"— is defined in terms of legal parentage. Part 3 of the *FLA* provides a comprehensive framework for determining who is a legal parent for all purposes of the law. The definition in the *FRA* did not define who had legal parentage. Rather, the definition provided for an expanded meaning of parent for the purposes of that Act to include guardians of the person and stepparents. This expanded definition does not mean that these people become legal parents, but rather that under the Act they will be treated in the same way as a parent; wherever the Act refers to a "parent" it also means a "guardian" or a "stepparent". These expansions are carried forward in the *FLA*, but are located in the relevant parts of the Act: Part 7—Child and Spousal support, ss. 146 [Definitions] (§3.146) and 147 [Duty to provide support for child] (§3.147).

"parental responsibilities" means one or more of the parental responsibilities listed in section 41 *[parental responsibilities]*;

Commentary

"parental responsibilities"—the *FLA* introduces a new model for parenting after separation. It includes the concept of parental responsibilities, which are the responsibilities that guardians have respecting children. The definition directs the reader to the section that lists the parental responsibilities.

Commentary

The emphasis on, and encouragement of, agreements respecting family law disputes is reflected by the fact that there are at least eight different sections, including this cover-all section dealing with family law agreements. The interest in promoting the finality of agreements is emphasized in some of these other sections which state that agreements governing property division (s. 93(5) (§3.93)) and spousal support (s. 164(5) (§3.164)) will not be interfered with (barring certain statutory exceptions) unless the agreements are significantly unfair. This raises the threshold from the "unfair" standard that governed agreements under the *Family Relations Act*.

SECTION 7 [§3.7]

Replacing agreements

7 If an agreement changes a previous agreement,

(a) each part of the previous agreement that is changed is deemed to have been revoked, and

(b) the remainder of the previous agreement, if any, remains effective.

Explanation from the Ministry of Justice

Section 7 makes clear that an agreement can be used to change a previously made agreement. It clarifies that, unless otherwise stated, the new agreement replaces only the terms changed, while the remainder of the agreement continues.

This clarification is especially important for agreements related to the care of children because parenting arrangements will need to change as children grow and change.

SECTION 8 [§3.8]

Duties of family dispute resolution professionals

8 (1) A family dispute resolution professional consulted by a party to a family law dispute must assess, in accordance with the regulations, whether family violence may be present, and if it appears to the family dispute resolution professional that family violence is present, the extent to which the family violence may adversely affect

(a) the safety of the party or a family member of that party, and

(b) the ability of the party to negotiate a fair agreement.

(2) Having regard to the assessment made under subsection (1), a family dispute resolution professional consulted by a party to a family law dispute must

(a) discuss with the party the advisability of using various types of family dispute resolution to resolve the matter, and

(b) inform the party of the facilities and other resources, known to the family dispute resolution professional, that may be available to assist in resolving the dispute.

(3) A family dispute resolution professional consulted by a party to a family law dispute must advise the party that agreements and orders respecting the following matters must be made in the best interests of the child only:

(a) guardianship;

(b) parenting arrangements;

(c) contact with a child.

Explanation from the Ministry of Justice

Section 8 imposes obligations on family dispute resolution professionals to ensure that their clients are aware of the most appropriate and effective services for resolving their disputes, based on the clients' circumstances.

The provision requires family dispute resolution professionals to screen for family violence and assess whether certain dispute resolution processes are appropriate.

Having regard to the assessment, family dispute resolution professionals must advise parties of the processes, services, and facilities available to them:

- to ensure that parties are making informed decisions about the range of options available for resolving family law disputes; and
- to maximize opportunities for early, co-operative settlement in order to reduce the emotional and financial costs of separation.

Family dispute resolution professionals also have a duty to advise parties that the best interests of the child must govern agreements and orders respecting children.

Family dispute resolution professionals include: family justice counsellors; parenting coordinators, family law lawyers, family law mediators and family law arbitrators.

A related section is s. 197 [Complying with duties respecting family dispute resolution] (§3.197) which requires lawyers to certify that they have discussed appropriate dispute resolution processes with their clients prior to making a court application.

Associated regulations may be made with respect to requirements for family dispute resolution professionals and their duties.

Commentary

The Act places an obligation on "family dispute resolution professionals" who are consulted by a party to a family law dispute to assess, in accordance with the regulations, whether family violence may be present, and if it appears that it is, the extent to which the violence may adversely affect the safety of the party or a family member of that party, and the ability of the party to negotiate a fair agreement. Family dispute resolution professionals include: family justice counsellors, parenting coordinators, family law lawyers, family law mediators, and family law arbitrators.

... continued

The duties in s. 8(2) are analogous to those in s. 197 (§3.197) of the *FLA* and the Alberta *FLA*. However, the latter two sections, which are similar to s. 9 of the *Divorce Act*, apply only to lawyers. The B.C. *FLA* seems to be somewhat novel in extending certain duties to family dispute resolution professionals, who include family justice counsellors, parenting coordinators, lawyers, mediators, and arbitrators, among others. However, it is important to note that many of the duties embodied in s. 8 of the *FLA* are already contained, often more expansively, in the professional codes of conduct that apply to these professionals. For example, the *Family Justice Services Manual of Operations*, which applies to Family Justice Counsellors, emphasizes the importance of promoting timely and just resolutions; screening for family violence; safety and protection concerns at the forefront; referring parties to other dispute resolution services; and finally, that the best interests of the child are of primary concern. Similarly, the *Mediate BC Society's Standards of Conduct* emphasize that mediators must identify safety threats and evaluate whether mediation is still appropriate where there has been abuse. If mediation is not appropriate due to abuse, mediators must refer parties to professionals who can more appropriately deal with the situation. These provisions mirror those in s. 8 of the *FLA*, which is just one of the many sections in the *FLA* emphasizing the existing responsibilities of those involved in family law disputes.

Some resources have been developed to help educate those in the family justice system about how to assess risk for family violence. Additional resources, training, and assessment tools must be produced to advance the implementation of the legislation in order to provide a common grounding for family law practitioners and the judiciary regarding the assessment of family violence.

Some helpful resources include:

"Is your Client Safe? A Lawyer's Guide to Relationship Violence" Legal Services Society and Ending Violence Association of BC (http://resources.lss.bc.ca/pdfs/pubs/Is-Your-Client-Safe-eng.pdf)

"Toolkit for Lawyers: Best Practices in Working with Battered Immigrant Women" Battered Women's Support Services (http://www.bwss.org/wp-content/uploads/2011/01/Toolkit-for-Lawyers_EIWITLS.pdf)

BC Society of Transition Houses (http://www.bcsth.ca/content/childrens-services-2)

PART 4—CARE OF AND TIME WITH CHILDREN

Explanation from the Ministry of Justice

Part 4 establishes a new regime for care and time with a child. This Part, probably more so than any other Part in the Act, represents the greatest departure from the *Family Relations Act*. Not only does it clarify the law surrounding time and care with children, but it also changes the framework for looking at family law issues where children are involved to promote a more collaborative approach to parenting after separation, where appropriate.

There are several key elements to this new framework, one of which is the change to the "best interests of the child" test to include family violence. There is also a change in terminology from custody and access to parental responsibilities, parenting time, and contact. Division 6 creates a framework for addressing cases where a parent wishes to relocate with a child, which tend to be very high-conflict cases. British Columbia is the first Canadian jurisdiction to provide a much-needed relocation framework.

This Division modernizes the best interests of the child test, which must be used when determining parenting arrangements. A number of changes have been made, including:

- making the best interests test the "only" consideration rather than the "paramount" consideration;
- including an overarching consideration, to "ensure the greatest possible protection of the child's physical, psychological and emotional safety";
- making the test applicable to all decision-makers, rather than only judges; and
- expanding the list of best interests factors to include the history of care of the child, the impact of family violence, and consideration of relevant civil or criminal proceedings.

Division 1—Best Interests of Child

SECTION 37 [§3.37]

Best interests of child

37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

(2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:

(a) the child's health and emotional well-being;

(b) the child's views, unless it would be inappropriate to consider them;

(c) the nature and strength of the relationships between the child and significant persons in the child's life;

(d) the history of the child's care;

(e) the child's need for stability, given the child's age and stage of development;

(f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;

(g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;

(h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;

(i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;

(j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

(3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.

(4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

Explanation from the Ministry of Justice

Section 37 carries over and expands s. 24 of the *Family Relations Act*. In the *Family Relations Act*, the best interests of the child were the "paramount consideration." Section 37 directs that, in making decisions about parenting arrangements or contact with a child, a decision-maker must consider only the best interests of the child.

This section expands the requirement to consider the best interests of the child beyond decision-making by judges, to include decision-making by guardians and all individuals party to a child-related agreement. A child's best interests must always be in the forefront when parenting issues are discussed.

Section 37 provides an overarching direction to "ensure the greatest possible protection of the child's physical, psychological and emotional safety" and provides a list of factors to consider when determining what is in a child's best interest. The expanded list modernizes the *Family Relations Act* to better reflect current social values and research.

Important changes to the best interests of the child factors include:

- a change in determining whether to consider the views of the child from "if appropriate" in the *Family Relations Act* to "unless it would be inappropriate". This change shifts the presumptive starting point: the child's views will be considered unless there is a reason why they should not be, rather than starting from the position that the views will not be considered unless justified;
- inclusion of family violence as a factor. The addition of family violence addresses an important gap in the law and recognizes that violence—even if directed exclusively at the spouse—can still be harmful to a child; and
- inclusion of any relevant prior civil or criminal proceedings as a factor. This requires decision-makers to consider the involvement of parties in other proceedings that are relevant to the safety, security or well-being of the child and promotes greater information-sharing between the family, child protection and criminal systems where children are involved.

Commentary

Section 37(1) carries over and expands s. 24 of the *Family Relations Act*. The best interests of a child is now the only factor to be taken into consideration when making an order or agreement, rather than the prior "paramount consideration". This section also provides an overarching direction to protect, as much as possible, "the child's physical, psychological and emotional safety, security and well-being".

The new factors include the history of the child's care, the child's need for stability, and the existence of any civil or criminal proceedings relevant to the child's safety, security, and well-being. The *FLA* also provides that the child's views are a factor, unless it would be inappropriate to consider them. Previously s. 24 of the *FRA* would include the child's views only where it was appropriate. The expansion of the list of considerations is intended to modernize the family law legislation to better reflect current social values and research.

Family violence is also considered in s. 37(2)(g)–(i). This recognizes that family violence, even if not directed at a child, can be harmful to a child. The inclusion of relevant prior civil or criminal proceedings as a factor under s. 37(2)(j) requires decision-makers to consider the parties' involvement in other proceedings relevant to the safety, security, or well-being of the child. It also promotes greater information-sharing between the family, the Ministry of Children and Family Development, and criminal systems where children are involved.

Sections 37 and 38 of the Act are complementary provisions. Section 37 provides a list of factors that the court must consider when assessing whether a parenting arrangement or contact with a child is in that child's best interests. Several of these factors specifically address family violence. Section 37(2)(g) states, "the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member". Section 37(2)(h) states, "whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs". Section 37(2)(i) states "the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members". This section expands the consideration of safety concerns beyond the child. It considers the impact of any risks guardians or other family members may face if certain parenting arrangements are ordered. Section 37(2)(j) states "any civil or criminal proceeding relevant to the child's safety, security or well-being." This new section highlights a departure from courts focusing only on civil family law matters in exclusion of criminal proceedings that may parallel or impact the family law proceeding. This section now mandates that the court "must" address both civil and criminal proceedings that centre on the issue of the child's best interests.

SECTION 38 [§3.38]

Assessing family violence

38 For the purposes of section 37(2)(g) and (h) *[best interests of child]*, a court must consider all of the following:

(a) the nature and seriousness of the family violence;

(b) how recently the family violence occurred;

(c) the frequency of the family violence;

(d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;

(e) whether the family violence was directed toward the child;

(f) whether the child was exposed to family violence that was not directed toward the child;

(g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence;

(h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring;

(i) any other relevant matter.

Explanation from the Ministry of Justice

Section 38 provides guidance for decision-makers on how to assess family violence as a factor in considering the best interests of the child.

This approach is designed to produce a more nuanced risk assessment and avoid a one-size-fits-all approach regarding parenting arrangements in cases where there has been family violence. Research shows that family violence is not all the same. This approach takes into account research showing that different types of violence carry different levels of future risk.

This section is adapted from a similar provision in New Zealand's family law, which is often considered to be a best-practice.

Commentary

Section 38 provides factors to assist decision-makers in assessing family violence. These factors were adapted from New Zealand's family law act and reflect the reality that family violence is not all the same. Interestingly, s. 38 provides the opportunity to put before the court social science material in the area of family violence in order for the court to assess risk, future risk, and security for the child.

The following case law from other jurisdictions provides some insight into how other courts have assessed the best interests of children when violence is present:

- *M. (N.G.) v. M. (W.A.)*, 2000 ABQB 328: The court considered the impact of verbal, emotional, and psychological abuse and the necessity for "healthy contact" in order to preserve the best interests of the children.

... continued

- *W. (C.L.) v. P. (K.P.)*, 2007 ABQB 591: The court "ventures into the grey area of psychological damage" and engages in an assessment that prioritizes the best interests of the children.
- *H. (H.) v. C. (H.)*, 2002 ABQB 426: The court engaged in an analysis of the impact of violence experienced against one parent by the other in the context of children witnessing family violence. The case contains significant social science research that was put before the court and the court's appreciation for such evidence in their assessment process of family violence and the best interests of the child.
- *Abdo v. Abdo* (1993), 126 N.S.R. (2d) 1 (C.A.): The court engaged in an analysis of the long-term impact for children when exposed to parental violence and the detrimental effect on children's psychological development.
- *Griffiths v. Leonard*, 2010 ONSC 4824: The court emphasized the father's historically violent behavior towards the child's mother in its determination that he should be denied access.
- *Lidder v. Lidder*, [2009] O.J. No. 2896 (QL) (S.C.J.): The court ordered that the father should have continued supervised access because of his failure to address his wife's reasonable concerns as to whether his anger and tendency to express himself by violence would pose a danger to the child. The court put an obligation on the father to have taken steps to address his wife's concerns.

Family law legislation in Alberta and Ontario parallels s. 37(2)(j) and the court's requirement to consider other existing civil and criminal proceedings in the assessment of family violence and the safety and best interests of children.

Division 2—Parenting Arrangements

Explanation from the Ministry of Justice

This Division includes significant changes to the terms used to describe those with responsibility for children and to describe time spent with children. The changes generally adopt terminology used in Alberta's *Family Law Act*, which have been met by broad positive response.

The emotionally laden terms "custody" and "access" are eliminated and replaced by the more neutral terms "guardianship" and "parenting time" to emphasize a relationship of responsibility towards a child. "Guardianship" signifies responsibility for children and "parental responsibilities" describes the responsibilities that guardians have. The references in the *Family Relations Act* to "guardianship of the person of the child" and "guardianship of the estate of the child" are not carried forward in the *Family Law Act*.

Other terminology changes include the use of "parenting time" to describe time with a child by a guardian and "contact" to describe time with a child by a non-guardian.

The Division begins with a new default guardianship provision. With few exceptions, the parents of a child who reside with the child are automatically their guardians and do not lose these responsibilities if they separate.

SECTION 61 [§3.61]

Denial of parenting time or contact

61 (1) An application under this section may be made only

(a) by a person entitled under an agreement or order to parenting time or contact with a child, and

(b) within 12 months after the person was denied parenting time or contact with a child.

(2) If satisfied that an applicant has been wrongfully denied parenting time or contact with a child by a child's guardian, the court on application may make an order to do one or more of the following:

(a) require the parties to participate in family dispute resolution;

(b) require one or more parties or, without the consent of the child's guardian, the child, to attend counselling, specified services or programs;

(c) specify a period of time during which the applicant may exercise compensatory parenting time or contact with the child;

(d) require the guardian to reimburse the applicant for expenses reasonably and necessarily incurred by the applicant as a result of the denial, including travel expenses, lost wages and child care expenses;

(e) require that the transfer of the child from one party to another be supervised by another person named in the order;

(f) if the court is satisfied that the guardian may not comply with an order made under this section, order that guardian to

(i) give security in any form the court directs, or

(ii) report to the court, or to a person named by the court, at the time and in the manner specified by the court;

(g) require the guardian to pay

(i) an amount not exceeding $5 000 to or for the benefit of the applicant or a child whose interests were affected by the denial, or

(ii) a fine not exceeding $5 000.

(3) If the court makes an order under subsection (2)(a), (b) or (e), the court may allocate among the parties, or require one party alone to pay, the fees relating to the family dispute resolution, counselling, service, program or transfer.

Explanation from the Ministry of Justice

The *Family Relations Act* did not have specific remedies for disputes over time with a child. The remedies were quasi-criminal tools, such as contempt proceedings or applications under s. 128(3) of the *Family Relations Act*, which provided for enforcement of access orders through the *Offence Act*. They were rarely used and were ineffective and ill-suited to this type of parenting dispute.

Section 61 establishes an enforcement regime for judges to ensure parties respect each other's parenting time and contact arrangements.

This section provides a limit to ensure that applications are made with regard to recent denials only by requiring applications to be brought within 12 months of the denial.

It provides a range of remedies, from preventative to punitive, that a judge can order when there is a denial of parenting time or contact, including:

... *continued*

- requiring parties or their children or both to attend family dispute resolution, counseling, or other services;
- compensatory time;
- reimbursement of expenses incurred as a result of the denial, which could include, for example, payment to the other parent for their wasted travel costs or daycare costs where the parent does not fulfill their parenting time commitments; and
- requiring the offending party to provide security or pay a fine of up to $5,000.

This section gives judges the discretion to allocate the cost, if any, of family dispute resolution, counselling, or supervised transfer of children to facilitate parenting time or contact.

Commentary

Division 5 provides a variety of remedial tools to address problems exercising parenting time and contact that was notably absent from the *FRA*. The range of remedies in this part provides the court sufficient flexibility to address the unique facts of each case. Options such as counselling may help resolve the underlying issues and reduce future difficulties whereas financial penalties are more punitive in nature.

The remedies under the *FRA* for circumstances where there were ongoing access problems were rarely used and ill-suited to parenting disputes regarding access. In addition, contempt orders were difficult to obtain in part because the test required that there be no ambiguity in the order from which the contempt arose. Further, the applicants were often able to provide quasi-legitimate reasons for the failure to abide by the order, such as a child's illness or miscommunication between the parties.

Section 61 provides a variety of remedies the court may order in circumstances where there has been a wrongful denial of parenting time or contact. Remedies include preventative measures as well as escalating sanctions. Section 61 also provides a time limit to ensure that applications are only in relation to denials that occurred in the previous 12 months. Further, it allows the court the discretion to allocate any costs of family dispute resolution, counseling, or supervised transfer of children to facilitate parenting time.

SECTION 62 [§3.62]

When denial is not wrongful

62 (1) For the purposes of section 61 *[denial of parenting time or contact]*, a denial of parenting time or contact with a child is not wrongful in any of the following circumstances:

(a) the guardian reasonably believed the child might suffer family violence if the parenting time or contact with the child were exercised;

(b) the guardian reasonably believed the applicant was impaired by drugs or alcohol at the time the parenting time or contact with the child was to be exercised;

(c) the child was suffering from an illness when the parenting time or contact with the child was to be exercised and the guardian has a written statement, by a medical practitioner, indicating that it was not appropriate that the parenting time or contact with the child be exercised;

(d) in the 12-month period before the denial, the applicant failed repeatedly and without reasonable notice or excuse to exercise parenting time or contact with the child;

(e) the applicant

(i) informed the guardian, before the parenting time or contact with the child was to be exercised, that it was not going to be exercised, and

(ii) did not subsequently give reasonable notice to the guardian that the applicant intended to exercise the parenting time or contact with the child after all;

(f) other circumstances the court considers to be sufficient justification for the denial.

(2) If, on an application under section 61, the court finds that parenting time or contact with a child was denied, but was not wrongfully denied, the court may make an order specifying a period of time during which the applicant may exercise compensatory parenting time or contact with the child.

Explanation from the Ministry of Justice

Section 62 provides examples of circumstances in which a denial of parenting time or contact is not wrongful.

Most remedies for denial of parenting time or contact are available only when the parenting time or contact was wrongfully denied. However, even when the denial was not wrongful, the court may, if appropriate, order compensatory time to the guardian to make up for the missed time with the child.

Commentary

With the exception of make-up parenting time or contact, the remedies set out in s. 61 for a denial of parenting time or contact are not available where the denial was not wrongful.

SECTION 63 [§3.63]

Failure to exercise parenting time or contact

63 (1) If a person fails repeatedly to exercise the parenting time or contact with the child to which the person is entitled under an agreement or order, whether or not reasonable notice was given, the court on application may make an order to do one or more of the following:

(a) require one or more of the things described in section 61(2)(a), (b) or (e) *[denial of parenting time or contact]*;

(b) require the person to reimburse any other person for expenses reasonably and necessarily incurred by the other person as a result of the failure to exercise the parenting time or contact with the child, including travel expenses, lost wages and child care expenses;

(c) if the court is satisfied that the person who failed to exercise the parenting time or contact with the child may not comply with an order under this section, order that person to do one or more of the things described in section 61(2)(f).

(2) In making an order under subsection (1)(a), the court may allocate among the parties, or require one party alone to pay, the fees relating to the family dispute resolution, counselling, service, program or transfer.

Explanation from the Ministry of Justice

Section 63 lists orders that can be made when a person fails repeatedly to exercise the parenting time or contact agreed to or granted in an order.

These remedies are more limited than those for denial of time, since it may be at odds with the child's best interests to force a relationship with an uninterested adult by using punitive remedies.

This section gives judges the discretion to allocate the cost, if any, to facilitate parenting time or contact.

Commentary

Section 63 sets out orders that can be made by the court when there is repeated failure by a person to exercise parenting time or contact that has been agreed on or granted in an order. This is notwithstanding whether the parent not exercising the time has provided reasonable notice.

The orders the court can make are more restrictive than those set out in s. 62. They include requiring the parties to participate in family dispute resolution, require one or more parties to attend counseling or specified programs, or require that the transfer of the child be supervised. The remedies are more limited than those under s. 62 since it may be at odds with a child's best interests to force a relationship with an uninterested adult by using punitive remedies.

SECTION 64 [§3.64]

Orders to prevent removal of child

64 (1) On application, a court may make an order that a person not remove a child from a specified geographical area.

(2) On application, if satisfied that a person proposes to remove a child from, and is unlikely to return the child to, British Columbia, the court may order the person who proposes to remove the child to do one or more of the following:

(a) give security in any form the court directs;

(b) surrender, to a person named by the court, passports and other travel records of the person who proposes to remove the child or of the child, or of both;

(c) transfer specific property to a trustee named by the court;

(d) if there is an agreement or order respecting child support, pay the child support to a trustee named by the court.

SECTION 86 [§3.86]

Family debt

86 Family debt includes all financial obligations incurred by a spouse

(a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate, and

(b) after the date of separation, if incurred for the purpose of maintaining family property.

Explanation from the Ministry of Justice

Section 86 describes family debt for the purposes of division. The starting point is that all debts incurred by either spouse during the relationship are to be equally divided.

There is an exception for debt incurred after the date of separation where it is incurred to maintain family property. Since both spouses generally continue to benefit from the family property until it is divided, both are presumed to be responsible for the cost of maintaining that property until that time.

If equal division of family debt is significantly unfair, the division may be adjusted under s. 95 (§3.95) of the *Family Law Act.*

Commentary

Section 86 is a new provision that broadly defines family debt. The statutory starting point is that all debts incurred by either spouse during the course of their relationship, from the date of cohabitation to the date of separation, are family debts subject to equal division under s. 81. Conversely, debts incurred after the date of separation are not family debts, unless either spouse has incurred the debt for the purpose of maintaining family property. Section 95, which allows for unequal division of family debt in circumstances of significant unfairness, will be an important provision in tempering the effects of this broad definition.

There may prove to be lacuna in how family debt is defined. For example, in circumstances where major debts are incurred by one spouse shortly after separation as a result of mutual decisions made by both spouses during their relationship, there may be litigation about the timing and circumstances surrounding the incurrence of that debt and whether the debt is captured by s. 86.

SECTION 88 [§3.88]

Orders under this Division

88 A spouse may make an application to the Supreme Court under this Division at any time before a final agreement or final order is made in relation to a family law dispute respecting property division.

> Explanation from the Ministry of Justice
>
> Section 88 authorizes applications to court under this division prior to an agreement or final order.

SECTION 89 [§3.89]

Orders for interim distribution of property

89 If satisfied that it would not be harmful to the interests of a spouse and is necessary for a purpose listed below, the Supreme Court may make an order for an interim distribution of family property that is at issue under this Part to provide money to fund

(a) family dispute resolution,

(b) all or part of a proceeding under this Act, or

(c) the obtaining of information or evidence in support of family dispute resolution or an application to a court.

> Explanation from the Ministry of Justice
>
> Section 89 authorizes judges to make orders for interim distribution of property prior to final resolution of the issues to assist in making assets available to economically disadvantaged spouses who need them to achieve a fair division of family property.
>
> The *Family Relations Act* did not explicitly authorize orders respecting the interim distribution of family property, although case law provides some authority to order interim distribution in very limited circumstances.

SECTION 90 [§3.90]

Temporary orders respecting family residence

90 (1) For the purposes of this section, **"family residence"** means a residence that is

(a) owned or leased by one spouse or both, and

(b) the ordinary place of residence of the spouses.

(2) The Supreme Court may make an order granting a spouse, for a specified period of time,

(a) exclusive occupation of a family residence, or

(b) possession or use of specified personal property stored at the family residence, including to the exclusion of the other spouse.

(3) An order under this section does not

(a) authorize a spouse to materially alter the substance of the family residence or personal property,

(b) grant to a spouse a proprietary interest in the family residence or personal property, or

(c) subject to subsection (4), grant to a spouse any right that continues after the rights of the other spouse, or of both spouses, as owner or lessee are terminated.

(4) If an order has been made under subsection (2), the Supreme Court may

(a) order that the right of a spouse to apply for partition and sale of, or to sell or otherwise dispose of or encumber, the family residence or personal property

(i) be postponed, and

(ii) is subject to the order made under subsection (2), and

(b) change the order made under subsection (2).

(5) Nothing in this section prevents the filing of an entry under the *Land (Spouse Protection) Act*.

Explanation from the Ministry of Justice

This section provides for exclusive occupation of a family residence or possession or use of personal property to the exclusion of the other spouse.

It authorizes the Supreme Court, which has exclusive jurisdiction over property issues, to make a temporary order for a specified period of time for exclusive occupation of a family residence or exclusive use and possession of personal property stored at the family residence.

These temporary orders do not allow a spouse to materially alter the family residence or personal property nor do they grant a proprietary interest in either.

Section 90 carries over ss. 124 and 125 of the *Family Relations Act*.

SECTION 91 [§3.91]

Temporary orders respecting protection of property

91 (1) On application by a spouse, the Supreme Court must make an order restraining the other spouse from disposing of any property at issue under this Part or Part 6 *[Pension Division]* until or unless the other spouse establishes that a claim made under this Part or Part 6 will not be defeated or adversely affected by the disposal of the property.

(2) The Supreme Court may make one or more of the following orders:

(a) for the possession, delivery, safekeeping and preservation of property;

(b) for the purpose of protecting the applicant's interest in property from being defeated or adversely affected,

(i) prohibiting the other spouse from disposing of, transferring, converting, or exchanging into another form, property in which the applicant may have an interest, or

(ii) vesting all or a portion of property in, or in trust for, the applicant.

(3) The Supreme Court may make an order under this section before notice of the application is served on the other spouse, or may order that notice of the application be served on the other spouse.

Explanation from the Ministry of Justice

This section carries over the substance of the spousal support related provisions in ss. 91 and 93(1) of the *Family Relations Act* to authorize judges to order spousal support, and clarified who may apply for a spousal support order.

The section limits a court's ability to make an order respecting spousal support where the spouses have an agreement. This is to ensure spouses can rely on their agreement to be upheld, except where the agreement is set aside under the limited conditions set out in s. 164.

SECTION 166 [§3.166]

Misconduct of spouse

166 In making an order respecting spousal support, the court must not consider any misconduct of a spouse, except conduct that arbitrarily or unreasonably

(a) causes, prolongs or aggravates the need for spousal support, or

(b) affects the ability to provide spousal support.

Explanation from the Ministry of Justice

Section 166 limits the court's ability to consider misconduct of a spouse when determining support. For example, consideration of who left the relationship or whether there was an affair is not allowed to be taken into account when determining spousal support.

The exception to this rule is that the court may consider misconduct of a spouse where a spouse has engaged in conduct that either prolongs the need for support or reduces the means from which support could be paid. For example, support may be reduced where the recipient refused to look for or accept appropriate employment. Alternatively, a payor's request to reduce the support paid may be refused where they have, without excuse, gone from full-time to part-time employment.

This section is similar to s. 15.2(5) of the *Divorce Act*.

The *Family Law Act* continues the duty on the person receiving support to become self-sufficient as provided for in ss. 89 and 96 of the *Family Relations Act*. Section 61(d) (Objectives of spousal support) of the Act provides for the objective that a spouse becomes self-sufficient in a reasonable period of time. This, in conjunction with the ability to consider misconduct that prolongs or aggravates the need for spousal support ensures that the recipient of support must make reasonable efforts to reduce the need for support.

Commentary

This is not quite the same situation as in *Leskun v. Leskun*, 2006 SCC 25, though one would be forgiven for thinking so. There, the Supreme Court of Canada held that a recipient spouse's inability to find or return to work due to stress from the breakdown of the marriage could be considered in light of the statutory obligation to contribute to one's own support. They specifically criticized the Court of Appeal's reference to the payor's misconduct in contributing to that result.

Here, the Court of Appeal appears to have been vindicated. Not only will the court be able to consider misconduct affecting the recipient's ability to contribute to his or her support, but also misconduct of the recipient, if it affects the payor's ability to pay.

What can now be considered misconduct under this section? The Ministry commentary suggests it might be limited to misconduct in changing or refusing employment, but the section itself is not so restricted. Misconduct might include defamatory comments or intentional infliction of mental distress affecting the other's employment. Really, the possibilities are open, so long as the conduct complained of relates to the ability either to pay or to support oneself.

The courts' interpretation of the words "arbitrarily or unreasonably" will be very important here.

SECTION 167 [§3.167]

Changing, suspending or terminating orders respecting spousal support

167 (1) On application, a court may change, suspend or terminate an order respecting spousal support, and may do so prospectively or retroactively.

(2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:

(a) a change in the condition, means, needs or other circumstances of either spouse has occurred since the order respecting spousal support was made;

(b) evidence of a substantial nature that was not available during the previous hearing has become available;

(c) evidence of a lack of financial disclosure by either spouse was discovered after the order was made.

(3) Despite subsection (2), if an order requires payment of spousal support for a definite period or until a specified event occurs, the court, on an application made after the expiration of that period or occurrence of that event, may not make an order under subsection (1) for the purpose of resuming spousal support unless satisfied that

(a) the order is necessary to relieve economic hardship that

(i) arises from a change described in subsection (2)(a), and

(ii) is related to the relationship between the spouses, and

(b) the changed circumstances, had they existed at the time the order was made, would likely have resulted in a different order.

Explanation from the Ministry of Justice

Section 180 allows a court to make changes to an appointment of a trustee if it is in the best interests of a child. These changes include requiring a trustee to provide an accounting or terminating the trustee's appointment and ordering the trustee to reimburse the child if necessary.

The section allows a flexible approach and provides safeguards to protect the child's interests.

SECTION 181 [§3.181]

When child's property must be delivered to child

181 Unless a trust instrument, an order or an enactment provides otherwise, a trustee must deliver to the child or the child's legal representative, when the child reaches the age of 19 years,

(a) the property, and

(b) an account of the property.

Explanation from the Ministry of Justice

Section 181 provides a duty on trustees, including guardians who are trustees of small trusts, to deliver the property and provide an accounting to the child when the child reaches 19 years old, unless a trust instrument, such as a will or an order, says differently.

PART 9—PROTECTION FROM FAMILY VIOLENCE

Explanation from the Ministry of Justice

Existing restraining orders, which prohibit harassment and contact in specified circumstances, are replaced with one type of order: a "protection order". A protection order is a safety-related order. Breaches of a protection order will be a criminal offence and may be enforced under s. 127 of the *Criminal Code*.

Use of the *Criminal Code* to enforce protection orders will promote timely, effective enforcement, which can save lives. It streamlines enforcement and limits it to the criminal justice system, where the police and Crown counsel are familiar with the processes and tools. It sends the message that breaches of protection orders will be taken seriously.

... *continued*

As well, the new protection order scheme:

- broadens the range of family members who are eligible to apply for protection orders;
- clarifies the procedure to ensure protection orders are accessible, clear, and effective; and
- provides guidance on risk factors to promote the use of protection orders in appropriate and safety-related situations.

The new regime responds to recommendations made in numerous reports, including the *Keeping Women Safe* report and the Representative for Children and Youth's *Honouring Christian Lee* report, which say consistent enforcement of protection orders is critical to increasing victim safety. The previous scheme, which was enforced through civil law, was identified as problematic on a number of levels. Inconsistent enforcement of civil restraining orders was identified as an issue that impacts families' safety and confidence in the justice system.

To ensure a consistent approach to enforcement of safety-related orders, breaches of orders to protect children made under the *Child, Family and Community Service Act* (Protective Intervention Orders under s. 28 or Restraining Orders under s. 98) will now also be enforced through s. 127 of the *Criminal Code*. This will allow for consistent and streamlined enforcement of civil orders to protect families and children regardless of whether they receive their protection order under the family law or the child protection law.

SECTION 182 [§3.182]

Definitions

182 In this Part and the regulations made under section 248(1)(d) *[general regulation-making powers]*:

"at-risk family member" means a person whose safety and security is or is likely at risk from family violence carried out by a family member;

"residence" means a place where an at-risk family member normally or temporarily resides, including a place that was vacated because of family violence.

Explanation from the Ministry of Justice

Section 182 creates definitions necessary to support interpretation of the other sections in this Part.

Commentary

Section 182 broadens the definition of the range of persons who are eligible to apply for a protection order while also expanding the definition of "residence" for the "at-risk family member". The definitions provided support the interpretations for the sections under Part 9.

SECTION 183 [§3.183]

Orders respecting protection

183 (1) An order under this section

(a) may be made on application by a family member claiming to be an at-risk family member, by a person on behalf of an at-risk family member, or on the court's own initiative, and

(b) need not be made in conjunction with any other proceeding or claim for relief under this Act.

(2) A court may make an order against a family member for the protection of another family member if the court determines that

(a) family violence is likely to occur, and

(b) the other family member is an at-risk family member.

(3) An order under subsection (2) may include one or more of the following:

(a) a provision restraining the family member from

(i) directly or indirectly communicating with or contacting the at-risk family member or a specified person,

(ii) attending at, nearing or entering a place regularly attended by the at-risk family member, including the residence, property, business, school or place of employment of the at-risk family member, even if the family member owns the place, or has a right to possess the place,

(iii) following the at-risk family member, or

(iv) possessing a weapon or firearm;

(b) limits on the family member in communicating with or contacting the at-risk family member, including specifying the manner or means of communication or contact;

(c) directions to a police officer to

(i) remove the family member from the residence immediately or within a specified period of time,

(ii) accompany the family member, the at-risk family member or a specified person to the residence as soon as practicable, or within a specified period of time, to supervise the removal of personal belongings, or

(iii) seize from the family member any weapons or firearms and related documents;

(d) a provision requiring the family member to report to the court, or to a person named by the court, at the time and in the manner specified by the court;

(e) any terms or conditions the court considers necessary to

(i) protect the safety and security of the at-risk family member, or

(ii) implement the order.

(4) Unless the court provides otherwise, an order under this section expires one year after the date it is made.

(5) If an order is made under this section at the same time as another order is made under this Act, including an order made under Division 5 *[Orders Respecting Conduct]* of Part 10, the orders must not be recorded in the same document.

Explanation from the Ministry of Justice

Section 183 establishes the framework for the new protection order regime.

It provides that a protection order may be made against a family member where there is a safety concern. The broadened range of eligible family members (as defined in s. 1 (§3.1) of the Act) is consistent with domestic violence laws elsewhere in Canada.

The section allows for an application for a protection order to be made by the at-risk family member or by another person on behalf of the at-risk family member. For example, the mother could also apply for a protection order on behalf of her child. It also allows for the court to make an order on its own initiative, where a risk is identified.

The section clarifies that protection orders are available on a stand-alone basis; they may be made at any time and need not be connected to other family law proceedings.

Section 183 limits the terms that may be included in protection orders to ensure they are safety-focused and appropriate for enforcement by police and the criminal justice system. This is intended to promote more consistent, timely and effective enforcement. Under the *Family Relations Act*, many restraining orders also included provisions that were not safety-related, which undermined the seriousness of the order and resulted in enforcement challenges. The new regime creates a division between orders for risky and non-risky behaviours to promote more effective enforcement appropriate to the situation. If a person requires an order for non-safety-related issues, there are "conduct orders" available under Part 10 of the *Family Law Act* that are enforced through family law remedies, whereas the safety-related protection orders are enforced through the criminal law remedies.

The section provides a default expiry date of one year unless the court specifies a different duration. Under the *Family Relations Act*, many orders had no end date, which caused enforcement problems since police were unable to tell whether the order remained relevant. The default expiry date allows judges to tailor orders while providing greater clarity for the police in their enforcement role as compared to orders that do not provide an end-date. Peace bonds under the *Criminal Code* also expire after a year.

As with all orders, a protection order takes effect the moment the judge makes it and it must be complied with right away. Under s. 229 (§3.229) of the Act, an order may be enforced whether or not service has been proven. If the order was made without notice, and a police officer is called to enforce a protection order in the case where the person did not know about the order, the police officer can advise the person and take necessary steps to promote safety.

A protection order is not to be combined within the same document as other types of orders. This will ensure that the orders in the Protection Order Registry are safety related and that those safety-related provisions are easily identifiable.

Section 183 replaces ss. 37, 38 and 126 of the *Family Relations Act*.

Commentary

The concept of the protection order under this new regime provides that:

- Another person can apply for a protection order for the at-risk family member.
- A party may still be granted a protection order even though they may no longer reside with the opposing party; for example, if women are in a transition house they will still be able to apply for a protection order.
- The court can make an order for protection on its own discretion.
- The protection order can be made at any time and is available to those at risk on a "stand alone basis" without necessitating that a family court action has been commenced.
- The orders have a one year expiry unless the court otherwise directs. The one-year expiry date reflects the time frame for peace bonds under the *Criminal Code*.
- The orders provide for effective enforcement measures by all members of the criminal justice system including directions for police officers to protect the subject of the protection order.
- Under this new regime the *FLA* distinguishes between safety-related orders—protection orders under this section—and non-safety related orders that can be addressed under "conduct orders" under Part 10 of the Act.
- Most significantly, protection orders will be enforced through the criminal justice system, under s. 127 of the *Criminal Code*. A breach of a protection order under this new regime will be a criminal offence.

Parties can apply for protection orders in Provincial or Supreme Court.

Peace bonds are still available for parties seeking to pursue safety-related orders through the criminal courts.

SECTION 184 [§3.184]

Whether to make protection order

184 (1) 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;

(e) any circumstance of the family member against whom the order is to be made that may increase the risk of family violence by that family member, including substance abuse, employment or financial problems, mental health problems associated with a risk of violence, access to weapons, or a history of violence;

(f) the at-risk family member's perception of risks to his or her own safety and security;

(g) any circumstance that may increase the at-risk family member's vulnerability, including pregnancy, age, family circumstances, health or economic dependence.

(2) If family members are seeking orders under this Part against each other, the court must consider whether the order should be made against one person only, taking into account

(a) the history of, and potential for, family violence,

(b) the extent of any injuries or harm suffered, and

(c) the respective vulnerability of the applicants.

(3) For the purposes of subsection (2), the person who initiates a particular incident of family violence is not necessarily the person against whom an order should be made.

(4) The court may make an order under this Part regardless of whether any of the following circumstances exist:

(a) an order for the protection of the at-risk family member has been made previously against the family member against whom an order is to be made, whether or not the family member complied with the order;

(b) the family member against whom the order is to be made is temporarily absent from the residence;

(c) the at-risk family member is temporarily residing in an emergency shelter or other safe place;

(d) criminal charges have been or may be laid against the family member against whom the order is to be made;

(e) the at-risk family member has a history of returning to the residence and of living with the family member against whom the order is to be made after family violence has occurred;

(f) an order under section 225 *[orders restricting communications]* has been made, respecting the at-risk family member, against the family member against whom the order is to be made.

Explanation from the Ministry of Justice

Section 184 provides guidance to courts on when protection orders should be ordered.

It lists risk factors courts must consider in determining whether family violence is likely to occur and whether it is appropriate to make a protection order. The risk factors are consistent with risk assessment research and tools used in British Columbia and across Canada by police and the justice system.

The section also provides factors for a court to consider when determining whether the order should be made against only one person in cases where both parties are seeking protection orders against each other. Mutual orders may not be appropriate where one person is the primary aggressor and one is repeatedly a victim.

... *continued*

Section 184 also provides examples of circumstances that should not preclude the making of a protection order, including whether the victim has previously returned to the home after incidents of family violence or whether criminal charges have been laid.

Commentary

Section 184 obligates the court to engage in an assessment of potential risk factors that may warrant ordering a protection order. This section provides a non-exhaustive list of risk factors that the court "must" "at least" consider in their determination process of either ordering or not ordering a protection order.

SECTION 185 [§3.185]

If child a family member

185 If a child is a family member, the court must consider, in addition to the factors set out in section 184 *[whether to make protection order]*,

(a) whether the child may be exposed to family violence if an order under this Part is not made, and

(b) whether an order under this Part should also be made respecting the child if an order under this Part is made respecting the child's parent or guardian.

Explanation from the Ministry of Justice

Section 185 adds additional factors to be considered when making a protection order where children are involved.

It requires the court to consider whether a child family member specifically requires protection in any circumstance where family violence may occur including to protect them from exposure to family violence.

This section responds to recommendations, such as those from the Representative for Children and Youth in the *Honouring Christian Lee* report, that challenge the assumption that the safety of a child is secured through the safety of the parent. It recognizes that children may specifically require protection as well.

Commentary

In addition to the factors outlined in s. 184, under s. 185 in the event the court is faced with assessing whether to order a protection order for a child, the court must assess whether the child will witness or be exposed to violence if an order is not made; and whether the child separately requires a protection order, regardless of whether an order is made for a child's parent or guardian.

Again the court is obligated to review these factors; the legislation provides that the court "must" engage in this additional assessment where children may face a safety risk.

SECTION 186 [§3.186]

Orders without notice

186 (1) An application for an order under this Part may be made without notice.

(2) If an order is made under this Part without notice, the court, on application by the party against whom the order is made, may

(a) set aside the order, or

(b) make an order under section 187 *[changing or terminating orders respecting protection]*.

Explanation from the Ministry of Justice

Section 186 clarifies that protection orders can be made without notice, and sets out how an order may be set aside, changed or terminated.

It establishes that in cases where family violence is a risk, orders without notice may be appropriate to promote safety.

Where an order is made without notice, the court may set aside or change the order if the order is not appropriate on consideration of the evidence of the party against whom the order was made. If the order is set aside, it is like the order never was and there is no prejudice to the party.

SECTION 187 [§3.187]

Changing or terminating orders respecting protection

187 (1) On application by a party, a court may do one or more of the following respecting an order made under this Part:

(a) shorten the term of the order;

(b) extend the term of the order;

(c) otherwise change the order;

(d) terminate the order.

(2) An application under this section must be made before the expiry of the order that is the subject of the application.

(3) Nothing in subsection (2) of this section prohibits a person from making a subsequent application for an order under section 183 *[orders respecting protection]*.

Explanation from the Ministry of Justice

Section 187 allows the court to shorten, lengthen, terminate or otherwise change a protection order after it is made to address changing circumstances or evolving risk.

Commentary

The application must be made before the expiry of the protection order.

SECTION 188 [§3.188]

Enforcing orders respecting protection

188 (1) An order made under this Part may not be enforced

(a) by means of any order that may be made under this Act, or

(b) under the *Offence Act*.

(2) A police officer having reasonable and probable grounds to believe that a person has contravened a term of an order made under this Part may

(a) take action to enforce the order, whether or not there is proof that the order has been served on the person, and

(b) if necessary for the purpose of paragraph (a), use reasonable force.

Explanation from the Ministry of Justice

Restraining orders under the *Family Relations Act* were enforced through civil law. Enforcement of restraining orders under the *Family Relations Act* was identified as a critical justice system failure.

Section 188 replaces s. 128 of the *Family Relations Act*, which provides for civil enforcement through the *Offence Act*, with a section stating that neither the *Offence Act* nor the *Family Law Act* apply to the enforcement of a protection order.

The Act deliberately remains silent on how protection orders are to be enforced. This is necessary to allow for enforcement through the *Criminal Code*. Section 127 of the *Criminal Code* is a default enforcement mechanism that, by its terms, applies only where there is no other remedy available under the statute. Section 127 of the *Criminal Code* is successfully being used to enforce civil protection orders in Manitoba, and recently Ontario amended its legislation to do the same.

... *continued*

Police authority to act on a breach of a protection orders is also clearly provided for. This will avoid confusion and promote consistent police enforcement at the time of a breach.

The protection order itself will be a civil order. When the order is breached, the breach triggers the use of the *Criminal Code*. If the restrained party never breaches the protection order, they are never brought into the criminal system.

Using the *Criminal Code* to enforce protection orders will promote timely, effective enforcement, which can save lives. It streamlines enforcement and limits it to the criminal justice system, where the police and Crown counsel are familiar with the processes and tools, and it sends the message that breaches of protection orders will be taken seriously.

To ensure a consistent approach to enforcement of safety-related orders, breaches of orders to protect children made under the *Child, Family and Community Service Act* (Protective Intervention Orders under s. 28 or Restraining Orders under s. 98) will also be enforced through s. 127 of the *Criminal Code*.

SECTION 189 [§3.189]

Conflict between orders

189 (1) In this section, **"protection order"** means any of the following orders:

(a) an order made under this Part;

(b) an order, made under the *Criminal Code*, that restricts a person from contacting or communicating with another person;

(c) an order, made by a court in British Columbia or another jurisdiction in Canada, that is similar in nature to an order made under this Part.

(2) If there is a conflict or an inconsistency between a protection order and an order made under a Part of this Act other than this Part, the other order is suspended, to the extent of the conflict or inconsistency, until

(a) either the other order or the protection order is varied in such a way that the conflict or inconsistency is eliminated, or

(b) the protection order is terminated.

Explanation from the Ministry of Justice

Section 189 gives priority to safety-related orders in cases where they conflict with another order relating to a family law dispute. These orders include: protection orders under the *Family Law Act*, orders under the *Child, Family and Community Service Act* and the *Criminal Code*, or safety-related orders made under legislation from another province.

... *continued*

For example, if a parent has parenting time but later bail conditions prohibit contact with the child, the safety-related bail conditions prevail and there is to be no contact with the child until the issue or inconsistency between the orders is resolved.

This will promote safety, eliminate confusion and provide for a consistent approach.

SECTION 190 [§3.190]

Rights not affected by Act

190 The making of an order under this Part does not affect any existing right of action of a person who has been the subject of family violence.

Explanation from the Ministry of Justice

Section 190 states that the making of a protection order does not affect any existing right of action of a person affected by family violence.

It clarifies that a person affected by family violence may continue to pursue civil or criminal proceedings in tandem with obtaining a protection order.

SECTION 191 [§3.191]

Extraprovincial orders

191 The *Enforcement of Canadian Judgments and Decrees Act* applies to an order, made by a court in another jurisdiction of Canada, that is similar to an order made under this Part.

Explanation from the Ministry of Justice

As part of the new protection order regime, consequential amendments have been made to the *Enforcement of Canadian Judgments and Decrees Act* which adopt the Uniform Law Conference of Canada's recommendations. These amendments allow civil protection orders made by judges elsewhere in Canada to be enforced like protection orders from British Columbia without the need to register the out-of-province order. Manitoba, Saskatchewan and Nova Scotia have already enacted these amendments.

This section is intended to promote greater safety and consistency across Canada.

Commentary

According to the Ministry of Justice comments, this section is to reflect recent case law that requires evidence to be lead in support of the consent order. This section is apparently to be read to say that if parties are to be bound by an order of the court, evidence must be lead.

SECTION 220 [§3.220]

Court may make order on behalf of child

220 If a court is satisfied that an application for an order under this Act should also have been made on behalf of a child, the court may make an order on behalf of the child.

Explanation from the Ministry of Justice

This section allows the court to make an order for relief on behalf of a child, if a spouse's or parent's application should have been on behalf of the child.

Section 220 carries over s. 17 of the *Family Relations Act*.

SECTION 221 [§3.221]

Misuse of court process

221 (1) A court may make an order prohibiting a party from making further applications or continuing a proceeding without leave of the court if satisfied that the party

(a) has made an application that is trivial,

(b) is conducting a proceeding in a manner that is a misuse of the court process, or

(c) is otherwise acting in a manner that frustrates or misuses the court process.

(2) If an order is made under subsection (1), the court may do one or more of the following:

(a) make the order apply

(i) for a specified period of time, or

(ii) until the party has complied with an order made under this Act;

(b) impose any terms and conditions respecting the granting of leave to make further applications or to continue a proceeding;

(c) require the party to pay

(i) the other party for all or part of the expenses reasonably and necessarily incurred as a result of the party's actions, including fees and expenses related to family dispute resolution,

(ii) an amount not exceeding $5 000 to or for the benefit of the other party, or a spouse or child whose interests were affected by the party's actions, or

(iii) a fine not exceeding $5 000.

Explanation from the Ministry of Justice

Section 221 adds a provision that provides the court with the power to prohibit or limit a party from making further applications in cases where the court feels a party is making trivial or vexatious applications or is otherwise misusing the court process.

It provides a case management tool for courts to deal effectively with high-conflict families and vexatious litigants, who often make repeated applications without adequate grounds.

This section allows a court to restrict a party from making future applications about the same issue or limit them from coming to court until they have complied with the conditions imposed. If the person has refused to comply with an order, the court may refuse to allow the party leave to make an application to court until they have complied with their orders.

It also provides the court with other remedies. For example, where the party has repeatedly taken their spouse to court without adequate grounds, they may be required to pay the expenses the spouse incurred as a result. Alternatively, the court may order the person to pay a fine for using the justice system inappropriately.

Commentary

This section provides the court with needed tools to deal with high-conflict families and individuals. Judges have been struggling with ways to control problematic files; for instance, a judge may seize himself or herself of the file. However, this section provides for file management by court order, not file management by judge; a small, but fine distinction.

Division 5—Orders Respecting Conduct

Explanation from the Ministry of Justice

The majority of the provisions in this Division are new.

This Division provides a court with a wide range of tools to help judges manage behaviour, de-escalate tensions, promote compliance, and facilitate the settlement of disputes. It includes a collection of tools and remedies that range from preventive measures, such as sending people to counselling or programs to punitive measures, such as fines or payment of expenses to encourage compliance. Conduct orders will allow a judge to tailor processes to the needs of a particular family.

... continued

These new measures are available to both Supreme and Provincial Court. This will ensure more consistency in the tools and remedies available between the two levels of court and ensure that Provincial Court, whose authority to act must be provided for in legislation, has the tools needed to effectively manage family law cases.

These tools can be used in any family law case, but will be particularly effective in managing high-conflict families. Although high-conflict families constitute a minority of separating or divorcing couples, they use a disproportionate amount of court resources. Some reports speculate that 10% of families demonstrating high-conflict behaviour use up to 90% of family justice system resources. Further, the research shows that children in high-conflict families are more likely to be damaged by their parents' ongoing conflict. These families often require a more interventionist approach to resolve the underlying issues, manage the dispute and contain their extraordinary demands on the resources of the justice system.

Commentary

Although the Provincial Court has the jurisdiction to control its process to protect the integrity of the judicial process (*Re Stanny*, 2008 ABPC 305), these new provisions expand the court's available range of approaches to decrease conflict and enhance co-operation between the parties to a family law dispute. Secondarily, they offer additions to the usual repertoire of case management tools used by judges of the Supreme Court, again with a view to removing impediments to settlement, or, in the alternative, to "the just, speedy and inexpensive determination of every family law case on its merits" mandated by the Supreme Court Family Rules.

These sections will provide judges with a panoply of tools to ameliorate the underlying causes of friction and will lead to greater consistency between the remedies available in Supreme Court and Provincial Court. They will also permit courts to tailor processes to the needs of the individual family, and to address the particular needs of "high-conflict families".

Note also that the orders can be made at the instance of the judge; it is not always necessary that a party apply for an order respecting conduct.

SECTION 222 [§3.222]

Purposes for which orders respecting conduct may be made

222 At any time during a proceeding or on the making of an order under this Act, the court may make an order under this Division for one or more of the following purposes:

(a) to facilitate the settlement of a family law dispute or of an issue that may become the subject of a family law dispute;

(b) to manage behaviours that might frustrate the resolution of a family law dispute by an agreement or order;

(c) to prevent misuse of the court process;

(d) to facilitate arrangements pending final determination of a family law dispute.

Explanation from the Ministry of Justice

Section 222 enables courts to use conduct orders at any time to facilitate settlement, facilitate and manage behaviours that might frustrate a resolution, prevent the misuse of court processes and facilitate arrangements pending final determination.

Commentary

Section 222 permits the court to make a wide range of orders without first having to determine that a party is at fault. The focus is not on what has happened between the parties, but on what should happen, or be prevented from happening, in order to move the process of resolution forward.

The objects in s. 222 should be read in conjunction with those in s. 199 (§3.199), which require that a court ensure that a *Family Law Act* proceeding is conducted with as little delay and formality as possible and in a manner that strives to minimize conflict between, and if appropriate, promote cooperation by, the parties, and protect children and parties from family violence. Orders under s. 222 should be made with s. 199(2) in mind, namely that the impact of the proceeding on children should be considered and the parties encouraged to focus on the best interests of the child, which includes minimizing the effect of conflict on the children.

Section 222(d) should be read together with s. 216, which alters the existing common law on varying interim orders. This may signal an approach directed more at adjusting the status quo to alleviate difficulties that may be impeding dispute resolution, rather than moving the parties more quickly toward expecting the definitive result of a trial.

SECTION 223 [§3.223]

Orders respecting case management

223 (1) A court may make an order to do one or more of the following:

(a) dismiss or strike out all or part of the party's claim or application;

(b) adjourn a proceeding while

(i) the parties attempt to resolve one or more issues before the court, or

(ii) a party complies with an order made under this Division;

(c) require that all further applications be heard by the judge or master making the order unless that judge or master directs otherwise;

(d) prohibit a party from making an application, without leave of the court, respecting any matter over which a parenting coordinator has authority to act under an agreement or order.

(2) Subsection (1)(d) of this section does not apply to an application made under section 19 *[confirming, changing or setting aside determinations]*.

(3) Nothing in this section limits any other order a court may make under an enactment or the common law for the purpose of controlling a proceeding before the court.

SECTION 224 [§3.224]

Orders respecting dispute resolution, counselling and programs

224 (1) A court may make an order to do one or both of the following:

(a) require the parties to participate in family dispute resolution;

(b) require one or more parties or, without the consent of the child's guardian, a child, to attend counselling, specified services or programs.

(2) If the court makes an order under subsection (1), the court may allocate among the parties, or require one party alone to pay, the fees relating to the family dispute resolution, counselling, services or programs.

Explanation from the Ministry of Justice

Section 224 authorizes the courts to require parties to attend family dispute resolution or attend counselling, services or programs. These interventions are often more effective and more affordable for families than court.

Interventions such as dispute resolution, counselling and programs can be used to de-escalate conflict, resolve underlying issues, promote settlement and encourage adherence to orders or agreements. Preventative tools such as these can better address the underlying causes of conflict.

If there are costs associated, the court may allocate the costs between the parties. The financial costs associated with dispute resolution are almost always significantly lower than the cost of court, particularly where lawyers are involved. As well, the emotional costs associated with court are high.

There are publicly funded Family Justice Centres and Justice Access Centres located in communities across British Columbia. Family Justice Counsellors offer assistance to families on separation by providing dispute resolution services and information and referrals to other services. As well, most separating parents are required to attend a "Parenting After Separation" course prior to filing an action in court.

Commentary

"Family dispute resolution" is defined in s. 1 (§3.1) of the Act as a process used by parties to a family law dispute to attempt or resolve one or more of the disputed issues outside court. It includes using the assistance of a family justice counsellor, a parenting coordinator, a mediator, an arbitrator, a collaborative family lawyer, and "prescribed processes". As the mechanisms for assisting families to resolve disputes continue to evolve this section is broad enough to encompass all manner of new alternate dispute resolution strategies. In combination with s. 223(1)(b), this provision permits the court to direct the parties to engage in a specified form of dispute resolution and to adjourn the proceeding until such time as they have complied with that direction to the satisfaction of the court.

... *continued*

Section 224(1) permits a court to direct that one or both of the parties or a child of the parties attend counselling or receive services. This would appear to be unrelated to an assessment or report made under Division 4 of the Act.

A common obstacle to participation in some forms of dispute resolution and/or counselling is the inability of one party to pay the associated cost. Section 224(2) permits a court to address this problem in a summary fashion, so long as the purpose of the dispute resolution and/or counselling is among those set out in s. 222.

SECTION 225 [§3.225]

Orders restricting communications

225 Unless it would be more appropriate to make an order under Part 9 *[Protection from Family Violence]*, a court may make an order setting restrictions or conditions respecting communications between parties, including respecting when or how communications may be made.

Explanation from the Ministry of Justice

Section 225 allows courts to make restrictions or conditions respecting communications between the parties in order to manage behaviour and limit conflict between parties.

For example, under this provision, an order could be made that requires the parties to communicate by email, except in emergencies, to avoid heated conversations in front of the children.

This provision is not to be used where there is a safety risk and a protection order is more appropriate. In those cases protection orders should be sought or ordered instead.

Under s. 228 (Enforcing orders respecting conduct), repeated breaches of a conduct order restricting communications are grounds for a court to consider if it would be appropriate to make a protection order under Part 9 of the Act. Research shows that when restrictions on contact or communication are repeatedly breached, it is often an indicator of escalating risk of harm.

The Act makes an important distinction between conduct orders and protection orders: conduct orders are tools to manage the misbehaviour of parties and are enforced in family court by the parties. Where there is safety risk due to family violence, a conduct order alone is not to be used to manage the risk. Protection orders also restrict communications (and contact) but are for the purpose of preventing violence. A protection order is enforced by the police and Crown under the *Criminal Code*. Where there is risk of harm, a protection order should be made since it is intended to prevent family violence and provides an appropriate justice system response.

Commentary

Section 226(a) and (b) provides a very useful tool to deal with urgent financial matters without the necessity of first determining issues of child and/or spousal support. Particularly in cases where the incomes of one or both parties are at issue, a party can avoid delay or the potential prejudice of a low interim support agreement or award, by seeking to have the court ensure that the immediate housing needs of the family are met. Although the argument can be made that these orders are outside the jurisdiction of the Provincial Court as they concern property (see *Re Family Relations Act (British Columbia)*, [1982] 1 S.C.R. 62), they are more akin to an "interim interim" support order, and likely to be used to bridge the gap between the commencement of proceedings and the making of a support order.

In seeking an order under s. 226(c) an applicant should provide evidence that the "specified person" consents to the task. To increase the likelihood that this order is made by consent it may be advisable to propose more than one person for this role and offer the other party the choice from the list.

SECTION 227 [§3.227]

Other orders respecting conduct

227 A court may make an order requiring a party to do one or more of the following:

(a) give security in any form the court directs;

(b) report to the court, or to a person named by the court, at the time and in the manner specified by the court;

(c) do or not do anything, as the court considers appropriate, in relation to a purpose referred to in section 222 *[purposes for which orders respecting conduct may be made]*.

Explanation from the Ministry of Justice

This section provides further tools for courts to manage behaviour such as ordering a party to provide security to ensure they comply with an order, report to the court or another person or program to monitor compliance, or anything else the court feels is appropriate.

Commentary

This section adds further options for a court attempting to achieve the goals set out in s. 222. Although these provisions are somewhat more coercive in nature, a finding of fault is not a prerequisite to an order under this section; the issue is whether such an order is necessary for one or more of the purposes in s. 222 to be achieved. Although s. 222 is only specifically referenced in s. 227(3), an order can only be made under this division for the purposes set out in that section.

SECTION 228 [§3.228]

Enforcing orders respecting conduct

228 (1) If a party fails to comply with an order made under this Division, the court may do one or more of the following:

(a) make a further order under this Division;

(b) draw an inference that is adverse to the party, and make an order based on the inference;

(c) make an order requiring the party to pay

(i) the other party for all or part of the expenses reasonably and necessarily incurred as a result of the non-compliance, including fees and expenses related to family dispute resolution,

(ii) an amount not exceeding $5 000 to or for the benefit of the other party, or a spouse or child whose interests were affected by the non-compliance, or

(iii) a fine not exceeding $5 000;

(d) make any other order the court considers necessary to secure compliance.

(2) If a party fails to comply with an order made under section 225 *[orders restricting communications]*, the court must consider whether it would be appropriate to make an order under Part 9 *[Protection from Family Violence]*.

Explanation from the Ministry of Justice

Section 228 provides remedies and consequences for failure to comply with a conduct order made under ss. 223 to 227.

The range of remedies is intended to enable the application of progressively more serious responses, without unduly limiting the court's discretion to make orders appropriate to the circumstances of the case. Both the conduct orders and the remedies allow judges to tailor their response to the circumstances of the particular case.

This section also provides that where there are repeated breaches of a conduct order respecting communications, a court must consider if it would be appropriate to make a protection order under Part 9 of the Act. Research shows that when restrictions on contact or communication are repeatedly breached, it is often an indicator of escalating risk of harm.

Commentary

Sections 227 and 228 are directed at promoting compliance with orders made under this division. These sections enable the application of progressively more serious responses, as a particular case requires. The procedural requirements of personal service, lengthy notice, and a higher standard of proof that are required in an application to have someone found in contempt are avoided in favour of a summary determination and a range of available remedies proportional to the nature of the non-compliance.

... *continued*

Provincial Advocates Training Conference 2012

Family Violence: Helping Clients Under the New *Family Law Act*

Kathryn J. Ferriss

Protection Orders, Conduct Orders, Enforcement of Orders, and Duties of the Family Dispute Professional

Definition of Family Violence

- Actual or attempted physical or sexual abuse of a family member
- Psychological or emotional abuse of a family member
- In the case of a child, direct or indirect exposure to family violence

Psychological or Emotional Abuse of a Family Member

- Intimidation, harassment, coercion or threats
- Unreasonable restrictions on financial or personal autonomy
- Stalking or following
- Intentional damage to property

Duties of a Family Dispute Resolution Professional

Definition of Family Dispute Resolution Professional

- Family Justice Counsellor
- Parenting Coordinator
- Family Lawyer
- Mediator (if mediator meets requirements in regulations)
- Arbitrator (if arbitrator meets requirements in regulations)
- A person within a class of prescribed persons.

Duties of Family Dispute Resolution Professional if Family Violence is Present – s. 8 of FLA

Must assess

- whether family violence is present
- the extent to which it will adversely affect the client's safety or ability to negotiate a fair agreement.

There will be regulations indicating how family dispute resolution professionals are to assess family violence.

Duty of Family Lawyer if Family Violence is Present

- discuss with the party the advisability of using various types of family dispute resolution to resolve the matter, and
- inform the party of the facilities and other resources, known to the family dispute resolution professional, that may be available to assist in resolving the dispute.

Duty of Family Dispute Resolution Professional

Must advise the party that agreements and orders respecting the following matters must be made in the best interests of the **child** only:

(a) guardianship;
(b) parenting arrangements;
(c) contact with a child.

Protection Orders

Part 9 – Protection from Family Violence

Who Can Apply for a Protection Order?

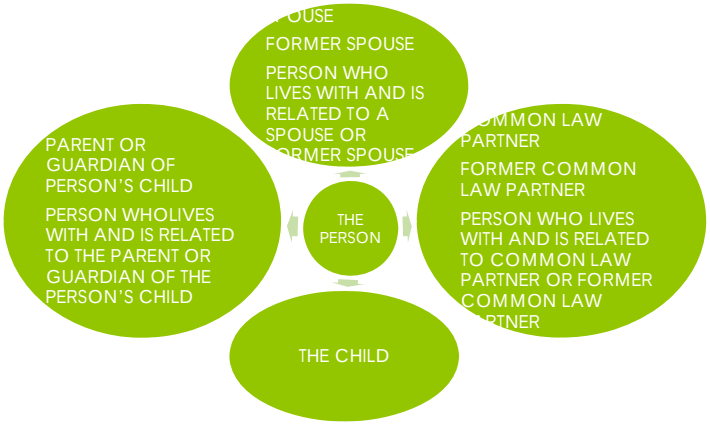
- A family member who is claiming to be an "at-risk family member"
- A person on behalf of the "at-risk family member"
- The court can make the order on its own initiative
- Application can be made without claiming other relief

Definition of "At Risk Family Member"

"A person whose safety and security is or is likely at risk from family violence carried out by a family member."

FLA, s. 182

Definition of "Family Member"



Possible Protection Order Terms

That the respondent:

- Not attend at a residence, property, business, school or place of employment of the at-risk family member (even if the respondent owns or has a right to possess the place);
- Not follow the at-risk family member;
- Not communicate or contact the at-risk family member or, if so, only in a certain way;
- Report to court or a person named by the court;

Other possible terms

- Any terms or conditions the court considers necessary to protect the at-risk family member or implement the order.
- Specify when the order will expire (the default period is one year)
- Restrict access to a residence for the purpose of protecting a family member occupying the residence (s. 193 of the *FLA)*

Factors to Consider

- History of family violence;
- Whether any family violence is repetitive or escalating;
- Any psychological or emotional abuse that indicates a pattern of coercive and controlling behaviour directed at the at-risk family member;
- Current status of the relationship including recent separation or intention to separate;
- Circumstances that may increase the risk of family violence.

Factors to consider

- The at-risk family member's perception of the risk;
- Circumstances that may increase the at-risk family member's vulnerability (mental health, etc);
- Whether a child may be exposed to family violence if a protection order is **not** made;
- Whether an order should be made protecting the child if one is made respecting the child's parents.

Conduct Orders

Part 10 – Court Processes

Conduct Orders

Used for:

- Facilitating settlement
- Managing behaviours
- Preventing misuse of court process
- Facilitating interim arrangements

Conduct Orders Judges Can Make

- Dismiss or strike out party's claim
- Adjourn a proceeding while parties attempt resolution of issues or a party complies with a conduct order
- Seize him or herself
- Prohibit a party from making an application for something a parenting coordinator has authority over, without leave of the court

Conduct Orders Judges Can Make

- Require the parties to attend dispute resolution
- Require the parties or the child to attend counselling
- Allocate payment of counselling or dispute resolution costs between the parties

Conduct Orders Judges Can Make

- Restrict communication between the parties
- Require a party to make payments respecting rent, mortgage, utilities, taxes, insurance
- Prohibit a party from terminating utilities
- Require supervision of the removal of personal belongings
- Require security

Enforcement of Orders and Agreements

Enforcement of Protection Orders

- May **not** be enforced under the *FLA* or *Offence Act (s. 188)*
- Enforceable as an offence under the *CCC*, s. 127.
- Protection Orders from another Canadian jurisdiction – enforceable under the *Enforcement of Canadian Judgments and Decrees Act.*
- "police officer" defined to include RCMP

Enforcement of Conduct Orders

Under s. 228, the court can order:

- Security be posted
- Person report to court or to another person
- That an adverse inference be drawn
- Reimbursement for expenses as a result of the non-compliance
- The person to pay up to $5,000 to the other party, the spouse or child
- Fine the person up to $5,000

Enforcement of Orders Generally

- Ss. 230 and 231 apply only if there are no other enforcement provisions for enforcing that order
- Used to enforce Parenting Time and Contact
- Does not apply to Protection Orders or Conduct Orders
- Does not apply to enforcement of support payments

For more information on the FLA

www.ag.gov.bc.ca/legislation/family-law/index.htm

5. Housing

- **Eviction Materials**
  - Understanding the Eviction Process from Start to Finish Outline
  - Flow Charts of the Process
  - Time Frame Tables
  - Sample Notices to End Tenancy
  - Bailiff Documents

THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

5. Housing

- **Understanding the Eviction Process from Start to Finish PowerPoint presentation**
- **Eviction Materials**
  - Understanding the Eviction Process from Start to Finish Outline
  - Flow Charts of the Process
  - Time Frame Tables
  - Sample Notices to End Tenancy
  - Bailiff Documents

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Legal Services Society

Understanding the Eviction Process from Start to Finish

Kaity Cooper and Kevin Love, lawyers, Community Legal Assistance Society (CLAS) and John Cooke, advocate, Together Against Poverty Society (TAPS)

Notices to End Tenancy

- The eviction process begins with the landlord serving the tenant with a Notice to End Tenancy
- Different Notices provide different time frames for the tenant to cancel or dispute the Notice

The Residential Tenancy Branch ("RTB") Dispute Resolution Process

- The tenant can apply for Dispute Resolution to dispute a Notice to End Tenancy
- In the alternative, the tenant can ask the Dispute Resolution Officer ("DRO") to exercise their discretion to delay the effective date of the Order of Possession
- If the tenant's application is unsuccessful, or the tenant does not dispute the Notice to End Tenancy within the time frame specified, the landlord can ask the RTB for an order of possession

Service of the Order of Possession

- If the landlord successfully obtains an Order of Possession for the rental unit, they must serve the Order on the tenant
- Usually, the Order of Possession gives the tenant 48 hours to leave the rental unit after it has been served

The Review

- The tenant can request a review of an unfavorable decision
- There are three narrow grounds for review:
  - A party was unable to attend the original hearing because of circumstances that could not be anticipated and were beyond the party's control
  - A party has new and relevant evidence that was not available at the time of the original hearing
  - A party has evidence that the director's decision or order was obtained by fraud

The Review

- If the tenant is successful on the review, the RTB will usually hold a new hearing
- The landlord should wait out the review period, and ensure that no review has been filed, before taking further steps to evict the tenant
- If a review has been filed, the landlord should not obtain a Writ of Possession until after a decision has been rendered on review

The Tenant's Options: Overview

- Once the landlord has an Order of Possession, the rest of the eviction process can happen really quickly
- Unless there are real grounds for challenging the Order of Possession, and the tenant really wants to stay, it is usually a matter of stalling and figuring out how to get the tenant more time

The Tenant's Options: #1 Move Out

The Tenant's Options: #2 Negotiate

- Negotiating with the landlord to give the tenant more time to move out is usually the best option
- More on negotiation to come

The Tenant's Options: #3 Judicial Review and Interim Stay

- Filing for judicial review and an interim stay is more time consuming and difficult than negotiation, but if the landlord is unwilling to negotiate it may be the tenant's only option for buying more time
- If the tenant wants to challenge the eviction and stay in the unit and the tenant's review application was unsuccessful, this is the only way to challenge the DRO's decision
- There is a 60 day time limit for bringing a judicial review

The Tenant's Options: #3 Judicial Review and Interim Stay

Judicial Review

- To challenge a decision of the RTB, one must apply to the BC Supreme Court for judicial review of the DRO's decision
- There are fees for filing for judicial review
- If the fees are prohibitively expensive for the tenant, they may apply to have the fees waived by making an application for indigent status

The Tenant's Options: #3 Judicial Review and Interim Stay

Judicial Review

- A judicial review is an opportunity for the BC Supreme Court to review the decision of a tribunal for errors or serious unfairness
- There are essentially two types of errors that might, if they are serious enough, lead a court to overturn a tribunal decision on judicial review:
  - Procedural errors
  - Substantive errors

The Tenant's Options: #3 Judicial Review and Interim Stay

Judicial Review: Procedural Errors

- Procedural errors are errors in the way the hearing was conducted or the way the decision was made, that make the process unfair
- Examples
- If alleging procedural unfairness, the tenant must show the tribunal failed to act fairly in all the circumstances

The Tenant's Options: #3 Judicial Review and Interim Stay

Judicial Review: Substantive Errors

- Substantive errors are errors in the actual decision made by the decision maker
- A tribunal makes a substantive error when it makes a mistake in factual findings, legal findings or an exercise of discretion
- Examples
- Courts only intervene in the case of extremely serious substantive errors

The Tenant's Options: #3 Judicial Review and Interim Stay

Judicial Review: Remedy

- If the tenant is successful on judicial review, the case will be remitted to the RTB for a new hearing
- If the tenant is not successful on judicial review, they will likely have to pay the legal costs of the other side, which could amount to several thousand dollars

The Tenant's Options: #3 Judicial Review and Interim Stay

Relief from Forfeiture

- If the decision under review is an eviction decision based on the tenant's non-payment of rent, the tenant may also be able to seek relief from forfeiture
- Relief from forfeiture is a one-time opportunity to ask the court to forgive a wrong (usually a debt) and give the wrongdoer another chance so that they do not "forfeit" their housing

The Tenant's Options: #3 Judicial Review and Interim Stay

Relief from Forfeiture

- A tenant may only obtain relief from forfeiture where:
  - It is possible to remedy the wrong completely, in money;
  - The tenant has never previously has a wrong forgiven by the court; and
  - The tenant acted reasonably and did not intentionally cause the wrong

The Tenant's Options: #3 Judicial Review and Interim Stay

Interim Stay

- Filing for judicial review does not automatically put the eviction process on hold
- When the tenant files for judicial review, they may also apply for a stay of the Order of Possession so they can stay in the rental unit until the judicial review is decided or some other date that the court orders

The Tenant's Options: #3 Judicial Review and Interim Stay

Interim Stay

- To obtain a stay, the tenant must show:
  - There is merit to their judicial review;
  - If the stay is not granted, they will suffer harm that cannot be fixed, even if they ultimately win the judicial review; and
  - If the stay is granted, there will be no (or little) prejudice to the landlord
- It is up to the court to decide whether to grant a stay and, if so, for how long

The Tenant's Options: #3 Judicial Review and Interim Stay

Disadvantages of this process

- The tenant must file quickly to avoid eviction
- Filing fees
- Risk stay application will be unsuccessful
- Risk of court costs
- No guarantee new hearing will result in different outcome

The Tenant's Options: #3 Judicial Review and Interim Stay

Advantages of this process

- Stay will pause eviction process
- This is the only way to challenge the DRO's decision

The Writ of Possession

- To get a Writ of Possession, the landlord must file the Order of Possession and an Affidavit of Service at the BC Supreme Court

Court Bailiffs Enforce the Writ of Possession

- Only a court bailiff can evict a tenant
- An approved court bailiff can remove a tenant and all their belongings and change the locks
- Hiring a bailiff costs the landlord money
- The landlord can take steps to recover the costs of the eviction
- In some circumstances the bailiff may be able to seize and sell a tenant's possessions
- Exemptions

Negotiation

Negotiation Strategies

- Gather information early
- Focus on interests, not on positions
- Maximize your leverage
- Think creatively
- Get specific

Bargaining Chips

- Cost of hiring a court bailiff
- Cost of responding to a judicial review
- Likelihood that the tenant will get a stay
- Likelihood that the tenant will win a judicial review
- Has rent been paid up to date
- Is the tenant willing to sign a written agreement to be out at a later date

Settlement Agreement

- If you manage to come to an agreement with the landlord, it is ideal to get the agreement in writing
- Consider whether the following terms should be included:
  - Move-out date
  - Agreement by Landlord to not continue the eviction process until after the move-out date
  - Payment by the tenant for use and occupancy
  - Agreement by parties to deal with past debts
  - Withdrawal of legal proceedings
  - Agreement to not commence or pursue further legal proceedings

Negotiation Exercise

- Objective: to negotiate the best possible settlement agreement for your client that addresses his/her concerns and resolves all issues between the parties
- Timing
  - 10 minutes to read facts and strategize
  - 30 minutes to negotiate a settlement agreement
  - 20 minutes to debrief

Negotiation Exercise De-Brief

- Who came to an agreement?
- What were the terms of the agreement?
- For those who didn't come to an agreement, why not?
- Were there any strategies or tactics that were effective?
- Were there any strategies or tactics that weren't effective?
- Anything you would do differently in the future?

Understanding the Eviction Process from Start to Finish: Course Materials

By: Kaity Cooper and Kevin Love, lawyers, Community Legal Assistance Society (CLAS) and John Cooke, advocate, Together Against Poverty Society (TAPS)

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Understanding the Eviction Process from Start to Finish

Notices to End Tenancy

- The eviction process begins with the landlord serving the tenant with a Notice to End Tenancy.
- Different Notices provide different time frames for the tenant to cancel or dispute the Notice, for example:
    - 10 Day Notice to End Tenancy for Unpaid Rent or Utilities
        - Tenant has 5 days to cancel the Notice by paying the rent, or dispute the Notice
    - 1 Month Notice to End Tenancy for Cause
        - Tenant has 10 days to dispute the Notice
    - 2 Month Notice to End Tenancy for Landlord's Use of Property
        - Tenant has 15 days to dispute the Notice
    - 12 Month Notice to End Tenancy for Conversion of Manufactured Home Park
- Where it would be unfair or unreasonable to make the landlord follow the usual notice rules, the landlord may apply for an early end to the tenancy.
- Where the landlord accepts rent for a period of time after the tenancy was to end, the tenancy may be reinstated. This will depend on the circumstances surrounding the acceptance of rent (e.g. did the landlord say the money was being accepted for use and occupancy only; did the landlord reiterate that the tenant had to move; was there outstanding rent due etc.)

The Residential Tenancy Branch Dispute Resolution Process

- The tenant can apply for Dispute Resolution to dispute a Notice to End Tenancy.
    - If the tenant's application is unsuccessful, the landlord can ask for an Order of Possession, which gives the landlord the right to repossess the rental unit and requires the tenant to move out.
    - In the alternative, the tenant can ask the Dispute Resolution Officer to exercise their discretion to delay the effective date of the Order of Possession. In making such a request on behalf of a tenant, you may consider:
        - the potential consequences to the tenant if the Order is issued on a short time frame;

    - how to minimize the potential consequences to the landlord if the Order is issued on a longer time frame;
    - whether the tenant is up-to-date with the rent, or can pay any outstanding amounts if the Order is issued on a longer time frame;
    - the tenant's potential difficulties in securing new housing on a short time frame;
    - the landlord's likelihood of re-renting the unit for the Order of Possession date; and
    - whether the tenant is willing to co-operate with the landlord's attempts to find a new tenant.

- If the tenant does not dispute the Notice to End Tenancy within the time frame specified by the Notice, the landlord can apply to the Residential Tenancy Branch for an Order of Possession.
    - If the Notice to End Tenancy was for unpaid rent or utilities and the tenant does not dispute the Notice within 10 days, the landlord can make a Direct Request for an Order of Possession.
        - Under the Direct Request procedure, the Residential Tenancy Branch can issue an Order of Possession without a hearing.
    - If the Notice to End Tenancy was not for unpaid rent or utilities, or the landlord does not make a Direct Request, the Residential Tenancy Branch will hold a hearing to determine whether to grant the landlord an Order of Possession.
- The Residential Tenancy Branch publications provide important information about ending a tenancy and the dispute resolution process: http://www.rto.gov.bc.ca/content/publications/default.aspx

Service of the Order of Possession

- If the landlord successfully obtains an Order of Possession for the rental unit, they must serve the Order on the tenant by:
    - giving it to them directly;
    - leaving a copy with an adult at the residence;
    - posting it in a noticeable place where the tenant lives (deemed served after 3 days); or
    - sending it by registered mail (deemed served after 5 days).
- Usually, the Order of Possession gives the tenant 48 hours to leave the rental unit after it has been served.

The Review

- The tenant can request a review of an unfavourable decision:
    - within 2 days of receiving the decision, if the decision relates to an Order of Possession, a sublet or assignment of a tenancy or unpaid rent;
    - within 5 days of receiving the decision, if the decision relates to repairs, maintenance, services, facilities or a Notice to End Tenancy (except for unpaid rent); or
    - within 15 days of receiving the decision, if the decision relates to any other matter.
- It costs $25 to request a review.
- A review is not an opportunity to re-argue the original case. There are three narrow grounds for review:
    - A party was unable to attend the original hearing because of circumstances that could not be anticipated and were beyond the party's control;
    - A party has new and relevant evidence that was not available at the time of the original hearing; or
    - A party has evidence that the director's decision or order was obtained by fraud.
- If the tenant is successful, the Residential Tenancy Branch will usually hold a new hearing.
- The landlord should wait out the review period, and ensure that no review has been filed, before taking further steps to evict the tenant.
- If a review has been filed, the landlord should not obtain a Writ of Possession until after a decision has been rendered on review. For that reason, this is a way to buy some time.
    - Note, however, that this is not a guarantee. There seems to be some confusion about whether landlords can enforce a Writ while there is an outstanding application for review, and it certainly has not stopped landlords from trying.
    - Tenants should keep a copy of the review form, and receipt, and show the landlord. This should hold them off.

The Tenant's Options

Overview

- Once the landlord has an Order of Possession, the rest of the eviction process can happen really quickly. This is an extremely serious situation.
- Unless there are real grounds for challenging the Order of Possession, and the tenant really wants to stay, it is usually a matter of stalling and figuring out how to get the tenant more time.
- No matter what the tenant decides to do, they should be preparing for a quick move, by looking for other places to move, packing, and possibly making arrangements to stay with friends in a pinch.

Option #1: Move out

Option # 2: Negotiate

- This is usually the best option. You may be able to negotiate with the landlord to give the tenant more time to move out.
- When negotiating on behalf of a tenant, keep in mind the following negotiation strategies:
    - Gather information early.
        - Before you begin negotiating with the landlord, familiarize yourself with the facts of the current situation.
        - Identify your client's goals, interests and concerns.
        - Identify possible options for concession.
        - Identify possible solutions.
        - Clarify your client's instructions.
        - Once you begin negotiation, find out what the landlord's goals, interests and concerns are.
    - Focus on interests, not on positions.
        - Describe the problem in terms of the impact on your client.
        - Encourage the landlord to explain their interests and goals.
        - Identify shared interests and goals.
        - Focus on present and future concerns, not past grievances.

- Separate the people from the problem.
    - Listen effectively to the landlord.
    - Confirm your understanding of the landlord's position.
    - Allow the landlord to let off steam.
- Maximize your leverage.
    - Keep in mind all the reasons it is in the landlord's interest to negotiate a solution.
- Think creatively.
    - There are often opportunities for joint gain. See if you can come up with a solution that will promote both parties' interests and address their concerns.
    - Consider if there are issues important to the landlord that are less important to the tenant. These may be areas for a concession by the tenant in exchange for a concession by the landlord with respect to an issue of greater importance to the tenant.
    - Brainstorm various options and ways to improve on the options discussed.
- Get specific.
    - For instance, if the tenant is agreeable to moving out at a later date get specifics from the tenant about their moving plan. These specifics may reassure the landlord that the tenant is actually going to move.

- When negotiating for a tenant, keep in mind the following bargaining chips:
    - Consider how much it will cost the landlord, in time and money, to hire a bailiff versus the tenant leaving peacefully on their own.
    - Consider how much it will cost the landlord, in time and money, to respond to a potential judicial review application.
    - Consider the likelihood that the tenant will get a stay if they file for judicial review.
    - Consider whether rent has been paid up to date and, if not, the tenant's ability and willingness to pay for extra time.
    - Consider whether the tenant is willing to sign a written agreement to move out of the rental unit at a later date.
- If you manage to come to an agreement with the landlord, it is ideal to get the agreement in writing, signed by both parties.

- The terms of the agreement will vary case by case, but consider whether the following terms should be included:
    - Move-out date;
    - Agreement by the landlord to not continue the eviction process until after the move-out date;
    - Payment by the tenant for use and occupancy of the rental unit;
    - Agreement by the parties to deal in some way with past debts;
    - Withdrawal of legal proceedings before the Residential Tenancy Branch or BC Supreme Court; and/or
    - Agreement to not commence or pursue any further legal proceedings against the other party.

Option # 3: File for Judicial Review and Seek an Interim Stay

- This process is more time consuming and difficult than negotiation, but if the landlord is unwilling to negotiate it may be the tenant's only option for buying more time.
- If the tenant actually wants to challenge the eviction and stay in the unit and the tenant's review application was unsuccessful, this is the only way to challenge the Dispute Resolution Officer's decision.
- There is a 60 day time limit for bringing a judicial review. Practically, however, a judicial review may have to be filed much more quickly to avoid an eviction.
- You can refer people with possible tenancy judicial reviews to Community Legal Assistance Society at 604-685-3425.
- CLAS offers a very helpful self-help guide for tenants who wish to file for judicial review on their own: http://www.clasbc.net/publications/?CategoryID=5

Judicial Review

- To challenge a decision of the Residential Tenancy Branch, one must apply to the BC Supreme Court for judicial review of the Dispute Resolution Officer's decision.
- It costs $200 to file for judicial review. There is an additional fee of $80 for setting the judicial review down for hearing. If this fee is prohibitively expensive for the tenant, they may apply to have the fee waived by making an application for indigent status.
    - The court has the power to waive fees if the tenant cannot afford the fees and the judicial review has some merit. CLAS's self-help guide explains how to apply for indigent status.

- A judicial review is an opportunity for the BC Supreme Court to review the decision of a tribunal for errors or serious unfairness. A judicial review is not an appeal, and a judge will generally not re-hear the case on judicial review.

- There are essentially two types of errors that might, if they are serious enough, lead a court to overturn a tribunal decision on judicial review:

    - First, there are **procedural fairness errors**, or errors in the way the hearing was conducted or the way the decision was made, that make the process unfair.

    - Second, there are **substantive errors**, or errors in the actual decision made by the decision maker.

- Procedural fairness errors

    - Procedural fairness errors might include the following situations:

        - The tenant did not get proper notice of the hearing.

        - The tenant was unable to attend the hearing because of circumstances they could not control.

        - The tenant did not get a chance to see all of the evidence that the tribunal used to reach its decision.

        - The tenant was not allowed to have someone represent them or assist at the hearing.

        - The tenant did not get a chance to test the other side's evidence (for example, the tenant was not allowed to question the other side's witnesses on important points).

    - If alleging procedural unfairness, the tenant must show the tribunal failed to act fairly in all the circumstances.

- Substantive errors

    - A tribunal makes a substantive error when it makes a mistake in its:

        - factual findings (for example, how it resolved conflicting evidence about what happened);

        - legal findings (for example, how the tribunal interpreted the law that applies); or

        - exercise of discretion (for example, how the tribunal decided to act when it had the option to do something in a particular way, like extending a timeline for submitting a document).

    - Courts will only intervene in cases of very serious substantive errors. For a court to set aside a Dispute Resolution Officer's decision on judicial review, the tenant must show the decision was patently unreasonable.

        - Patent unreasonableness is a very high standard to meet.
        - Examples of errors that may render a decision patently unreasonable may include:
            - The Dispute Resolution Officer failed to apply the right legal test.
            - The Dispute Resolution Officer made serious errors of fact that a judge could identify simply by looking at the decision and the evidence.

- If the decision under review is an eviction decision based on the tenant's non-payment of rent, the tenant may also be able to seek relief from forfeiture.
    - Relief from forfeiture is a one-time opportunity to ask the BC Supreme Court to forgive a wrong (usually a debt) and give the wrongdoer another chance so that they do not "forfeit" their housing.
    - Relief from forfeiture is an exercise of discretion. It is up to the individual judge whether to grant this remedy.
    - A tenant may only obtain relief from forfeiture where:
        - It is possible to remedy the wrong completely, in money;
        - The tenant has never previously had a wrong forgiven by the court; and
        - The tenant acted reasonably and did not intentionally cause the wrong.
    - It is helpful if the tenant also has sympathetic circumstances.
- If the tenant is successful on judicial review, the case will be remitted to the Residential Tenancy Branch for a new hearing.
- If the Tenant is not successful on judicial review, they will likely have to pay the legal costs of the other side, which could amount to several thousand dollars.
- CLAS's self-help guide explains how to file for judicial review.

Interim Stay

- Filing for a judicial review does not automatically put the eviction process on hold.
- When the tenant files for judicial review, they may also apply for a stay of the Order of Possession so they can stay in the rental unit until the judicial review is decided or some other date that the court orders.

- To obtain a stay, the tenant must show:
    - There is merit to their judicial review;
    - If the stay is not granted, they will suffer harm that cannot be fixed, even if they ultimately win the judicial review; and
    - If the stay is granted, there will be no (or little) prejudice to the landlord.
- It is up to the court to decide whether to grant a stay and, if so, for how long
- CLAS's self-help guide explains how to apply for an interim stay.

Disadvantages of this process

- The tenant must file for judicial review and apply for a stay quickly to avoid eviction, usually within the same or next day of receiving the Order of Possession.
- It costs $200 to file a petition for judicial review, although a tenant may apply for indigent status.
- The tenant will have to spend time running around in court rather than making arrangements to move.
- There is a risk the stay application will be unsuccessful and/or very little time will be granted.
- There is always a risk of court costs, particularly if the client does end up doing the full judicial review and losing. This could be several thousand dollars.
- If the tenant pursues the judicial review and wins, the remedy is a new hearing. There is no guarantee the new hearing will result in a different outcome.

Advantages of this process

- A court ordered stay, if obtained, will put a pause on the eviction process and allow the tenant to breathe.
- If there are grounds to review the Dispute Resolution Officer's decision, and the tenant wants to challenge it, this is the only way.

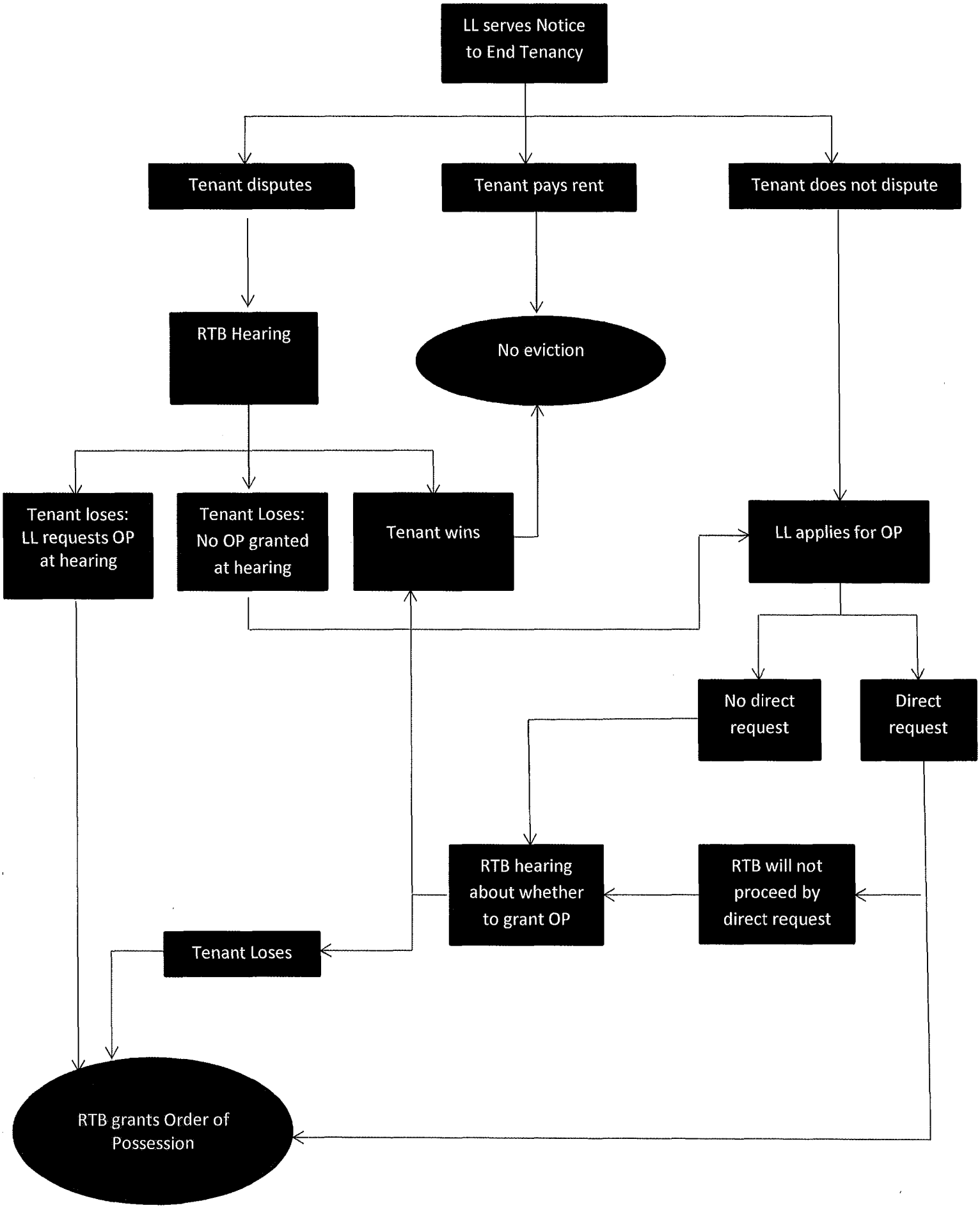
The Writ of Possession

- To get a Writ of Possession, the landlord must file the Order of Possession and an Affidavit of Service of the Order of Possession at the BC Supreme Court. This is a quick process.
- It will cost the landlord $80 to get a Writ, which can be recovered later from the tenant (though this may not realistically happen).

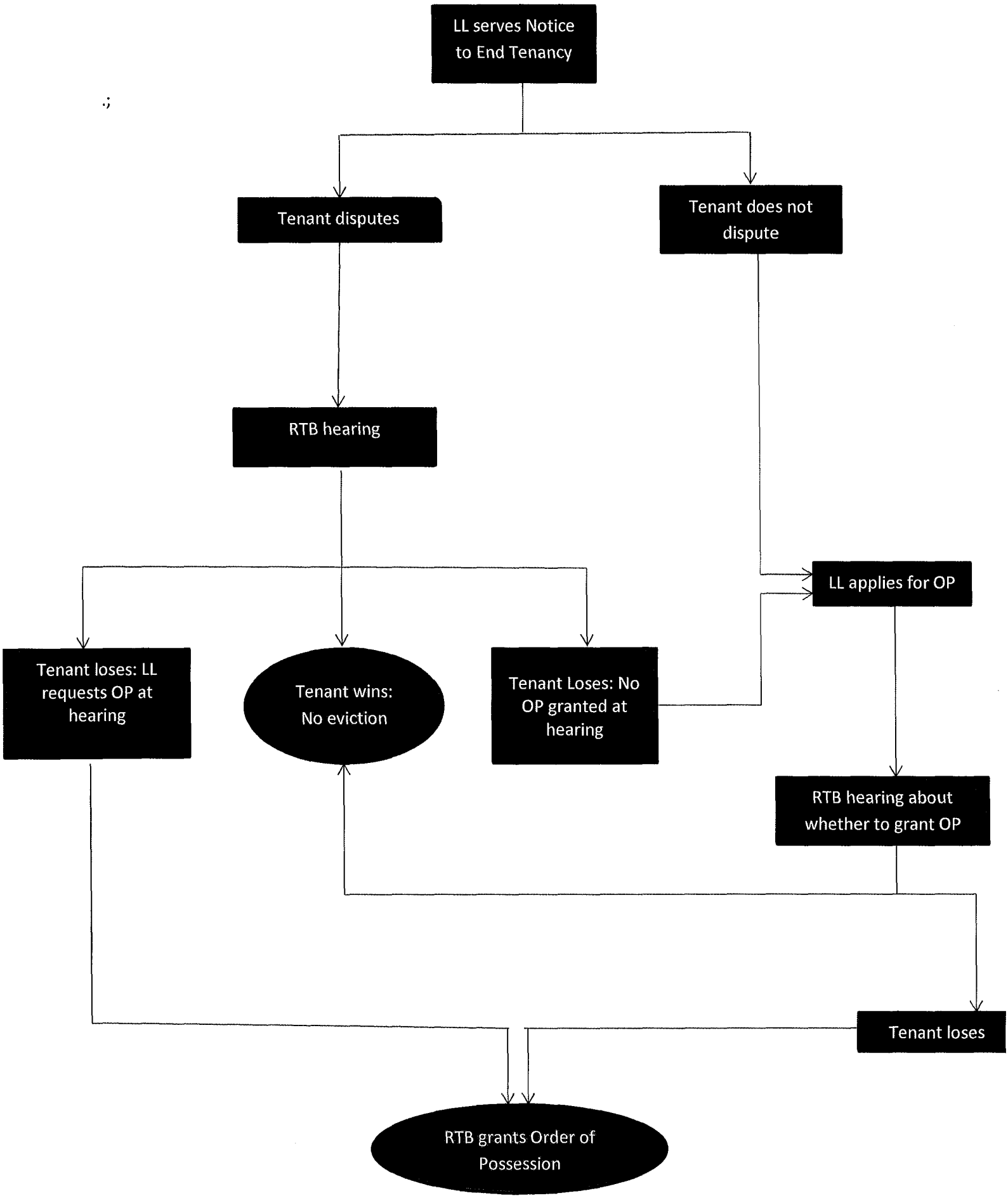
Court Bailiffs Enforce the Writ of Possession

- Only a court bailiff can evict a tenant. A list of approved bailiffs is posted on CLAS's website: http://www.clasbc.net/publications/?CategoryID=5
- There are people in BC who make their living by pressuring tenants to move out, even though they are not actually authorized to carry out an eviction.
- If someone comes to the tenant's door saying that they are a bailiff, the tenant should ask for identification, including the name of the bailiff company. The tenant can look to see if that company is on the Attorney General's list. If not, they do not have the authority to evict.
- There are fines for illegally evicting a tenant.
- An approved court bailiff can remove a tenant and all their belongings and then change the locks.
- However, hiring a bailiff costs the landlord money.
- The landlord can take steps to recover the costs of the eviction through the Residential Tenancy Branch or Small Claims court.
- In some circumstances, the bailiff may be able to seize and sell a tenant's possessions to recover their costs.
- The tenant can claim a certain amount of personal property which is exempt from seizure and sale:
    - Household goods- $4,000
    - Tools of the trade- $10,000
    - Motor vehicle- $5,000
    - Equity in a home- $12,000
- The tenant only has 48 hours to claim their exemption.

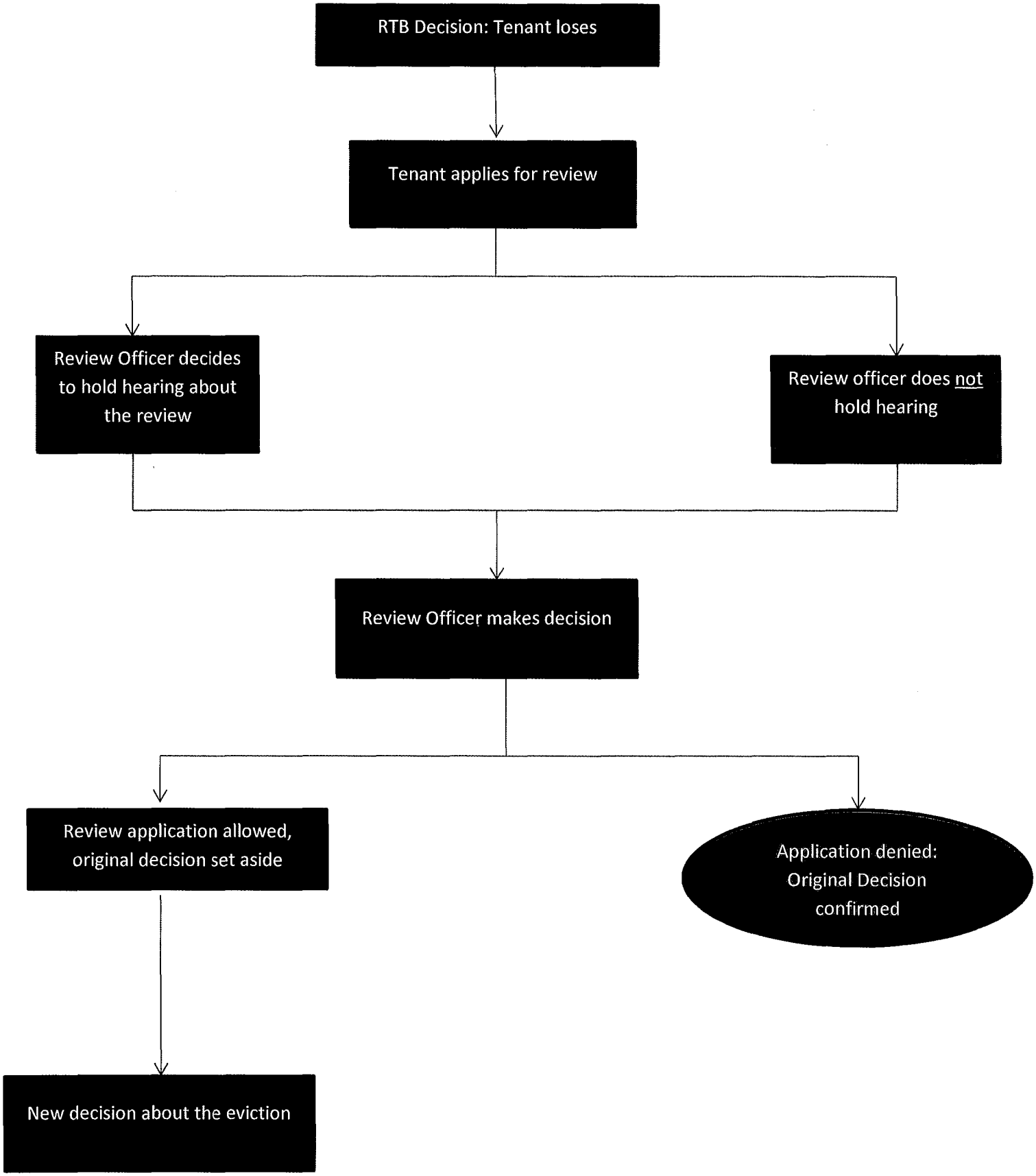
RTB EVICTION PROCESS: NON-PAYMENT OF RENT



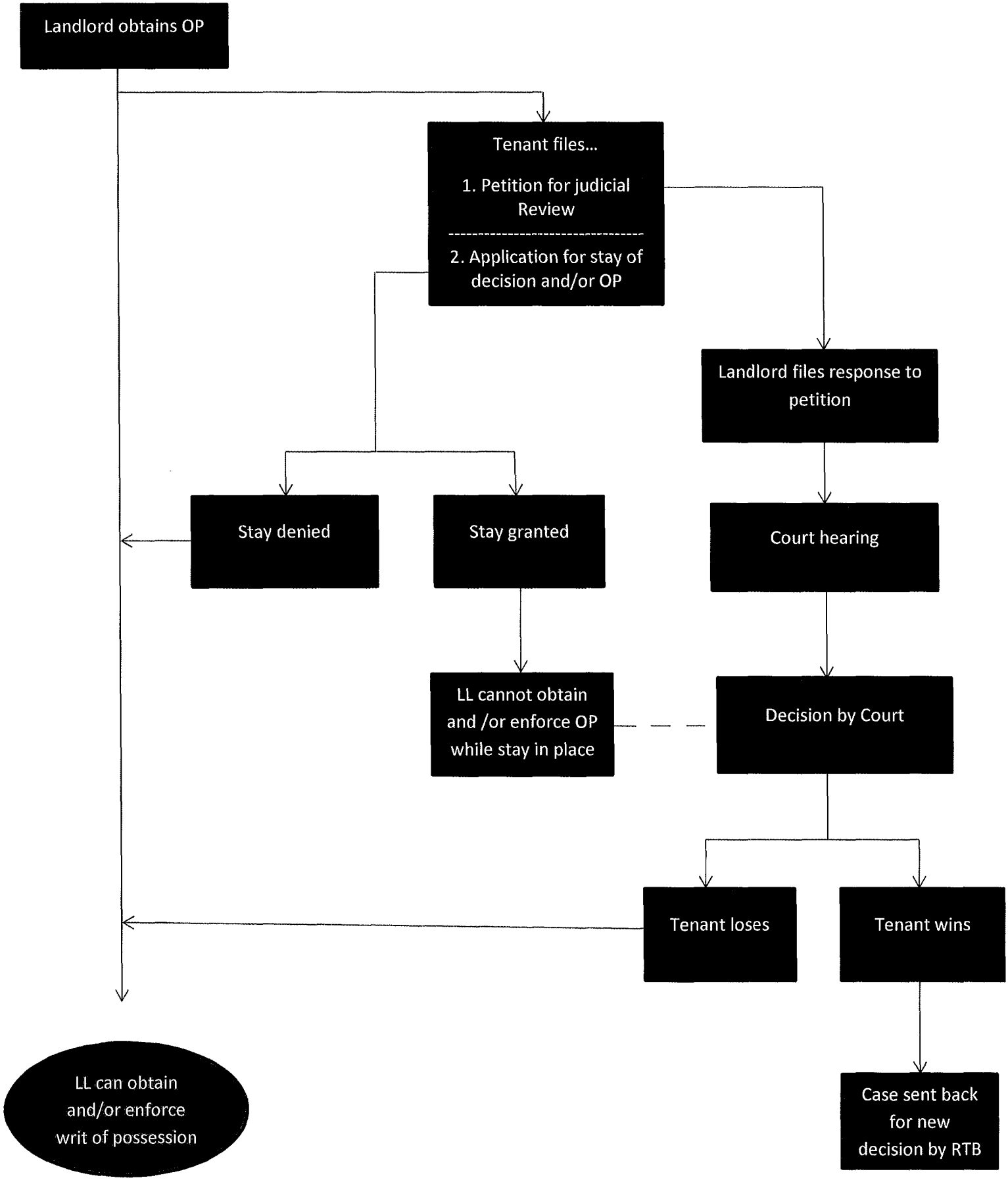
RTB EVICTION PROCESS: REASONS OTHER THAN NON-PAYMENT OF RENT



RTB REVIEW PROCESS



SUPREME COURT PROCESS



NOTICES TO END

REASON	LAW	DEADLINE TO DISPUTE	EARLIEST TENANCY CAN END
Unpaid rent or utilities	RTA, s.46	5 days	10 days after tenant receives notice
Cause	RTA, s.47	10 days	The day before rent is due that falls at least 1 month after tenant receives notice. For example, a tenant receives a notice to end for cause on November 3, 2012. If the tenant pays rent on the 1st day of each month, the soonest the landlord can end the tenancy is December 31st, 2012.
End of employment with landlord	RTA, s.48	10 days	The day before rent is due that falls at least 1 month after notice is received (Note: tenancy cannot end under this section until after employment ends)
Landlord's use of property - Landlord or close family member moving in - Sale of property - Demolition, renovation or conversion of property	RTA, s.49	15 days	The day before rent is due that falls at least 2 months after notice is received. (Note: If tenancy is for a fixed term, then the tenancy cannot end under this section until term is over)
Ceasing to qualify for rental unit	RTA, s.49.1	15 days	The day before rent is due that falls at least 2 months after notice is received. (Note: If tenancy is for a fixed term, then the tenancy cannot end under this section until term is over)

OTHER APPLICATIONS TO END

REASON	LAW	EARLIEST TENANCY CAN END
Cause where it would be unfair or unreasonable to make landlord follow usual rules - Interference, disturbance, health and safety, risk - Illegal activity - Extraordinary damage	RTA, S.56	Anytime
Tenancy is frustrated (impossible to perform)	RTA, s. 56.1	Anytime

DEADLINES FOR REVIEW AT RTB

DECSION OR ORDER RELATES TO	DEADLINE	LAW
any order of possession	2 days after tenant receives decision or order	RTA, s.80(a)(iii)
a notice to end for non-payment	2 days after tenant receives decision or order	RTA, s.80(a)(ii)
A notice to end that does not relate to non-payment or an order of possession	5 days after tenant receives decision or order	RTA, s.80(b)

SUPREME COURT DEADLINES

	TIME LIMIT	**LAW**
Landlord obtains Writ of Possession	Any time after 1. Tenant has been served with order of possession; and 2. RTB review has concluded or time limit for review has expired	RTA, s.84
Judicial review	60 days from date of decision Note: Although formal deadline is 60 days, do not wait to make referral because tenant might get forced out before they file for judicial review.	Administrative Tribunals Act, s.57(1)

SAMPLE NOTICE FOR NON-PAYMENT OF RENT

November 1, 2012

Hey Dan;

You no pay the rent today.

So you outta here.

Thank you very mats,

Tony

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10 Day Notice to End Tenancy for Unpaid Rent or Utilities

BECAUSE:

You have failed to pay rent
In the amount of $ 775.00
that was due on 1 (Day) 11 (Month) 2012 (Year)

You have failed to pay utilities
in the amount of $ 128.75 following
written demand on 30 (Day) 9 (Month) 2012 (Year)

Tenant: You may be EVICTED if you Do Not Respond to this Notice.

You have five (5) days to pay the rent or utilities to the landlord or file an Application for Dispute Resolution with the Residential Tenancy Branch.

☐ This notice applies to a manufactured home site, *Manufactured Home Park Tenancy Act*, section 39
☒ This notice applies to a rental unit, *Residential Tenancy Act, section 46*

TO the TENANT(S) (full names are required)
If additional space is required to list all parties, use and attach "Schedule of Parties", form #RTB-26.

Jones (Last name) | Bob (First and middle names)
(Last name) | (First and middle names)

Tenant Address (address for service of documents or notices – where material will be given personally, left for, faxed, or mailed)

Suite #104 (Unit/site #) | 812 Elm Street (Street # and street name) | Victoria (City) | BC (Province) | V8V 3Y2 (Postal Code)

250 886-1000 (Daytime phone number) | (Other phone number) | (Fax number for document service)

FROM the LANDLORD (full names are required)
If additional space is required to list all parties, use and attach "Schedule of Parties", form #RTB-26.

Smith (Last name or full legal business name) | John (Agent for Whispering Pines Apartments) (First and middle names)

Landlord Address (address for service of documents or notices – where material will be given personally, left for, faxed, or mailed)

Office (Unit/site #) | 812 Elm Street (Street # and street name) | Victoria (City) | BC (Province) | V8V 3Y2 (Postal Code)

250 381-3521 (Daytime phone number) | (Other phone number) | 250 381-3522 (Fax number for document service)

NOTICE: I am hereby giving you 10 days notice to move out of the rental unit or manufactured home site located at:

Suite #104 (Unit/site #) | 812 Elm Street (Street # and street name) | Victoria (City) | BC (Province) | V8V 3Y2 (Postal Code)

By: 12 (Day) 11 (Month) 2012 (Year) (date when tenant must move out or vacate the site)

Noticed served: In person ☒ On the door ☐ By registered mail ☐

Landlord's or Agent's signature _____

Print name: John Smith Date: November 2, 2012

This is page 1 of a 2-page Notice.
The landlord must sign page one of this notice and must give the tenant pages 1 & 2.

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If within 5 days you do not pay the rent or utilities or make an application for dispute resolution, the landlord can apply for an order of possession through the direct request process.

The direct request process is completed without either party attending a hearing. Instead:

- The landlord makes an application for an order of possession and submits:
  - A copy of the tenancy agreement
  - A copy of this notice
  - Proof that this notice was served
  - An application for Dispute Resolution.
- The landlord will receive a proceeding package which must be served on the tenant within three days.
- The landlord sends the proof of service of the package to the Residential Tenancy Branch.
- A Dispute Resolution Officer will review all documentation and will make a decision.
- The decision is final and binding on both parties.
- Fraud is the *only* reason that will be considered for a review of the decision.

The *10 Day Notice to End Tenancy for Unpaid Rent or Utilities* Can be Served:

- Any day after the rent was due, for unpaid rent.
- 30 days after the tenant was given a written demand to pay the arrears, for unpaid utilities.

The Notice is Deemed Received by the Tenant:

- The day the landlord gives the notice to the tenant in person, or to an adult (19 years or older) who appears to live with the tenant, or
- Three (3) days after the landlord either; leaves the notice in the mailbox or in mail slot; posts it on the door or a noticeable place at the address where the tenant lives; or faxes it to a number provided by the tenant, or
- Five (5) days after the landlord sends the notice by registered mail to the address where the tenant lives.

Disputing the Notice:

- The tenant can make an application for dispute resolution within 5 (five) days of receiving the *10 day notice*.
- If the tenant disputes the notice a hearing will be held. Both parties will have an opportunity to participate.
- At the hearing, the landlord can ask for and receive an order of possession if the *10 day notice* is upheld by the dispute resolution officer.

Tenants may dispute the notice for specific reasons such as:

- They have proof the rent was paid.
- They have an order from a dispute resolution officer giving them permission to keep all or part of the rent.
- They held part or all of the rent with prior notice to the landlord, for the cost of emergency repairs.

Important Facts:

- The tenant is not entitled to withhold rent unless ordered by a dispute resolution officer.
- The tenant who accepts the notice must move out by the date set out on page 1 of this notice or sooner.
- An error in this notice or an incorrect move-out date does not make it invalid.

For More Information:

- Visit RTB web site at www.rto.gov.bc.ca.
- Contact a RTB office.
- Refer to *A Guide for Landlords and Tenants in British Columbia* available on the RTB web site and offices.

This is page 2 of a 2-page Notice.
The landlord must sign page one of this notice and must give the tenant pages 1 & 2.

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1 MONTH NOTICE TO END TENANCY FOR CAUSE

Residential Tenancy Act, s. 47 and *Manufactured Home Park Tenancy Act*, s. 40

1 MONTH NOTICE TO END TENANCY FOR END OF EMPLOYMENT

Residential Tenancy Act, s. 48 and *Manufactured Home Park Tenancy Act*, s. 41

Form #RTB – 33

TENANT: YOU MAY BE EVICTED IF YOU DO NOT RESPOND TO THIS NOTICE.

Landlord: place an "x" in the appropriate box:		
		Manufactured home site, *Manufactured Home Park Tenancy Act*
	X	Rental unit, *Residential Tenancy Act*

To the TENANT(S) (full names are required)

Last name	First and middle names
Jones	Bob

Service Address (address where documents will be given personally, left for, faxed, or mailed to the tenant for service)

Unit/site #	Street # and street name	City	Province	Postal Code
#104	812 Elm Street	Victoria	BC	V8V 3Y2

Daytime phone number	Other phone number	Fax number for service of documents
250 886-1000		

From the LANDLORD (if the landlord is a business name, enter the full legal business name in the "last name" box)

Last name	First and middle names
Smith	John (Agent for; Whispering Pines Apartments)

Service Address (address where documents can be given personally, left for, faxed, or mailed to the landlord for service)

Unit/site #	Street # and street name	City	Province	Postal Code
Office	812 Elm Street	Victoria	BC	V8V 3Y2

Daytime phone number	Other phone number	Fax number for service of documents
250 381-3521		250 381-3522

NOTICE TO END TENANCY

I, the landlord, am hereby giving you one month notice to move out of the rental unit or manufactured home site located at:

Unit/site #	Street # and street name	City	Province	Postal Code
#104	812 Elm Street	Victoria	BC	V8V 3Y2

by (date when tenant must move out of the rental unit or vacate the site)

date	month	year
30	November	2012

Landlord's or Agent's signature:

Print name: John Smith

Date: October 31, 2012

This is page 1 of a 2-page Notice. The landlord must sign this Notice and the tenant must receive page 1 and page 2.

REASONS FOR THIS 1 MONTH NOTICE TO END THE TENANCY (put an "X" in all the boxes that apply)	
X	Tenant is repeatedly late paying rent
X	Tenant has allowed an unreasonable number of occupants in the unit/site
	Tenant or a person permitted on the property by the tenant has:
	☐ significantly interfered with or unreasonably disturbed another occupant or the landlord
	☐ seriously jeopardized the health or safety or lawful right of another occupant or the landlord
	☐ put the landlord's property at significant risk
	Tenant has engaged in illegal activity that has, or is likely to:
	☐ damage the landlord's property
	☐ adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant or the landlord
	☐ jeopardize a lawful right or interest of another occupant or the landlord
	Tenant has caused extraordinary damage to the unit/site or property/park
	Tenant has not done required repairs of damage to the unit/site
	Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so
	Tenant has assigned or sublet the rental unit/site without landlord's written consent
	Tenant knowingly gave false information to prospective tenant or purchaser of the rental unit/site or property/park
	Rental unit/site must be vacated to comply with a government order
	Non-compliance with an order under the legislation within 30 days after the tenant received the order or the date in the order
	Tenant's rental unit/site is part of an employment arrangement that has ended and the unit/site is needed for a new employee
	Residential Tenancy Act only: security or pet damage deposit was not paid within 30 days as required by the tenancy agreement

WHEN THE TENANT WILL BE ASSUMED TO HAVE RECEIVED THIS NOTICE

- The date when the landlord gives this Notice to the tenant in person, or
- The date when the landlord leaves this Notice with an adult (19 years or older) who apparently lives with the tenant, or
- 3 days after the landlord leaves this Notice in the mailbox or mail slot for the address where the tenant lives, or
- 3 days after the landlord faxes this Notice to a fax number provided by the tenant, or
- 3 days after the landlord attaches a copy of this Notice to the door or other noticeable place at the address where the tenant lives, or
- 5 days after the landlord mails this Notice (by registered or regular mail) to the tenant at the address where the tenant lives.

INFORMATION FOR TENANTS WHO RECEIVE THIS NOTICE TO END TENANCY

- You have the right to dispute this Notice within 10 days after you receive it by filing an Application for Dispute Resolution at the Residential Tenancy Branch. A Dispute Resolution Officer may extend your time to file an Application, but only if he or she accepts your proof that you had a serious and compelling reason for not filing the Application on time.
- If you do not file an Application within 10 days, you are presumed to accept this Notice and must move out of the rental unit or vacate the site by the date set out on page 1 of this Notice (You can move out sooner.) If you do not file an Application, move or vacate, your landlord can apply for an Order of Possession that is enforceable through the court.

INFORMATION FOR LANDLORDS SERVING THIS NOTICE TO END TENANCY

- For repeated late rent payment, you can give this Notice any time after the third occurrence. However, if the occurrences were far apart, a Dispute Resolution Officer may decide that, in the circumstances, the tenant cannot be said to be "repeatedly late".
- Take steps to confirm that the tenant actually receives this Notice when it is assumed to be received. A Dispute Resolution Officer may set this Notice aside if the tenant can prove that he/she did not receive this Notice due to circumstances beyond his/her control.
- If the tenant fails to move out of the rental unit or vacate the site, or if you believe the tenant does not intend to move out or vacate and the tenant's deadline to dispute this Notice has expired, you can apply for an Order of Possession.
- If the tenant applies to dispute this Notice, you can attend the tenant's hearing and verbally ask for an Order of Possession.

INFORMATION FOR BOTH LANDLORDS AND TENANTS

- Keep copies of all Notices to End Tenancy and record each date and how the Notice was given or received.
- An error in this Notice or an incorrect move-out date on this Notice does not make it invalid. A Dispute Resolution Officer can order that the tenancy ends on a date other than the date specified in this Notice.
- It is against the law for a landlord to (1) physically evict a tenant without a Writ of Possession, or (2) change the locks without a Dispute Resolution Officer's order to do so, or (3) seize a tenant's personal property without a court order.
- More information is available online: www.rto.gov.bc.ca
  Or by telephoning: Lower Mainland 604-660-1020 Victoria 387-1602 Elsewhere in B.C. 1-800-665-8779

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2 MONTH NOTICE TO END TENANCY FOR LANDLORD'S USE OF PROPERTY

Residential Tenancy Act, s. 49

2 MONTH NOTICE TO END TENANCY BECAUSE THE TENANT DOES NOT QUALIFY FOR SUBSIDIZED RENTAL UNIT

Residential Tenancy Act, s. 49.1

Form #RTB – 32

TENANT: YOU MAY BE EVICTED IF YOU DO NOT RESPOND TO THIS NOTICE.

To the TENANT(S) (full names are required)

Last name	First and middle names
Jones	Bob

Service Address (address where documents will be given personally, left for, faxed, or mailed to the tenant for service)

Unit #	Street # and street name	City	Province	Postal Code
#104	812 Elm Street	Victoria	BC	V8V 3Y2

Daytime phone number	Other phone number	Fax number for service of documents
250 886-1000		

From the LANDLORD (if the landlord is a business name, enter the full legal business name in the "last name" box)

Last name	First and middle names
Smith	John; Agent for Whispering Pines Apartments

Service Address (address where documents can be given personally, left for, faxed, or mailed to the landlord for service)

Unit #	Street # and street name	City	Province	Postal Code
Office	812 Elm Street	Victoria	BC	V8V 3Y2

Daytime phone number	Other phone number	Fax number for service of documents
250 381-3521		250 381-3522

NOTICE TO END TENANCY

I, the landlord, am hereby giving you two months notice to move out of the rental unit located at:

Unit #	Street # and street name	City	Province	Postal Code
#104	812 Elm Street	Victoria	BC	V8V 3Y2

by (date when tenant must move out of the rental unit)

Day	Month	Year
31	December	2012

Landlord's or Agent's signature:

Print name: John Smith; Agent for Whispering Pines Apartments

Date: October 12, 2012

This is page 1 of a 2-page Notice. The landlord must sign this Notice and the tenant must receive page 1 and page 2.

REASONS FOR THIS 2 MONTH NOTICE TO END THE TENANCY (put an "X" in all the boxes that apply)	
	The rental unit will be occupied by the landlord or the landlord's spouse or a close family member (father, mother, or child) of the landlord or the landlord's spouse
	A family corporation owns the rental unit and it will be occupied by an individual who owns, or whose close family members own, all the voting shares
	All of the conditions for sale of the rental unit have been satisfied and the purchaser has asked the landlord, in writing, to give this Notice because the purchaser or a close family member intends in good faith to occupy the rental unit
X	The landlord has all necessary permits and approvals required by law to demolish the rental unit or repair the rental unit in a manner that requires the rental unit to be vacant
	The landlord intends to convert the residential property to strata lots or a not-for-profit housing cooperative
	The landlord intends to convert the rental unit for use by a caretaker, manager or superintendent of the residential property
	The landlord has all necessary permits and approvals required by law to convert the rental unit to a non-residential use
	The tenant no longer qualifies for the subsidized rental unit

COMPENSATION FOR TENANTS

- On or before the effective date of this Notice, the landlord must pay the tenant an amount equal to one month's rent payable under the tenancy agreement.
- If this Notice is ending a periodic tenancy, the tenant may withhold the last month's rent instead of being paid compensation.
- Compensation is not owed to tenants who receive this Notice because they do not qualify for the subsidized rental unit.
- If a tenant has already paid the last month's rent, the landlord must refund the rent as the compensation.
- If the landlord does not take steps toward the purpose for which this Notice was given or if the unit is not used for the stated purpose for at least 6 months beginning within a reasonable period after the effective date of this Notice, the landlord or purchaser must pay the tenant an additional amount equal to double the monthly rent paid under the tenancy agreement.
- If this is a periodic tenancy, a tenant who receives this Notice can give 10-days notice and move out early. The landlord must still pay the tenant one-month's rent as compensation.

WHEN THE TENANT WILL BE ASSUMED TO HAVE RECEIVED THIS NOTICE

- The date when the landlord gives this Notice to the tenant in person, or
- The date when the landlord leaves this Notice with an adult (19 years or older) who apparently lives with the tenant, or
- 3 days after the landlord leaves this Notice in the mailbox or mail slot for the address where the tenant lives, or
- 3 days after the landlord faxes this Notice to a fax number provided by the tenant, or
- 3 days after the landlord attaches a copy of this Notice to the door or other noticeable place at the address where the tenant lives, or
- 5 days after the landlord mails this Notice (by registered or regular mail) to the tenant at the address where the tenant lives.

INFORMATION FOR TENANTS WHO RECEIVE THIS NOTICE TO END TENANCY

- You have the right to dispute this Notice within 15 days after it is assumed to be received by filing an Application for Dispute Resolution at the Residential Tenancy Branch. A Dispute Resolution Officer may extend your time to file an Application, but only if he or she accepts your proof that you had a serious and compelling reason for not filing the Application on time.
- If you do not file an Application for Dispute Resolution within 15 days, you are presumed to accept that the tenancy is ending and must move out of the rental unit by the date set out on page 1 of this Notice (You can move out sooner). If you do not file the Application or move out, your landlord can apply for an Order of Possession that is enforceable through the court.

INFORMATION FOR LANDLORDS WHO WANT TO END A TENANCY

- Take steps to confirm that the tenant actually receives this Notice when it is assumed to be received. A Dispute Resolution Officer may set this Notice aside if the tenant can prove that he/she did not receive this Notice due to circumstances beyond his/her control.
- If the tenant fails to move out of the rental unit, or if you believe the tenant does not intend to move out and the tenant's deadline to dispute this Notice has expired, you can apply to the Residential Tenancy Branch for an Order of Possession.
- If the tenant applies to dispute this Notice, you can attend the tenant's hearing and verbally ask for an Order of Possession.

INFORMATION FOR BOTH LANDLORDS AND TENANTS

- Keep copies of all Notices to End Tenancy and record each date and how the Notice was given or received.
- An error in this Notice or an incorrect move-out date on this Notice does not make it invalid. A Dispute Resolution Officer can order that the tenancy ends on a date other than the date specified in this Notice.
- It is against the law for a landlord to (1) physically evict a tenant without a Writ of Possession, or (2) change the locks without a Dispute Resolution Officer's order to do so, or (3) seize a tenant's personal property without a court order.
- More information is available online: www.rto.gov.bc.ca
  Or by telephoning: Lower Mainland 604-660-1020 Victoria 387-1602 Elsewhere in B.C. 1-800-665-8779

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12 MONTH NOTICE TO END TENANCY FOR CONVERSION OF MANUFACTURED HOME PARK

Manufactured Home Park Tenancy Act, s. 42

Form #RTB – 31

TENANT: YOU MAY BE EVICTED IF YOU DO NOT RESPOND TO THIS NOTICE.

To the TENANT(S) (full names are required)

Last name	First and middle names
Jones	Bob
Jones	Jane

Service Address (address where documents will be given personally, left for, faxed, or mailed to the tenant for service)

Unit/site #	Street # and street name	City	Province	Postal Code
#12	550 Riverside Drive	Victoria	BC	V8V 3Y2

Daytime phone number	Other phone number	Fax number for service of documents
250 881-1000		

From the LANDLORD (if the landlord is a business name, enter the full legal business name in the "last name" box)

Last name	First and middle names
Smith	John

Service Address (address where documents can be given personally, left for, faxed, or mailed to the landlord for service)

Unit/site #	Street # and street name	City	Province	Postal Code
	1221 Uplands Drive	Victoria	BC	V8R 1L6

Daytime phone number	Other phone number	Fax number for service of documents
250 381-3521		250 381-3522

NOTICE TO END TENANCY

I, the landlord, am hereby giving you 12 months notice to vacate the manufactured home site located at:

Unit/site #	Street # and street name	City	Province	Postal Code
#12	550 Riverside Drive	Victoria	BC	V8R 1L6

by (date when tenant must move out of the rental unit or vacate the site)

Day	Month	Year
31	December	2013

Landlord's or Agent's signature:

Print name: John Smith

Date: October 15, 2012

This is page 1 of a 2-page Notice. The landlord must sign this Notice and the tenant must receive page 1 and page 2.

REASON FOR THIS 12-MONTH NOTICE TO END TENANCY

The landlord has all necessary permits and approvals required by law and intends in good faith, to convert all or a significant part of the manufactured home park to a non-residential use or a residential use other than a manufactured home park.

TENANT COMPENSATION

- A landlord who gives a tenant this Notice must pay the tenant, on or before the effective date of this Notice, an amount equal to 12 months' rent payable under the tenancy agreement.
- Following receipt of this Notice, a tenant who has a periodic tenancy may at any time give the landlord a minimum of 10 days notice to end the tenancy. Rent is payable only until the date the tenant permanently vacates the site. The landlord must still pay the 12-months rent as compensation.
- A tenant's notice to move in response to this Notice does not affect the tenant's right to compensation.
- If steps have not been taken to accomplish the stated conversion of the manufactured home park within a reasonable period after the effective date of this Notice, the landlord must pay the tenant an additional amount equal to 6 times the monthly rent that would have been payable under the tenancy agreement.

WHEN THE TENANT WILL BE ASSUMED TO HAVE RECEIVED THIS NOTICE

- The date when the landlord gives this Notice to the tenant in person, or
- The date when the landlord leaves this Notice with an adult (19 years or older) who apparently lives with the tenant, or
- 3 days after the landlord leaves this Notice in the mailbox or mail slot for the address where the tenant lives, or
- 3 days after the landlord faxes this Notice to a fax number provided by the tenant, or
- 3 days after the landlord attaches a copy of this Notice to the door or other noticeable place at the address where the tenant lives, or
- 5 days after the landlord mails this Notice (by registered or regular mail) to the tenant at the address where the tenant lives.

INFORMATION FOR TENANTS WHO RECEIVE THIS NOTICE TO END TENANCY

- An error in this Notice does not make it invalid.
- A tenant has the right to dispute this Notice within 15 days after it is assumed to be received by filing an Application for Dispute Resolution at the Residential Tenancy Branch. A Dispute Resolution Officer may extend your time to file an Application, but only if he or she accepts your proof that you had a serious and compelling reason for not filing the Application on time.
- If you do not file an Application for Dispute Resolution within 15 days, you are presumed to accept that the tenancy is ending and you must vacate the manufactured home site on the date set out on page 1 of this Notice (you can move out sooner.) If you do not file the Application or vacate, your landlord can apply for an Order of Possession that is enforceable through the court.

INFORMATION FOR LANDLORDS WHO WANT TO END A TENANCY

- Take steps to confirm that the tenant actually receives the Notice when it is assumed to be received. A Dispute Resolution Officer may set the Notice aside if the tenant can prove that he/she did not receive this Notice due to circumstances beyond his/her control.
- If the tenant fails to vacate the site, or if you believe the tenant does not intend to vacate the site and the deadline for the tenant to dispute this Notice has expired, you can apply to the Residential Tenancy Branch for an Order of Possession.
- If the tenant applies to dispute this Notice, you can attend the tenant's hearing and verbally ask for an Order of Possession.

INFORMATION FOR BOTH LANDLORDS AND TENANTS

- Keep copies of all Notices to End Tenancy and record each date and how the Notice was given or received
- An error in this Notice or an incorrect move-out date on this Notice does not make it invalid. A Dispute Resolution Officer can order that the tenancy ends on a date other than the date specified in this Notice.
- It is against the law for a landlord to (1) physically evict a tenant without a Writ of Possession, or (2) seize a tenant's personal property without a court order.
- More information is available online: www.rto.gov.bc.ca
  Or by telephoning: Lower Mainland 604-660-1020 Victoria 387-1602 Elsewhere in B.C. 1-800-665-8779

To Swear The Affidavit $40.00 @Court House

$80.00 cost of Writ @Court House

West Coast Court Bailiffs Inc.
#101 – 668 Carnarvon Street, New Westminster, BC V3M 5Y6
Phone (604) 529-9328 Fax (604) 529-9102

WRIT OF POSSESSION

DOCUMENTS REQUIRED:

- Original Writ of Possession, plus two copies
- Three copies of the Order for Possession
- Three copies of the Affidavit of Service of the Order of Possession

The landlord must serve the Order for Possession on the tenant. It gives the tenant a specific time to vacate, usually between one and three days. At the expiration of this time, if the tenant has not vacated, the landlord must go to the Supreme Court Registry and fill out and swear an Affidavit of Service of the Order for Possession. The landlord can then obtain a Writ of Possession from the Court.

A Court Bailiff is different from other types of Bailiffs. The Court Bailiff is appointed by the government and is the only person who can move a tenant out. Landlords should make sure they deal only with an Official Court Bailiff, or they may find themselves responsible for all fees and fines arising from this error.

Note: There is an Information Sheet that must be completed prior to booking the Writ of Possession. This is to show such information as: if there are children on the premises; if the tenants have any pets; are there any vehicles which will need to be towed; what items in the premise belong to the landlord, etc.

DEPOSIT AMOUNTS:		OUT OF TOWN
- Bachelor & One Bedroom	$1,000.00 (and up)	$1,800.00 (and up)
- Two Bedroom	$1,500.00 (and up)	$2,300.00 (and up)
- Three Bedroom	$1,800.00 (and up)	$2,800.00 (and up)
- Four Bedroom	$2,400.00 (and up)	$3,500.00 (and up)
- Five & Six Bedroom	$3,000.00 (and up)	$4,000.00 (and up)

* **All Deposits must be in the form of a Certified Cheque, Bank Draft, Money Order or Cash.**

White Rock $1300.00

Please Take Note: The deposit is only a deposit and not necessarily the cost of the eviction. The actual price could be lower or higher, depending on how much is in the home and how long it takes to box everything up and move it out.

If there is any money left over, it will be refunded to the landlord. However, if the bailiff finds that there is more than the average home of that size, he may call the landlord and ask him to bring in a further deposit, in certified funds, immediately, or they will not be able to complete the job. This deposit could easily be another thousand or more dollars.

TURN AROUND TIME:

The eviction will usually take place within one to three working days of receiving the documents and deposit.

If the documents are in before 12:00 pm, we can sometimes set it up for the following morning, but that will depend on the availability of the Court Bailiffs and the Movers.

No evictions are scheduled for the weekend or for holidays. Evictions are usually started between 8:30 and 9:00 am.

WHERE THE GOODS GO:

If the tenant is home:

The contents of the home will be boxed up and moved off the property line, left at the side of the road for the tenant to take away.

If the tenant is not home:

The contents of the home will be boxed up and moved to storage. They will be held for up to thirty (30) days, at the landlord's expense. If the tenant claims them within the 30 days, he can pay for the storage only, and take them away. If they are not claimed, they will be sold at auction, and the money realized will be used towards the costs.

Seizing the goods:

Each tenant named on the documents has a $5,000.00 personal exemption. This means that they can choose $5,000.00 worth of goods each, which cannot be seized. In most cases, as second hand furnishings have very little re-sale value, it is unlikely that we will be able to seize to cover the cost of the eviction.

KEYS:

If possible, the landlord should bring the keys with the documents and deposit. If no keys are provided we will have to take a locksmith with us. The landlord can choose to have our locksmith change the locks or do it themselves after the eviction.

AFTER THE EVICTION:

The Court Bailiff will call the landlord, or his agent, when the job is nearing completion. The landlord, or agent, must then attend at the property to sign for possession of it. The Court Bailiff cannot leave until this is done therefore it is important that the landlord, or agent, be aware that they must make themselves available.

DANGEROUS TENANTS:

The questionnaire will attempt to provide the Court Bailiff with advance warning of any dangers he might encounter. It is important to advise the landlord that there is no extra charge for dangers. For safety sake we need to know if the police should attend with us.

COMMONLY ASKED QUESTIONS:

- ***Do you have to use your movers or can I supply someone?***
  We only use our movers. They are insured and bonded.

- ***All their stuff looks like junk. What if I don't want to pay to store it? If it is sold, you probably won't even get enough to cover storage costs.***
  (One man's junk is another man's treasure) We must protect their belongings. Therefore, if the tenant's are not home at the time of the eviction, all goods must be moved to storage, at your expense, regardless of its value. We are required to do this by law.

- ***Can you give me a ballpark figure as to what the eviction will cost me?***
  Yes, (quote the deposit amount). This is an average price for that size home, however, it is impossible to give you an exact price. If there are a lot of goods in the home, it could be a lot higher. There is no way of knowing until we get inside and assess the site.

- ***How can I get my money back?***
  By getting a court judgment for the cost of the eviction. However, you should be aware that this will cost you money, and once we have evicted the tenants, you will have to find them to try to collect the judgment amount. Also, if they don't have any money to pay, and no seizable assets, you may be throwing good money after bad.



When you've got an Order of Possession ...

Landlord must serve Order of Possession on tenant.

If tenant still doesn't move out ...

Ask Residential Tenancy Branch if tenant has applied for review consideration of decision within two days of receiving the Order.

If tenant has applied for review consideration of decision ...

Landlord must wait for decision on application for review consideration.

If tenant has **not** applied for review consideration of decision...

Landlord may apply to Supreme Court of BC for enforcement of Order.

To enforce the Order, landlord must ask Supreme Court of BC for Writ of Possession.

With Writ of Possession, a landlord may hire court bailiff to evict tenant. *Landlord may never remove tenant or tenant's personal property.*

For more information ...

- please see Fact Sheet RTB-103: *Landlord: Enforcing an Order of Possession*
- please see *A Guide for Landlords and Tenants in British Columbia*

Residential Tenancy Branch
Office of Housing and Construction Standards
Ministry of Energy and Mines and Minister Responsible for Housing

RTB-PE4 (2011/11)

RESIDENTIAL TENANCY ACT

WRIT OF POSSESSION PACKAGE

If you have received an Order of Possession from the Residential Tenancy Branch and wish to have the order enforced by the Supreme Court, section 84 of the *Residential Tenancy Act* permits the order to be filed in the Supreme Court and enforced as a judgment or an order of that court.

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.

Practice Direction #8 – Enforcement of Order or Decision of A Statutory Body, effective July 1st, 2010 and issued by the Chief Justice of the Supreme Court sets out the procedures for these applications.

The Residential Tenancy Branch website provides an information sheet setting out the process for enforcing an Order of Possession. The sheet is available at the following link;
http://www.rto.gov.bc.ca/documents/Fact%20Sheets/RTB-103.pdf

Supreme Court Civil Rule 13-2 – Enforcement of Orders includes a provision for issuance of a Writ of Possession. (Rule 13-2(3)). Pursuant to Supreme Court Civil Rule 13-2(13)(b) a writ of possession must not be issued unless there has been filed proof satisfactory to a registrar that;

(b) in the case of a document, issued under an enactment, that on being filed in the court may be enforced as if it were an order of the court, the document

(i) has been filed in the court,

(ii) has, before or after being filed in the court, been served in accordance with the enactment or these Supreme Court Civil Rules on the person against whom the order is sought to be enforced, and

(iii) has not been complied with.

The *Residential Tenancy Act* Part 6 – General Matters, Division 1 – How to Give or Serve Documents sets out the requirements for service and when documents are considered to have been received. A link to all of BC Statutes may be found on the Court's website at www.courts.gov.bc.ca or by accessing the following link; http://www.bclaws.ca/.

The filing fee in Supreme Court for a Writ of Possession is $80.00. If you require any affidavits sworn at the court registry, the fee for swearing an affidavit at the court registry is $40.00.

A Supreme Court Writ of Possession must be enforced by a Court Bailiff. The landlord/applicant will need to make arrangements with one of the Court Bailiffs and advise the Court Registry which bailiff they have chosen to enforce their Writ of Possession. The applicant should inquire directly with the various Court Bailiffs as to their fees.

The documents included in this package are:

1) Requisition – Form 17
2) Writ of Possession – Form 52
3) Affidavit of Service (RTA)
4) PD-8 – Enforcement of Order or Decision of a Statutory Body

No. .....
.....Registry

In the Supreme Court of British Columbia

In the Matter of Sections 58(1) 55(3) and 84(1) of the *Residential Tenancy Act* (S.B.C. 2002, c.78) and Sections 51(1) 48(3) and 77(1) of the *Manufactured Home Park Tenancy Act* (S.B.C. 2002, c.77)

In the Matter of

..... Landlord/Applicant

..... Tenant/Respondent

REQUISITION

Filed by: .....
[party(ies)]

Required: File the attached Order of Possession with the Supreme Court for enforcement pursuant to section 84 of the *Residential Tenancy Act* and issuance of a Writ of Possession.

This requisition is supported by the following:

1. Original or certified copy of the Order of Possession.
2. Writ of Possession
3. Affidavit of Service of....., made ..... .

Date: .....

.....
Signature of filing party

.....
[type or print name]

Address for service of Landlord/applicant:

.....

.....

.....

.....

No. .....
.....Registry

In the Supreme Court of British Columbia

In the Matter of Sections 58(1) 55(3) and 84(1) of the *Residential Tenancy Act* (S.B.C. 2002, c.78) and Sections 51(1) 48(3) and 77(1) of the *Manufactured Home Park Tenancy Act* (S.B.C. 2002, c.77)

In the Matter of

..... Landlord/Applicant

..... Tenant/Respondent

WRIT OF POSSESSION

Name and address of lawyer or person causing this writ to be issued:

.....

.....

To the Sheriff:

WHEREAS it was ordered, on ....., that

☐ the tenant/respondent ....., deliver to the landlord/applicant ....., possession of ..... (the "land");

YOU ARE COMMANDED promptly to enter the land and cause ..... to have possession of it;

YOU ARE COMMANDED promptly to seize and sell at public auction or tender for the best price available sufficient of the goods and chattels of ..... to realize the landlord/applicant's costs, fees and expenses of execution and the costs, fees and expenses for executing this writ.

Dated: .....

.....
Registrar

No. .....
.....Registry

In the Supreme Court of British Columbia

In the Matter of Sections 58(1) 55(3) and 84(1) of the *Residential Tenancy Act* (S.B.C. 2002, c.78) and Sections 51(1) 48(3) and 77(1) of the *Manufactured Home Park Tenancy Act* (S.B.C. 2002, c.77)

In the Matter of

..... Landlord/Applicant

..... Tenant/Respondent

AFFIDAVIT

I, ...of .....,
..... *[occupation]*, make oath/affirmation as follows:

1. That, on the .....day of .....in the year ..... at ..... o'clock ☐ AM ☐ PM, I did serve the Respondent, ... with a copy of the attached Order for Possession of residential property/manufactured home site here unto marked Exhibit A to this my affidavit by:
   - ☐ Leaving it with the respondent at .....
   - ☐ Sending it registered mail to the respondent's residence at .....
     .....
   - ☐ Sending it regular mail to the respondent's residence at .....
     .....
   - ☐ Leaving it with an adult whom apparently resides with the respondent
   - ☐ Leaving it in the mailbox or mail slot at the respondent's residence at .....
     .....
   - ☐ Attaching it to a ..... at .....
   - ☐ Faxing it to the respondent's address for service at .....
     .....
   - ☐ Serving it as directed on the Order by .....

2. That the time for filing for review under section 80 of the *Residential Tenancy Act* or section 73 of the *Manufactured Home Park Tenancy Act* has passed and the Order has not been suspended under section 81(3) of the *Residential Tenancy Act* or section 74(3) of the *Manufactured Home Park Tenancy Act*.

or

2. That the order for possession was not suspended under section 81(3) of the *Residential Tenancy Act* or section 74(3) of the *Manufactured Home Park Tenancy Act*. After a review before a Dispute Resolution Officer, the original decision and order under the *Residential Tenancy Act/Manufactured Home Park Tenancy Act* was confirmed.

3. The respondent has not obeyed the order and has not delivered vacant possession of the residential property/manufactured home site.

SWORN (AFFIRMED) BEFORE)
ME at .....)
in the Province of British Columbia, this .....)
day of ....., 20.....)
)
)
)
.....)
A Commissioner for taking Affidavits)
in the Province of British Columbia)

.....
signature of deponent

REV - 1Jan2011

THE SUPREME COURT
OF BRITISH COLUMBIA

Effective Date: 2010/07/01

Number: PD - 8

Title:

Practice Direction

Enforcement of Order or Decision of a Statutory Body

Summary:

This Practice Direction sets out the requirements for filing an order or decision of a statutory board, statutory decision maker or tribunal for enforcement as a judgment of the court.

Direction:

1. Applicants filing an order or decision of a statutory board, statutory decision maker or tribunal for enforcement as a judgment of the Supreme Court must file:

   a. a Requisition in Form 17

   b. a certified copy of the order or decision of the statutory board, statutory decision maker or tribunal.

2. The Requisition:

   a. must refer to the legislation or rule authorizing enforcement of the order or decision of the statutory board, statutory decision maker or tribunal

   b. provide an address for service of the applicant.

Robert J. Bauman
Chief Justice

WCCB West Coast Court Bailiffs Inc.
2-117 East 15th St, North Vancouver, BC. V7L 2P7
Phone (604) 983-9328 Fax (604) 980-0641

WRITS OF POSSESSION/PROCEDURE

Numerous enquires are received by the Court Bailiff's offices from Landlords and tenants with problems relating to residential premises. The Court Bailiff should not attempt to give advice or become involved in the dispute until a Writ of Possession is place in his hands.

Writs of Possession are authorized by Rule 42 of the Supreme Court rules, and in the case of residential premises are issued under the provisions of the Residential Tenancy Act. A Writ of Possession directs a Sheriff to enter on certain lands and eject and remove a tenant and his goods. The Court Bailiff will then give proper possession to the Landlord or his agent.

If the premises are vacant, etc., or if a tenant is in possession but refuses on the demand of the Court Bailiff, the Court Bailiff may, after allowing the tenant reasonable time to respond to his demand for admittance, force open any door in order to gain entry and eject the tenant or occupant. Common sense must prevail in all cases in that if a Landlord or his agent has a spare key to the residential premises it must be used to gain entry rather than forcing a door and causing unnecessary damage.

On receipt of a Writ of Possession always ensure that sufficient security for costs is received to cover Court Bailiff's fees and costs. I.e. for hiring movers, locksmiths, tow companies etc. should it be necessary.

In most cases a copy of the Order of Possession accompanies the Writ. If it does not, endeavour to obtain a copy as it outlines the history of the matter up to the time the Writ was issued.

As this is a serious matter you must always be in possession of the original Writ.
Obtain as much information as possible from the Landlord as to the type of person you will be dealing with and any items that belong to the premises, ie Writ of Possession information sheet.

The Court Bailiff assistant will at this point contact a local mover to ascertain if they have men and a vehicle for your attendance. The next step is to attend at the premises.

Ensure every file is in order, original Writ together with a copy of the Arbitrator's Order and Affidavit of Service. In some cases the eviction is the result of a foreclosure in which case an Order from the Court will backup the Writ.

WCCB West Coast Court Bailiffs Inc.
2-117 East 15th St, North Vancouver, BC. V7L 2P7
Phone (604) 983-9328 Fax (604) 980-0641

A service copy of each should also be enclosed. Also, make sure you have your exemption criteria which is the exemption claim form, Notice to Debtor and information sheet.

If value of the Debtor's goods is questionable make sure he/she signs and claims his exemption. This will defuse any misperceptions from the Landlord.

Review your information sheet and communicate with your partner **prior to attendance.** If the information sheet is concerning with regards to potential violent individuals or dogs, do not hesitate to call and request Police attendance to keep the peace.

It has always been recommended to attend the residence prior to the rest of agents attending and do a drive by to assess the property. Direct the movers to park out-of-sight from the residence.

Always be aware of your situation and your surroundings when approaching a residence. Both you and your partner must be cautious when entering a home. You are dependant on the assistance of your partner in a possibly violent situation.

Question individuals as to how many people are in the residence? Are there any weapons, needles, dogs?

Follow individual into different room(s) do not loose visual contact.

Do not hesitate to contact local Police to attend if tenant is not complying with your directions.

Incident reports: Court Bailiffs will be required to write a detailed report on a situation of violence against a Court Bailiff or if an individual is claiming assault against them.

Levels of Force

The first level of force is uniform presence. Usually, this will gain the respect and attention required from the individual(s) you are dealing with. There are three stance's taken when dealing with an individual(s) open stance, ready stance and defensive stance. Initially your approach would be the open stance when communication with an individual. However if the person is becoming agitated and showing signs of nervousness, i.e. shaking or increased rapped breathing, be aware, he is in a fight or flight mode.

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Take a ready stance position by turning your body 45° away from the individual with your knees bent slightly. This will increase your balance and take away the angle of a kick to the groin area. Keep your hands at your waist and be ready to block a blow or grabbing.

Dialogue

There are four, being, search talk, i.e. asking general questions, persuasion, explaining your position and the Court Order. Light control (advice), explaining his position. Heavy control (warning), Police presence.

Empty-Hand Control

Only in a defensive manner or if you believe you or your partner are in danger. Pain/pressure compliance, passive counter measures, active counter measures. **Only** use as much force as is necessary to control and hold the individual.

When knocking on a door. Always stand on either side of the door when possible. Standing directly in front of the door puts you at risk for anything which may come through.

If the tenants are present and open the door, identify yourself verbally and produce I.D. The tenant must then be served with a copy of the Writ, Arbitrator's Order and Affidavit. Explain the Writ to him/her and then explain the exemption rights.

All persons and animals must be removed prior to movers entering the premises. Secure the residence so movers may do their job without interference from the tenant(s) as to avoid any claims for breakage.

Once an eviction is commenced, even though some considerable time may be required, it should continue until completion and **both** Court Bailiffs must stay in possession until the land is handed over to the party named.

Court Bailiffs are **not** limited to between the hours of 8:30 am and 5:00 pm in execution of a Writ of Possession. If circumstances necessitate eviction outside of these hours and the Court Bailiff can engage a local insured mover, the Court Bailiff is legally authorized to execute a Writ of Possession any time of the day or night.

Good sense should guide the Court Bailiff in cases where eviction could be harmful to the occupant's health, i.e. harsh weather conditions, or where eviction may reflect poorly

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on Court services, i.e. Christmas Day. Pursuant to Section 64 the **Supreme Court Act,** a Writ of Possession cannot be executed on a Sunday.

As soon as all the property of a tenant has been removed, he should be advised that the premises now belong to the Landlord, and should he/she return they will be in the position of being a trespasser. Give the tenant a verbal "trespass warning". When the tenant has left, the Landlord or his/her agent should be requested to attend to accept possession.

In the event the Court Bailiff estimates the cost of the eviction will exceed the deposit on hand. He should contact the Landlord or his/her agent and request a further deposit.

Section 10 of the Sheriff Act:
Sheriff may require payment in advance

A Sheriff is not required to effect execution or seizure under any process unless, if demanded by the Sheriff,

(A) All reasonably anticipated costs of the process are first paid to the Sheriff, or

(B) An undertaking satisfactory to the Sheriff is given by the person initiating the process.

A Writ of Possession also has a direction to the Court Bailiff to seize and sell at public auction or by tender, sufficient of the goods and chattels of the tenant to satisfy fees, costs, and expenses for executing the Writ. A Court Bailiff must keep in mind the provisions of Sections 71 – 75 of the Court Order Enforcement Act, which provides a Debtor with the exemption entitlements from forced seizure and sale.

It appears that the only requirement for a Court Bailiff acting on a Writ of Possession is to move the tenant's goods and chattels to the edge of the property on the Landlord's side of the property.

J.W. Milton,
Senior Court Bailiff
Vancouver, New Westminster Regions

WEST COAST COURT BAILIFFS INC.

NOTICE TO DEBTOR

1. A Court has given judgment against you in respect of one or more claims that you owe money.

2. A Creditor who has a Judgment against you has asked the Court to help collect this money by ordering a Sheriff (Court Bailiff) to seize and sell some of your personal property. This process is called **"execution"**.

3. The law allows you to select a certain amount of personal property which is exempt from Seizure and Sale, this is called **"exempt property"**. The exemption amounts are as follows:

Household Goods	-	$ 4,000.00	
Tools of the Trade	-	$10,000.00	
Motor Vehicle	-	$ 5,000.00	(And $2,000.00 for maintenance debtors)
Equity in a Home	-	$12,000.00	In the Capital Regional District and the Greater Vancouver Regional District

Plus all necessary clothing and all required medical aids (of a debtor or dependent)

You may choose any goods which you would like to exempt from Seizure and Sale up to the allowable amounts within each category. You must make this claim at the time a Court Bailiff comes to make the seizure or within two days after the seizure or notice of it, **or you will lose the right to claim the property as exempt from seizure.**

4. The exemption from seizure does not apply:

   (a) to goods where the debt sought to be satisfied by the seizure was contracted for or in respect of those goods; and,

   (b) to goods of a trader that form part of the stock in trade of his business.

5. The Credit Counselling Society is a non-profit organization that helps consumers find solutions to resolve their debt and money problems. They provide no cost and confidential financial counselling and low cost debt repayment programs and settlement services. To speak with a Credit Counsellor by telephone or in person at one of their nine offices, please call one of the following numbers:

Vancouver	#604-527-8999
Outside the Lower Mainland - Toll Free	#1-888-527-8999

6. If any monies are paid to a Court Bailiff towards satisfaction of the Judgment amount, a receipt should be obtained.

I _____ have been advised of my right to claim an exemption and have been served with a copy of this form and an exemption claim form

Signature _____ (Debtor) Date: _____

Signature _____(Court Bailiff) Date: _____

WEST COAST COURT BAILIFFS INC.

TO: **Court Bailiff**

BETWEEN:

(JUDGMENT CREDITOR)

AND:

(JUDGMENT DEBTOR)

Please note that I claim the following goods and chattels seized by you on _____ 20 _____, as my personal exemption under Section 66 (2) of the Court Order Enforcement Act.

_____

Judgement Debtor

Date: _____

Take notice that I concur that the above noted goods are exempt from seizure and sale under Sec. 66 (2) COEA.

OR

Take notice that I dispute the value of the goods claimed as exempt from sale by the Court Bailiff, and I am applying for the appointment of an Appraiser under Sec. 67, COEA. Notice of the appointment, when made, will be sent to you.

_____

Court Bailiff

_____

(Place)

_____

(Date)

BRITISH COLUMBIA Ministry of Attorney General

What You Should Know About the Court-Ordered Seizure of Personal Property by Court Bailiffs

This information sheet has been written to let you know what your rights are when a court bailiff comes to make a court-ordered seizure of your personal property.
This information does not apply to corporate debtors.

When can a court bailiff take my personal property?

Court bailiffs can seize personal property when a court orders them to do so. This can happen when the court has determined that you owe money and haven't paid it as you were required to.

What papers should a court bailiff give me when making a seizure?

The court bailiff must provide you with the following:

- a copy of the court documents—these say exactly what the court has ordered
- a notice form—you must sign this to show that you understand the seizure process and have received the papers; if you refuse to sign, the court bailiff will make a note to this effect, but must proceed with the seizure
- a copy of this information sheet.

You should take particular note of the exemption amounts outlined on page 2 of this information sheet.

Can the court bailiff take things right now?

Yes. The court bailiff has the right to place property under seizure immediately, and may or may not physically remove it at this time. Immediate seizure *does not* affect your right to choose certain property that the court bailiff cannot sell to pay the court judgment. This property is known as your "exemption" and you have two days to claim it. Your right to claim your exemption expires two days after the seizure or your notice of seizure.

Can court bailiffs come onto my property even if I don't want them to?

Yes. Court bailiffs are peace officers and have the right to enter your property.

Can I pay the court judgment right now to avoid having my property seized?

Yes. You can pay the full judgment *plus* the court bailiff's costs by cash, bank draft or money order. The bailiff can usually estimate costs accurately at that time.

Is there any way for me to get more time to pay?

Sometimes this is possible, but it is entirely up to the judgment of the creditor and the court bailiff. If you are prepared to pay the court judgment over time, it might be possible to work out a payment schedule. If you want to do this, you may suggest it to the court bailiff.

What if there has been a mistake and I have already paid the court judgment?

Tell the court bailiff about this and show him or her a receipt or other documents showing that you made the payment. Also, contact the person you made the payment to and ask that person to resolve the matter.

Do I have to let the court bailiff take whatever he or she wants?

Yes, but you are entitled to and may choose to exempt certain property, which means it can't be sold to pay the court judgment. **This is very important.** You have two days from when you were given the court documents to choose what goods you want to keep under your exemption and notify the court bailiff. If the court bailiff intends to remove property immediately, it's best for you to identify your exemptions before the removal. That way you avoid having to pay any storage or transportation costs involved in having the exempted property returned to you.

The things you get to keep or have returned to you are called "exempt goods". You are allowed to exempt the items listed on the next page:

Item	How much you can exempt
Necessary clothing....	all necessary clothing for you and your dependents
Medical aids.....	all necessary medical aids for you and your dependents
Household goods.....	$4,000 worth (including furniture and appliances)
Tools of your trade.....	$10,000 worth of tools or personal property used to earn a living
Motor vehicle.....	$5,000 worth of equity in a single vehicle (unless you are in default on family maintenance payments, in which case you can only exempt $2,000 worth of equity in a vehicle)
Equity in your home...	$12,000 worth of equity if you live in the Greater Vancouver Regional District or Capital Regional District; otherwise, $9,000 worth of equity

Are there situations in which I am not entitled to claim exempt goods?

If you are a corporation owing money, then you are not entitled to claim exempt goods. Also, you may not be entitled to claim exempt goods when the seizure relates to debts owed to government, including taxes.

Why am I allowed to keep this particular amount of property?

The law provides these exemptions to make sure that after a court-ordered seizure you are left with the basic necessities for maintaining a household and earning a living.

How do I figure out the value of my personal property?

Do your best to estimate the current value of things you want to include under your exemption. Notify the court bailiff. Court bailiffs are experienced at estimating the price that property is likely to receive when put up for sale. They will let you know whether your estimates are realistic.

What if we disagree over the value of my personal property?

If you disagree with the value a court bailiff places on your property, you can ask the court bailiff to arrange for a professional appraisal. If the appraisal shows that you are right, the court bailiff pays the cost of the appraisal. If you are wrong, the appraisal costs are added to the amount you owe.

Once my property has been seized, is it too late for me to pay the court judgment and get my things back?

You can pay the court judgment *plus* the court bailiff's expenses any time before the property is sold. Do this through the court bailiff. Once the property has been sold, you cannot get it back. You should ask the court bailiff when the goods will be put up for sale.

What rules do court bailiffs operate under?

Court bailiffs follow common law, provincial legislation and a contract with the provincial government. The contract sets out rules that court bailiffs must follow.

How are court bailiff fees calculated?

Within a few weeks the court bailiff will give you an invoice detailing all the costs. If you want to verify that these costs are appropriate, you can ask the court bailiff or a court contract administrator (see below) to give you a copy of the province's fee schedule for court bailiffs. There are separate schedules for small claims court orders and Supreme Court orders.

Can I complain if I don't think I have been treated fairly by a court bailiff?

Yes. Complaints about the inappropriate actions of a court bailiff should be made to the court bailiff firm. If this does not resolve the problem, you may contact a contract administrator or the Ministry of Attorney General:

Vancouver Island
(*Envoy Court Bailiffs*)
Sheriff Shayne Gorman
Law Courts
850 Burdett Avenue
Victoria, BC V8W 1B4

(*Comox Valley Court Bailiffs*)
Sheriff Bob Baker
35 Front Street
Nanaimo, BC V9R 5J1

Vancouver
(*West Coast Court Bailiffs, Active Bailiff Services and Accurate Court Bailiffs*)
Sheriff Chris Erickson
2620 Mary Hill Road
Port Coquitlam, BC
V3C 3B2

Okanagan, Kootenays and Williams Lake
(*Okanagan Court Bailiffs and Kootenay Columbia Collections & Bailiffs*)
Sheriff Michael Sims
Box 100, 20 Hudson Ave. N.E.
Salmon Arm, BC V1E 4S4

Okanagan, Prince George, Terrace/Skeena, Fort St. John/Peace River and Williams Lake
(*North Central Bailiffs*)
Sheriff Duane Jones
1201 103rd Avenue
Dawson Creek, BC V1G 4J2

Terrace/Skeena
(*Caledonia Collection Agencies*)
Sheriff Lee Searle
3408 Kalum Street
Terrace, BC V8G 2N6

Fort St. John/Peace River
(*Expert Bailiffs*)
Sheriff Duane Jones
1201 103rd Avenue
Dawson Creek, BC V1G 4J2

Where can I get help to manage my debts?

The Debtor Assistance Branch of the Ministry of Public Safety & Solicitor General can provide individuals and families with financial counselling and other services. To locate the branch office nearest you, contact:

Enquiry BC
Toll-Free: 1-800-663-7867
Vancouver: 660-2421 Victoria: 387-6121

6. Immigration

- **Mothers without Legal Status PowerPoint presentation**
- **Updates and Changes in Immigration Law (non-refugee)**
- **Refugee Clients: a legal update and overview of referral resources**
    - Changes in Refugee Law PowerPoint presentation
    - Services for Refugees PowerPoint presentation

THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

Mothers Without Legal Status

2012 Advocates Conference
Lisa Rupert,
Associate Director of Housing,
YWCA Metro Vancouver
lrupert@ywcavan.org
&
Andrea Vollans,
YWCA Legal Educator
avollans@ywcavan.org

The Issue

Defining Mothers Without Legal Status

Who are Mothers Without Legal Status?

- They have met and become involved with a Canadian man – typically a citizen or permanent resident
- They have at least one child who is not able to leave the country with them due to custody and access issues
- Their ex-partner was abusive to them and/or their children
- They do not have citizenship or permanent residence or a completed sponsorship

MWLS Arrival in Canada

- Mothers without Legal Status come to Canada as students, to travel or to work.
- Some meet their partners while in Canada, some already have Canadian partners when they arrive
- Mothers without Legal Status come to Canada in a lot of different ways:
  - They come here from non-permit (visa) requiring countries
  - They come here on a visitor permit or student permit
  - They come here on a work permit

How Do They Come to be Without Legal Status?

- The term “without legal status” can be a misnomer – many mothers without legal status work hard to maintain visitor permits or other temporary status – they are lacking permanent resident status
- Many of the women believed they would be sponsored by their spouse or were not aware that they required sponsorship
- Most women left their partner due to the abuse; a few women had their partners leave them
- Virtually all mothers in this situation have ex-partners that refuse to allow them to leave this jurisdiction with their children

Abuse

- 100% of the women interviewed in the YWCA’s research project identified that they had experienced abuse from an intimate partner.
- 17% of women interviewed volunteer the information that their partner had been in other intimate relationships for women who don’t have legal status.

Immigration & MWLS

- One of the biggest issues for mothers without legal status is that they may be “unwilling immigrants” – some mothers without legal status say that they feel they are being “held hostage” by Canada
- Reasons women may want to return to their country of origin include having emotional and practical supports from family and friends, and financial reasons, such as having educational credentials and/or work experience that is better recognized in their country of origin, and having the ability to work and support themselves immediately, and issues such as experiencing cultural and language barriers in Canada.
- Failure to apply for Permanent Resident status can impact mothers without legal status’ eligibility for various supports, including income assistance, and BC Housing.

The Legal Processes

Family Law & Immigration Process, Definitions and Information

If She Wants to Leave Canada

- Recognize that this is totally normal
- Acknowledge these feelings
- Let her know that unless her ex-partner consents, she may not be able to leave (exception – women who have existing custody from other countries and no order in Canada)
- Refer her to a lawyer for specific advice
- Tell her that she needs to prove her case with all the evidence that she can gather

- She will need a court order through the Supreme Court of BC granting permission to leave
- She may file for Indigent Status to avoid filing fees (currently $208)
- If she files an application, her ex-partner may file a counter-application asking for Custody, Access or to prevent the child from leaving the country ever
- She should ask the lawyer if suggesting some type of access would be useful in this case – offering frequent skype contact and regular visits in both Canada and her home are possible options.
- Most successful applications have police and/or hospital documentation of abuse

Family Law

- In BC, decisions in Family Law are directed by the Family Relations Act & the Divorce Act, but as of March 18, 2013 will be covered under the Family Law Act and the Divorce Act
- Mothers without Legal Status will not automatically get custody, even if the father has been abusive
- Parents are guardians if they have resided with the child, provided care for the child or are covered under surrogacy agreements or other agreements or orders

- If there is already a court order from another country that says somebody has custody it may be considered by BC courts as valid particularly, ***if*** that country is a signatory to the **Hague Convention on the Civil Aspects of International Child Abduction**
- Let women who are planning to try to leave Canada without a Canadian court order know that that there are precedents where MWLS were able to do this, but they returned to Canada to visit their ex-partner, or to reconcile with him, only to find that he had gone to court in their absence, stated that she abducted the child and he gained custody of the child. In some cases, not only did the woman lose custody of her child, but she was also arrested for abduction.

- In BC Family Law the parent who has looked after the children most of the time before the break up of the relationship will ***usually*** be the one who has primary residence of the children
- For MWLS, their lack of housing or income has prevented them from being given custody, even when they were deemed primary caregiver by the Judge
- Mothers without legal status are often considered a flight risk and denied custody on those grounds

His Abuse or Bad Behaviour

- Generally, a judge will not consider a parent's previous "bad" behaviour unless it seriously affects the child(ren)
- This means that a judge may not consider an ex-partner's abusive behaviour, alcoholism or drug use so long as they don't feel it affected the child.
- Under the new Family Law Act, judges will consider abuse and violence.
- Mothers without legal status may need extra support around understanding this.

Maximum Contact

- The courts favour “Maximum Contact” with both parents.
- Even parents who have a history of abusing the child are seen as beneficial to a child’s upbringing and care
- You may need to help the woman understand this concept
- If all things seem equal, a parent more likely to facilitate access will get custody

Hague Convention on the Civil Aspects of International Child Abduction

The *Hague Convention* is designed to facilitate prompt return of children that have been wrongly removed

An order valid in Canada should be given equal weight in another signatory country

there are approximately 80 countries that are signatories to the *Hague Convention*

http://www.voyage.gc.ca/publications/child-abductions_enlevements-enfants-eng.asp

If a mother flees to a signatory with the child, the child may be returned to Canada by force

She may also have problems coming back in to Canada or establishing any custody of the child if she flees

Legal Aid & Assistance

Getting and Getting the most out of a lawyer for these complex situations

Getting Legal Assistance

It is important that the woman you are helping receive legal advice from both a family law lawyer and an immigration lawyer as promptly as possible.

- Applying for Legal Aid in most situations is the best way to have her legal needs met
- She may be told that a woman is only entitled to family or immigration representation, or that without status she is not eligible for Legal Aid. Both of these statements are untrue.
- If she is denied you may appeal – an appeal can take a few weeks to go through

One of the most important supports you can provide is assistance with the Legal Aid applications for family and immigration.

- You will need to explain why she has a safety issue in family law and why her immigration issue is unique in that she cannot legally leave the country with her child/ren.
- Take time with the woman to prepare and explain to her that together you will have to convince this worker that her situation meets their criteria.

- You may also want to ensure that all the information the intake worker needed was provided.
- If you the woman did not have the opportunity or failed to provide specific information on the safety or immigration concern you can contact the Legal Aid intake worker and provide them with “new information”.
- If she needs to write an appeal it is best if you work with the woman to write out the appeal – include in there why she cannot leave the country and the history of abuse with her ex-partner.

Collateral Processes

Canada Border Services and
MCFD involvement

Reports to Canada Border Services

- If a report has been made to the Canada Border Services stating a mother without status is living in Canada illegally, she **must** contact an immigration lawyer immediately for legal advice.
- If you are providing her with housing, you should discuss the possibility of Canada Border Services calling your organization or even showing up at your organization, and inform the woman of your policies on disclosing her whereabouts to them, including whether or not you will accept service of documents intended for her.

- Failure to accept any documents or to address the issue that Canada Border Services is looking for her will result in her living “on the run.”
- If she chooses to return Canada Border Services call, she will be given an appointment in the near future.
- She will then have to attend in person. Be sure to advise if translation is needed, as it is not automatically provided.
- She can bring her lawyer and/or an advocate into the meeting if she chooses.
- Although unlikely, it is possible for her to be deported at this time, particularly if there is a history of avoiding service or she has an outstanding removal order

- At the first meeting, they will do an assessment of her situation. She will be asked to come back for a second meeting for the results of the assessment.
- For the second meeting again, be sure to specify if a translator is needed.
- At this meeting, if the woman clearly has no status in Canada whatsoever, she will be found to be here illegally and given a removal order that is effective immediately.
- However, she will also be offered a Pre-Removal Risk Assessment (PRRA). If she is not offered this for some reason, be sure to advise her to ask for it. This will put a temporary halt to the removal order.

- The woman should have the assistance of a lawyer to complete the PRRA form and send it in.
- If she is already in the process of applying for Permanent Resident Status on Humanitarian and Compassionate grounds, both that and the PRRA will be considered at the same time.
- If the PRRA is approved, the woman will get status.
- In the meantime, she can apply for a work permit in Canada while the PRRA is being considered (which she could not do if she only had an application for Permanent Resident Status on Humanitarian and Compassionate grounds).

MCFD

- Many mothers without legal status are told to leave abusive partners by MCFD
- Many child protection workers don't fully understand the challenges experienced by mothers without legal status and may not understand why the mother hesitates to leave the abusive relationship.
- Once a mother without legal status leaves an abusive relationship at the insistence of a child protection worker, she often has nowhere to go, nor does she have the resources to support herself and her children.

- Some women in this situation, to survive, may stay in contact with their abuser so that he does not cancel their sponsorship applications in order to get food, shelter, or financial support from him.
- As service providers, we can advocate, with child protection workers. We can help educate a child protection worker about why a mother without legal status might have to choose to remain in contact with her abuser.
- Child protection workers are required to follow MCFD Guidelines for Best Practice Approaches – Child Protection and Violence Against Women
- http://www.mcf.gov.bc.ca/child_protection/pdf/best_practice_approaches_nov2010.pdf

- If MCFD is already involved there may be some benefits that you can receive for the woman.
- You may advocate on the woman's behalf to MCFD to get a monthly bus pass, which is invaluable for mothers without legal status or to have the child protection worker get needed resources for the woman.
- There have been cases where MCFD has provided funding for the medical exam required for a permanent resident application of a mother without legal status.

Assisting Them to Meet Basic Needs

Money

Mothers without legal status may have one or more of the following sources of income:

- Income assistance
- Legal employment
- Child support
- Spousal support
- Family assets
- Canada Child Tax Benefit and Universal Child Care Benefit
- Income from illegal employment
- No source of income at all

Income Assistance

- From 2002 until 2011 MWLS were unable to get income assistance, in October 2012 the BC Government introduced Employment and Assistance regulations which would make MWLS entitled to income assistance through S 7.1
- To be eligible for income assistance MWLS have to meet 5 criteria

MWLS Income Assistance Criteria

- Sole Applicant/Recipient (cannot have a spouse that they wish to collect income assistance with)
- One or more dependent children who are Canadian citizens
- Separated from an abusive partner
- Proof that they have applied for refugee status or for status as a permanent resident under the IRPA
- Cannot leave British Columbia with the dependent children because of a court order, an application that the child stay, or because of the health of the applicant or one of the children

Legal Employment

- This is limited to women with work permits. As part of her application for permanent residency, women may apply for a work permit, but she cannot work until she has the permit and satisfied the requirements of that permit (medical exam, 4 passport sized photos, cannot be studying)
- When a mother without status has applied for a work permit, there is a delay between the issuing of the permit and getting a social insurance number.
- This can take several months. In the meantime, she is legally entitled to work, but she will have to inform her potential employer of this situation. They can choose to hire her, let her start working, but withhold pay until the social insurance number is issued.
- As a worker, let the woman know that she should maintain records of hours worked to ensure that she is not taken advantage of in this situation.

Child Support

- Mothers without legal status have the same entitlement to child support as permanent residents and citizens of Canada.
- If the child resides mainly with the mom, they can apply for child support, even if custody has not yet been determined. The guidelines are available online or through the resources at the back.
- They can also register with the Family Maintenance Enforcement Program. However, despite a court order and involvement with the Family Maintenance Enforcement Program, payments are not always made on time. Women need a back-up income plan.
- Women who have experienced abuse from their ex-partner may have safety concerns about seeking child support, and choose not to do so. Some women may also choose not to ask for child support as their ex-partners will retaliate by seeking custody of the children.

Spousal Support

- Mothers without legal status have the same entitlement to spousal support as permanent residents and citizens of Canada.
- They must have lived together in a marriage like relationship for at least two years. Considerations for spousal support include: length of marriage, difference in incomes, economic disadvantage from the relationship, and potential earning capacity
- Women who have experienced abuse from their ex-partner may have safety concerns about seeking spousal support, and choose not to do so.

Family Assets

- Mothers without legal status are entitled to the same division of family property as permanent residents and citizens of Canada.
- Women should be encouraged to speak with a lawyer about whether she should seek a certificate of pending litigation against properties, as women can be penalized for filing and withdrawing such a certificate, it is strongly suggested that she seek legal counsel.
- You will also want to explain to the woman that it may take a long time for the assets to be divided in court.
- Often foreign assets may not be considered by BC courts as they fall outside of the jurisdiction. It may be worthwhile for the woman to connect with legal counsel in the country where the assets are.

Canada Child Tax Benefit and Universal Child Care Benefits

- If a woman's partner has permanent resident status or Canadian citizenship AND filed income tax returns for the previous year, the family was eligible for the Canada Child Tax Benefit. If the child(ren) were under age 6, they were also eligible for the Universal Child Care Benefit.
- Even if the woman had no status in Canada, if she was listed on the tax return, the Canada Child Tax Benefit and the Universal Child Care Benefit would normally be issued in her name.
- When the relationship ends, the Canada Child Tax Benefit and the Universal Child Care Benefit will continue to be issued to the mother without status until one of the parents contacts Revenue Canada to inform them of the change in circumstances OR they file the next year's taxes and record the changes (in which case the last cheque will usually be received in September.)

- However, the mother without legal status ceases to be legally entitled to the Canada Child Tax Benefit and the Universal Child Care Benefit upon the end of her relationship with the parent who has legal status in Canada, even if the children are Canadian citizens.
- When/if Revenue Canada becomes aware that she was receiving the benefits after the end of the relationship, she will be asked to pay back the money received.
- Even in cases where the mother without status subsequently gets permanent residence status, and legal entitlement to the Canada Child Tax Benefit and the Universal Child Care Benefit, she will still have to pay back any money that she received before becoming eligible.

No Income At All

- There are some mothers without legal status who have no source of income at all. Transition Houses and Shelters may be of temporary assistance.
- Mothers in this situation will need assistance creating a patchwork of all available free resources in her local community as it changes.
- Banking may be challenging for mothers without legal status due to lack of documentation and potential language barriers.
- You can support a mother without legal status by going with her to a bank or credit union and advocating on her behalf to set up a bank account.

Food

- **In addition to the challenge of buying food on limited or non-existent budgets, some places that normally provide free food require proof of residence or identity.**
- Having a letter from your organization confirming her lack of status and a contact number for a support person may be very useful for the woman to have for many reasons.
- If your organization collects donations, you may want to adopt a policy for mothers without status that provides them with extra donations given the precarious nature of their situation.

Housing

Finding housing is one of the biggest challenges for mothers without legal status due to their lack of income and their inability to get a social insurance number.

- **First Stage Transition Houses** will often accept mothers without status on a temporary basis for a period of between two weeks to thirty days. Occasionally, transition houses will keep women for longer periods of time.
- First Stage Transition Houses differ from shelters in that they are specifically for women fleeing abuse in their intimate relationship, and women are not required to be on income assistance.

- **Second Stage Transition Houses** provide long-term housing and support to a limited number of mothers without legal status. While they typically have a housing charge, some offer partial or complete subsidy to women with low or no income. As most second stage program do not provide food, it might be useful to assist the woman to have a plan in place for securing food and attaching it to her application. Some second stage programs are reluctant to take women if they do not have such a plan in place.
- **Shelters** do not typically receive funding for clients who are not eligible to receive income assistance; as such they may put limits on the amount of time a mother without legal status can reside there.

- **BC Housing** will accept applications from women who have applied for refugee status. Since 2011, mothers without legal status who are collecting income assistance are eligible to apply for BC Housing.
- **Housing Co-operatives** officially cannot accept women who don't have status in Canada, but some co-ops do not follow this guideline or are unaware of it.
- The BC Co-operative Housing Federation also has a special program called Opening Doors that can lend women who are leaving an abusive relationship interest free loans to pay for the share purchase when they are moving into a coop.

Education

Mothers without legal status are not legally entitled to access free government-funded programs in Canada.

English as a Second Language programs like ELSA are also unavailable

Some churches offer free, non-government-funded English classes that accept mothers without legal status

The BC Ministry of Education has stated that children of MWLS are entitled to free education:

http://ywcavan.org/content/YWCA_welcomes_provincial_commitment_to_help_children_of_non_status_women/1375

Thank you!

Updates in Immigration Law

Presentation for Law Foundation of BC
Provincial Training Conference for Legal Advocates
21 November 2012

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Overview

- Thumbnail Sketch of the Canadian Immigration System
  - Eligibility and Admissibility
  - Temporary Residence Programs
  - Permanent Residence Programs (excluding refugees and protected persons)
- Recent and Upcoming Changes (the highlights)
  - Changes to Spousal Sponsorship Programs
  - Changes to the Federal Skilled Worker Program
  - New Limitations on the H&C Discretion
  - "Designated Foreign Nationals" and "Irregular Arrivals"
  - Bill C-45: "Faster Removal of Foreign Criminals" Act
  - Cut-backs and Closures

*Eligibility/Admissibility

* In order to qualify for temporary or permanent residence status in Canada, an applicant must demonstrate that they are both eligible for the status sought, and admissible to Canada
* A person may be found inadmissible to Canada on any of the following grounds:
  * security (e.g. espionage, terrorism, etc);
  * criminality and serious criminality;
  * medical
  * financial
  * misrepresentation
  * non-compliance with the act
  * Inadmissible family member

Temporary Residence Applications

* Visitors
* Workers
* Students

* Visitor Visas/Visitor Records

* Foreign nationals from visa-requiring countries must apply for a Temporary Resident Visa (TRV) at a visa office outside Canada before seeking admission at a port of entry. To gain entry, visitors must establish that they only intend to enter Canada for a temporary purpose.
* Since May 2012, a person in Canada who holds a valid study or work permit can now apply for a new TRV from inside Canada (prior to that date, subsequent TRVs could only be approved through a visa office outside Canada)
* Visitors are generally authorized to stay in Canada for a six-month period following their entry. They can, however, apply within Canada to extend their temporary stay. If that application is approved, they will be issued a "visitor record".

* "Super Visas"

* In December 2011, CIC announced that eligible parents and grandparents may now obtain long term multiple-entry visas and an extended authorized stay for up to two years when seeking to visit a Canadian or permanent resident child or grandchild in Canada (info at www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob357.asp).
* To establish their eligibility for a "super visa" applicants must demonstrate:
  * that their child or grandchild is a Canadian citizen or permanent resident;
  * that they have undergone medical examination and are not inadmissible on health grounds;
  * that they have purchased private medical insurance from a Canadian insurance company, valid for a minimum period of one year (the policy must provide a minimum of $100,000 coverage, with provision for health care, hospitalization and repatriation); and
  * the child/grandchild concerned must provide proof of their capacity to provide financial support.

Obtaining a Work Permit

- The general rule is that, where a foreign national seeks to obtain a Canadian work permit:
  - they must first secure a job offer in Canada;
  - their intended employer must then obtain a positive "Labour Market Opinion" by demonstrating to from Service Canada that the hiring of the foreign worker for the position will not have a negative impact on the Canadian labour market; and
  - if they come from a visa requiring country, they must apply for their work permit at a visa office outside Canada whereas if they come from a visa exempt country, they may be able to apply for their work permit at a port of entry to Canada.

LMO Exemptions

- The following list includes some of the TFWs who are exempt from the LMO requirement:
  - Applicants in the International Experience Canada program (e.g. working holiday permits holders);
  - Intra-company transferees;
  - Foreign nationals who have graduated from a participating post-secondary institution may obtain an LMO-exempt "post-graduation work permit" of up to three years duration;
  - Spouses of "skilled workers";
  - Applicants under various international free trade agreements (e.g. NAFTA);
  - Workers who have already received approval-in-principle for permanent residence in the live-in caregiver class, and those who have received a positive nomination certificate from the BCPNP;
  - etc.

* April 2011 Amendments to the TFW program

* Amendments to the TFW program, which came into effect on 1 April 2011, empower CIC, Service Canada/HRSDC and CBSA to:
  * scrutinize the *genuineness* of jobs offered to TFWs and consider: a) whether the employer is actively engaged in business, b) whether the job offer is consistent with reasonable employment needs, c) whether the employer is reasonably able to fulfil the terms of the employment agreement, and d) whether the employer has demonstrated past compliance with federal/provincial/territorial agreements;
  * evaluate whether employers accessing the TFW program have provided other FNs in their employ with wages, working conditions and employment conditions that were *substantially the same* as those items as set out in their initial employment offers over the last two year period.
* In addition to the above, the 1 April 2011 amendments limit the total duration that a TFW can remain in Canada to **4 years** (including time worked only post-1 Apr 2011), except:
  * those who have received a PNP nomination or have 1st stage approval for PR in the live-in caregiver class, the Federal Skilled Worker Class or the Canadian Experience Class;
  * NOC O and A occupations;
  * TFWs covered by international agreements (e.g. NAFTA, SAWP or IEC); and
  * Certain LMO exempt TFWs (including spouses of f/t students, charitable/religious workers, intra-company transferees, researchers, academics, etc).

*Student Permits

* Initial study permit applications must generally be made *outside* Canada.
* Students must demonstrate that they have been admitted to the school of their choosing, that they can afford to pay the *international* student tuition, and that they have the means to support themselves during their studies.
* Students may apply to renew their permits within Canada provided that they continue their studies. They will generally be able to bring their families with them to Canada on work or study permits.
* College students are authorized to work on their own college campus. Students at certain universities may also be able to obtain authorization to work off campus.

*Canada/BC Immigration Agreement

* Under the International Student Annex, graduates of certain BC private post-secondary career-training institutions may qualify for LMO-exempt post-graduation work permits, as part of a 2-year pilot project from Jan 2011 (info at www.cic.gc.ca/english/department/media/backgrounders/2011/2011-02-22.asp);
* Under the Temporary Foreign Worker Annex, spouses of "low skilled" workers and their working-aged dependent children (ages 18-22) may now qualify for open work permits as part of a pilot project from 15 August 2011-15 February 2013 (info at www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob337.asp);

Permanent Residence Applications

* Family Class
* Federal Skilled Worker Program
* Provincial Nominees Program
* Live-in Caregivers Class
* Canadian Experience Class
* Humanitarian and Compassionate Class

The Family Class

* The "Family Class" is the application stream that enables permanent resident and citizens of Canada to sponsor eligible family members
* Family class applications are generally processed through a visa office outside of Canada, though it is possible to make an application inside Canada in the case of a spousal sponsorship
* Sponsors can apply to bring their spouses, children, as well as their *parents/grandparents (although CIC announced a 2-year hiatus on the parent/grandparent category in Nov 2011)* – more info at: www.cic.gc.ca/english/department/media/releases/2011/2011-11-04.asp
* One cannot sponsor a sibling, niece/nephew or grandchild unless that family members is orphaned, under 18 years of age and not a spouse or common-law partner – more info at: www.cic.gc.ca/english/information/applications/family.asp
* There is also a provision that allows one to sponsor a single relative of any age or relationship, but only if the sponsor does not have a living spouse, conjugal 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 Canadian citizen or a permanent resident or registered as an Indian under the *Indian Act*.
* Sponsors "undertake" to provide for the applicant's financial needs or over a 3 years in the case of a spouse or a 10 year period in all other cases.

CIC initiatives to curb "marriage fraud"

* CIC has introduced the following amendments to the spousal sponsorship policy:
  * that sponsored spouses be prevented from sponsoring a subsequent spouse for 5 years after landing, regardless of why the first relationship ended. This change came into effect 2 March 2012. Info at www.cic.gc.ca/english/resources/manuals/bulletins/2012/ob386.asp.
  * that sponsored spouses who have been in a relationship with their sponsor for two years or less be landed on a *conditional* basis, provided that they have no children with their sponsor. This change came into effect on 25 October 2012. Info at http://www.cic.gc.ca/english/resources/manuals/bulletins/2012/ob480.asp

The Federal Skilled Worker Program

- July 2012: CIC temporarily stopped accepting applications in the Federal Skilled Worker Program, with the exception of applications by persons with an Arranged Employment Offer or applying under the PhD stream. The government has recently announced new assessment criteria, and the program is expected to be re-launched in early 2013. More information at: www.cic.gc.ca/english/department/media/releases/2012/2012-08-17.asp
- The new FSW program will:
  - set minimum language thresholds and increase points for language proficiency;
  - require applicants to have their educational credentials assessed for equivalency;
  - put greater emphasis on younger immigrants likely to remain in the workforce longer;
  - increase points for Canadian work experience/reduce points for foreign work experience;
  - simplify and increase fraud prevention in the Arranged Employment process; and
  - award points for spousal language ability and Canadian experience.

The Live-In Caregiver Program

- To enter the LCP, workers must have the following qualifications:
  - equivalent of Canadian secondary school graduation (equals 12 years of schooling);
  - six months full-time training or twelve months relevant work experience within the last three years;
  - ability to speak and read English or French;
  - employment as a live-in caregiver with a Canadian employer.

The Live-In Caregiver Program

* Once in Canada, live-in caregivers are issued highly restrictive temporary work permits. Caregivers must work full-time and live in the home of the employer whose name appears on their work permit.
* Caregivers must provide care to a child, elderly person or person with a disability.
* Caregivers can apply for landing if, within the 4 year immediately following their admission to the LCP, they complete 24 months of authorized work or 3900 hours of authorized work within a period of not less than 22 months.
* Caregivers are typically uanble to bring their family members to Canada unless/until they are granted landing.
* In December 2011, CIC began issuing open work permits to live-in caregivers who have submitted an application for PR with an open work permit application (prior to this change, open permits were not issued until approval-in-principle had been issued, approximately 12-16 months after PR filing). Regrettably, overall processing of PR applications has subsequently spiked to >32 months, thereby prolonging family separation.

The Provincial Nominee Programs

* Each province and two of the territories have agreements with the federal government that enable them to nominate candidates for permanent residence on their selection criteria. PNP applicants apply to the province/territory of their choice. If they receive a positive nomination, they then apply to CIC for screening on federal admissibility criteria (i.e. financial, medical, criminal, misrepresentation) through the CIO in Sydney NS since Dec 2011 – info on BC's PNP at: www.welcomebc.ca/wbc/immigration/come/work/about/index.page?WT.svl=LeftNav
* BC's PNP has five areas of focus:
  * *Skilled Workers* with permanent job offers in NOC O, A or B occupations;
  * *Recent international graduates* from recognized Canadian post-secondary institutions with permanent job offers;
  * *Recent international post-graduates* from certain Canadian post-graduate degree programs (pilot project to 28 May 2013);
  * *Designated health professionals* including: nurses and psychiatric nurses who are registered or eligible for registration in BC; physicians who have practiced in BC for at least 9 months and received a positive assessment from their supervising physician, and midwives who are eligible to register in BC and have been accepted into a established practice group in BC;
  * *Low and semi-skilled workers* who have worked in BC for a minimum of 9 months in select occupations in the tourism (hospitality), food processing & long-haul trucking industries (permanent project since August 2011); and
  * Investment-ready and qualified entrepreneurs and *business immigrants* who are ready to invest and settle in BC.

The Canada Experience Class

- This class allows certain foreign nationals to qualify for landing based on Canadian education/work experience:
  - *Worker stream*: applicants must establish that they have completed 2 years of (legal) full-time paid employment in Canada in a managerial or professional field (NOC O, A or B) within the 3 year period prior to their application;
  - *Student stream*: applicants must have graduated from a Canadian post-secondary institution, and completed 1 year of (legal) full-time paid employment in Canada in a NOC O, A or B occupation within 3 years prior to their application.
- CIC announced in April 2012 that the CEC worker stream will be amended to require only 12 months of work experience. Changes anticipated in late 2012/early 2013.

Humanitarian and Compassionate Applications

- For applicants who do not fit into any of the categories already described, it is possible to apply for PR on Humanitarian and Compassionate ("H&C") Grounds.
- To succeed on an H&C application, it is necessary to demonstrate that the applicant would suffer "unusual, undeserved or disproportionate hardship". Applicants must generally show evidence of their establishment in Canada.
- The following limitations have recently been imposed on the H&C provision:
  - June 2010: Minister's delegates can no longer consider risk factors normally taken into account when assessing a refugee claim or PRRA claim in H&C decision making;
  - June 2012, refugee claimants can no longer make a concurrent application for PR on H&C grounds, nor can they make an H&C application for 1 year after their refugee claim is refused/abandoned (unless they have minor children who would be adversely affected by the removal, or they/their dependents suffer from a life-threatening medical condition that cannot be treated in their home country).
  - August 2012: CIC stipulated that the hardship arising from the temporary pause on sponsorship applications for parents/grandparents will not normally warrant H&C approval: www.cic.gc.ca/english/resources/manuals/bulletins/2012/ob461.asp

Designated Foreign Nationals

- June 2012: CIC introduced new measures to combat human smuggling. Key immigration consequences of the new provisions are as follows:
  - Groups of foreign nationals who come to Canada by "irregular means" may be "designated" by the Minister of Public Safety;
  - Designated Foreign Nationals (DFNs) will be detained (unless under the age of 16) until a positive refugee decision is rendered or the IRB/Minister orders release;
  - DFNs will be prohibited from applying for PR in any category until 5 years from date of designation (even if their refugee claim is successful).

More info at
www.cic.gc.ca/english/resources/manuals/bulletins/2012/ob440D.asp
www.cic.gc.ca/english/resources/manuals/bulletins/2012/ob440D.asp

Bill C-45: "Faster Removal of Foreign Criminals" Act

- At the time of writing, Bill C-45 has finished 2nd Reading in the House and has been referred to Committee.
- The Bill, if enacted in its current form would:
  - Eliminate appeal rights for: PRs sentenced in Canada to >6 mos (down from 2 years) for any offence; PRs convicted of certain foreign offences regardless of sentence; PRs who are deemed to have committed certain foreign offences (even absent conviction);
  - Enable the Minister to deny entry to Canada on undefined "public policy grounds"; and
  - Increase the period of inadmissibility for misrepresentation from 2 to 5 years.

More info at
www.cic.gc.ca/english/department/media/releases/2012/2012-09-24.asp

* Cut Backs and Closures

* There have been a number of departmental cut-backs and closures that have had an important impact on application processing. In particular:
  * Several overseas visa offices have been closed (including Buffalo, Berlin, Tokyo, Tehran, Taipei, Belgrade);
  * 19 local CIC offices were closed (including Kelowina, Nanaimo, PG and Victoria);
  * Resources were dramatically cut at the CIC call centre; and
  * There have also been massive cuts all across the Ministry of Human Resources and Skills Development Canada.

6. Immigration

- **Refugee Clients: a legal update and overview of referral resources**
  - Changes in Refugee Law PowerPoint presentation
  - Services for Refugees PowerPoint presentation

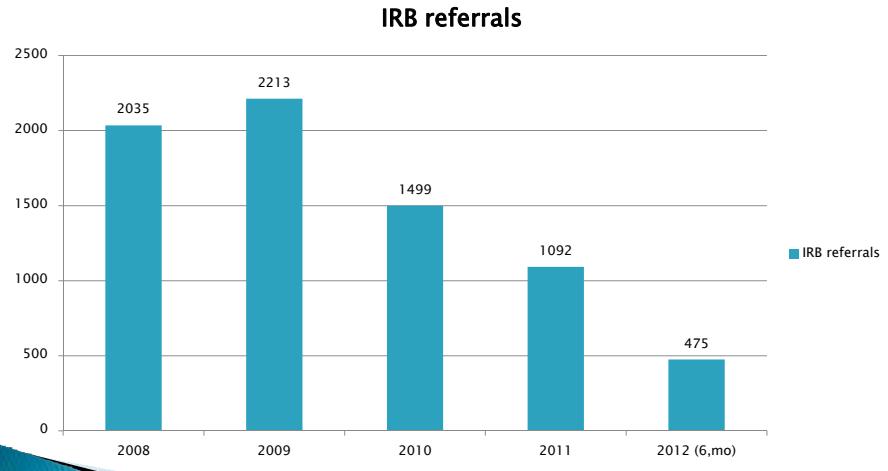
THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

Refugee Clients: An Update and Overview of Legal Aid Services

Provincial Advocates Training
November 22, 2012
Rochelle Appleby

Refugee Claims Referred to IRB (BC)



Top Source Countries

Top Source Countries 2011-BC

MEXICO	138
HUNGARY	133
CHINA	120
HONDURAS	80
INDIA	51
IRAN	48
PHILIPPINES	34
EL SALVADOR	30
AFGHANISTAN	30
COLOMBIA	29
USA	29

Amendments to Immigration and Refugee Protection Act (IRPA)

- ***Balanced Refugee Reform Act (BRRA)***
  - Bill C- 11
  - Was to come into force (CIF date) December 1, 2011 – moved ahead to June 29, 2012
  - Only very few sections came into force
- Further amended by ***Protecting Canada's Refugee System Act***
  - Bill C- 31
  - Expected to come into force December 15, 2012

December 15, 2012

- Legacy Cases/Backlog
  - Claimants who:
  - arrived before the *Coming into Force* Date of the amendments
  - were referred to the IRB and
  - Were given a Personal Information Form (PIF) to complete within 28 days
  - Hearing of claims will be scheduled as time permits
- Claims processed under the new system

Post December 15, 2012 Key changes

DESIGNATED COUNTRY OF ORIGIN (DCOs)

- Minister will designate based on acceptance rates and volumes

REFUGEE CLAIM DOCUMENTS

- Eliminated PIF (and Interview process introduced by BRRA)
- Introduced a new form– Basis of Claim form (BOC)
- New CIC forms (IMM0008, schedule A and additional info form)

TIMELINES

- 60 days from filing a Basis of Claim Form (BOC) to hearing date
- 30 days if from a "designated countries of origin" (DCO)

Anti-Smuggling Provisions

- **"Designated Foreign National"**
  - Group of persons whom the Minister "has reasonable grounds to suspect" arrived with the assistance of a smuggler
  - A group of persons whom the Minister "is of the opinion" that the examination "cannot be conducted in a timely manner"
  - Provisions may be applied retroactively
- **Consequences**:
  - Mandatory detention -14 days review and then 6 month review (unless under the age of 16)
  - No access to RAD
  - No access to H&C for 5 years
  - No right to apply for permanent resident status for 5 years from the date accepted as a refugee (no ability to sponsor relatives)
  - No right to a travel document for accepted refugees

The Basis of Claim Form

- 14 pages
- Less tombstone data than a PIF (status, family, previous claims, travel, documents)
- Specific questions about refugee claim
  - Would you experience harm if returned?
  - Have you experienced harm in the past?
  - Did you ask the authorities for protection?
  - Did you move to another part of your country?
  - Which of 5 grounds is claim based on? Cruel or unusual treatment or torture

Immigration Forms

- IMM0008
  - Personal details
  - Documents
  - Education
  - Information about each dependent

Schedule A
  - Details of mother and father
  - Education
  - Personal history since the age of 18
  - Addresses since 18

Refugee Claim Process

- **Port of entry (POE) claimant (border or airport)**
  - Interviewed by CBSA at port of entry
  - Complete CIC forms (at time of arrival?)
  - Given new Basis of Claim Form (BOC) and must complete **within 15 days**
  - Date set for hearing
- **Inland Claims**
  - Walk into CIC given forms to complete and date to return
  - Return to CIC with completed CIC forms and a BOC
  - Given a date for refugee protection hearing

Applying for Legal Aid

- Port of entry claimants
  - should apply as soon as they leave the POE so that they get legal assistance with completing the BOC

- In land claimants
  - Before going to Canada Immigration to make a claim

Refugee Hearings

- Date set when BOC submitted
- New appointments to Refugee Protection Division RPD) of the Immigration and Refugee Board (IRB)
- No longer GIC appointments–Public Servant decision makers

TIMELINES:
Attend hearing within 30 days(DCO) or 60 days (all other claimants)

- More oral decisions
- Governed by a new set of RPD Rules
  (The Rules are not yet publically available)

Refugee Appeal Division (RADs)

- New level of Appeal
- Appeal is in writing
- Can only submit new evidence if it was unavailable at hearing

Must apply and perfect appeal within 15 days

No Access to RAD

- No access to RAD if persons–
  - **from Designated Country (DCO)**
  - **claims were referred to RPD before CIF date (backlog/legacy case)**
  - found at RPD to have a manifestly unfounded claim (MUC) or no credible basis
  - arrived from safe third country
  - claims were vacated or were found to cease being a refugee (cessation)
  - claim was withdrawn or declared abandoned
  - designated foreign nationals

Post Refugee Claim

- **Pre Removal Risk Assessment**
  - Cannot apply for PRRA unless it is at least one years since receiving a negative decision
- **Humanitarian & Compassionate applications**
  - One year restriction for filing an H&C application (unless health or best interest of children)
    - Can't file an H&C at the same time as a refugee claim is in progress
    - H&C does not stop removal
    - Will need to consider which is better legal option- H&C or refugee claim

Judicial Review- Federal Court

- If you have access to RAD:
  - Apply to RAD first before applying to Federal Court
- If you don't have access to RAD:
  - apply to Federal Court for leave to Judicially Review (JR) a RPD decision
  - Must also apply for a stay of removal

Detention

- Will more refugee claimants be detained under Bill C- 31 because of shorten timelines?
- LSS duty counsel available 5 days a week at 300 West Georgia 7th floor
  - 48 hour reviews
  - 7 day reviews
  - 30 day reviews

LSS Funding

- 1.7 million dollars in provincial and federal monies
  - Duty counsel (detention)
  - Refugee claims
  - Appeals- Federal Court
  - Admissibility Hearings
  - Permanent Resident removals
  - Submissions –PRRA and H&C

PLUS

- RADs, test cases, administrative applications

LSS changes

LSS Intake

- Specialized immigration intake workers
- Immigration applications only processed in Vancouver
- Direct phone and e mail contact

- No screened and non screened countries
- No refugee claimant questionnaires
- No two stage (PIF followed by Hearing referral)

RPD Referrals To Private Bar

RPD referrals

- Fund about 450 cases- merit screen (around 15% will not get legal aid)

- Issue referrals early so that a lawyer prepares the BOC

- Legal aid referrals- 16 hour general preparation and attendance -Average cost $2,090 (compared to $2,630 current)

LSS Appeals Department

- Admissibility hearings
- Submissions to the Minister
  - H and C
  - PRRA
  - Other submissions
- Judicial Reviews
- Stays of Removals
- People in detention with no access to duty counsel

RAD Referrals to the Private Bar

Processed by LSS Appeals Department

- Fund about 100 cases (1/4 of cases funded for RPD)– priority given to Respondents to Minister's appeals
- 10 hours preparation – very low disbursement budget
- No disbursement budget for transcripts

LSS working with other agencies

- Form completion clinics (under discussion with NGOs)
- Referrals to other services for those refused legal aid
  - Access Pro Bono
  - Law Students (LSLAP)
- Advice to those refused legal aid (orientation)
- Extra Duty Counsel

Public Legal Education Materials

- How to apply for legal aid for refugee claimants (book mark)
- Flow chart of refugee claim process
- One pager describing how to make a refugee claim
- Your Guide to the Refugee Claim Process (green book) will be pulled from LSS website

- Ready Group (Kinbrace) Law Foundation Grant (Preparing for your refugee claim)

Refugee Claim Accepted

Apply for permanent residence status

Once eligible for citizenship Permanent Residents should apply for citizenship

some supports for refugee claimants in metro vancouver and b.c.

Fran Gallo
Kinbrace
22 November 2012
Legal Advocates Conference

refugee claimants
snapshot

- making a claim for refugee protection from w/in Canada
- ~1000 new refugee claimants in Metro Vancouver annually
- ~ 25,000 annually in Canada (24,981 in 2011)
- many face multiple barriers on arrival:
  - language, poverty, homelessness, complex systems, health

refugee claimants
in the community

- refugee claimants are invisible in our neighbourhoods
  - they don't stand out, prefer to fit in
- remain very vulnerable: PTSD, ID, work permit, uncertain future, family separation, little power
- settlement, legal, social, housing, neighbourhood, counselling agencies play an important role in being attentive to and empowering of refugee claimants

some specific supports
for refugee claimants

- First Contact
- Housing Agencies
- Refugee Claim Orientation/Settlement Services
- Trauma Counselling
- READY

first contact

- project of Canadian Red Cross (Lower Mainland)
- Red Cross First Contact program provides newly arrived refugee claimants with emergency services as well as a 24 / 7 multilingual information and referral line
- CBSA & CIC distribute First Contact information kits to refugee claimants at CIC Vancouver, YVR and borders
- Kits contain services & agency listings, Lower Mainland map, bus tickets, information & flowchart about the refugee claim process in 10 languages
- First Contact #: 604-787-8858 or 1-866-771-8858

housing

- refugee claimant housing organizations in Metro Vancouver:
  - New Hope Community Services (Vancouver,Surrey)
  - Journey Home Community (Burnaby, New West)
  - Kinbrace (Vancouver)
  - A number of public shelters and safe houses also provide housings for refugee claimants
- Inland Refugee Society coordinates housing referrals

some settlement/orientation services

- Settlement Orientation Services (Vancouver)
- Inland Refugee Society (Vancouver)
- MCC Refugee Office (Vancouver)
- Rainbow Refugee (LGBTQ claimants, Vancouver)
- Options (Surrey)
- DiverseCity (Surrey)
- Settlement Workers in Schools (SWIS)
- Immigrant Services Societies
- MOSAIC
- La Boussole
- Neighborhood houses, community centres and more..

trauma counselling

- Vancouver Association for Survivors of Torture (VAST) 2618 E Hastings St., Vancouver P:604 299-3539
- Lower Mainland Society for Torture Survivors, 4855 Imperial St., Burnaby P: 604 355 9881
- Bridge Clinic:2450 Ontario Street,Van P:604 709 -6540
- ISS Trauma-Info and Support Services- Mohsen Eslami P: 604 684-7498 ext.1644

referrals

- people who support refugee claimants should:
  - keep a robust list of organizations that support refugee claimants
  - have trusted go-to guru(s) to get more information
  - share information
- build trust with refugee claimants and other service providers
- help refugee claimants connect to supports in their neighbourhoods / region

READY-Kinbrace

- refugee claimants (represented and unrepresented)
  - are often “in the dark” about the hearing process
  - often experience anxiety
  - exhibit a sense of fate about the hearing event
  - lack awareness of their responsibility
  - simply “not ready” for their own hearing
  - not aware of the legal issues involved

READY Tours

- held monthly in an IRB-RPD hearing room, 300 West Georgia for approx 2 ½ hours
- to prepare refugee claimants for their hearings; service providers are welcome when space available
- IRB Tribunal Officer provides orientation on procedures, legal issues and logistics of the hearing
- participants provided with a READY hearing prep guide
- interpretation provided by volunteers

READY accessing the tours

- contact Fran Gallo (READY Coordinator) ready@kinbrace.ca 604 328-3132 to register

READY guide

- Refugee Hearing Preparation: A Guide for Refugee Claimants (English and Spanish versions available)
- www.kinbrace.ca

READY
future

-grant from the Law Foundation of BC for “READY: Navigating Refugee Reform”

-update READY Guide to new refugee process and translate into 4 languages.

-5 service providers workshops (with IRB, CIC, LSS) in the Lower Mainland between January and March.

-guide and workshop registration at www.kinbrace.ca

MAP:
helping service providers help refugee claimants find their way

- MAP - Multi Agency Partners
- MAP - all about refugee claimants
- MAP - a great networking and education resource

MAP
multi agency partners

- meets monthly at the Canadian Red Cross in Burnaby
- mission:
  - to work collaboratively to identify barriers and provide solutions to promote the protection and well-being of refugee claimants and the community servicing them and to encourage networking and information sharing between the communities assisting refugee claimants.
- Contact: MAP@redcross.ca for information / meeting dates

MAP
get connected

- agencies serving refugee claimants are encouraged to become members and attend meetings
- meetings:
  - agency updates and concerns
  - networking and collaboration (ngo, govt, inter-govt)
  - learning (emerging issues, agency presentations, trends)

final words

- isolation for refugee claimants and service providers is one our greatest challenges
- empower the rest of us with your knowledge
- the worst thing we can do is think we know it all - there is likely more that we don’t know than we do know
- keeping connected to good people and good education while helping refugee claimants do the same empowers all of us

7. Skills

- **Legal Research and Updates**
  - CanLII PowerPoint presentation
  - CanLII Practice Questions
  - Using RSS Feeds
- **Power Advocacy A and B**
  - Checklist
  - Interviewing
  - Negotiation
  - Statutory Interpretation
- **Ethical and Professional Issues in Poverty Law**

THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

7. Skills

- **Legal Research and Updates**
  - CanLII PowerPoint presentation
  - CanLII Practice Questions
  - Using RSS Feeds

THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

COURTHOUSE LIBRARIES | BC

Using CanLII like a Pro

Plus a Couple Bonuses

Meghan Maddigan

November 21, 2012

Increasingly legal information is available online.
As this happens, it starts to level the playing field.

CanLII is an example of great, flat field.



COURTHOUSE LIBRARIES | BC

COURTHOUSE LIBRARIES | BC

First: What is CanLII?

- A non-profit organization
- Managed by the Federation of Law Societies



COURTHOUSE LIBRARIES BC

First: What is CanLII?



Mission: Free access to law

2001– one legislative and 18 case collections

2011- nearly 7 million site visits, 1 million documents over 200 collections.

2012- survey revealed nearly 9 in 10 responding lawyers use CanLii with 56% of them starting their research there.

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Top Ten Ways to Use CanLII

1. Find a specific case
2. Find cases about a specific topic
3. Note up cases
4. Find the Law relied on in a case
5. Find Statutes
6. Find Regulations
7. Judicial Consideration of Statutes
8. Compare Point in Time Legislation
9. Print or save PDF
10. RSS Feeds

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Before we get started, let's talk about how to search like a pro...

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Just a bonus (not mandatory)

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Learn to Boolean



Boolean is a way of combining terms to make your searching more efficient.

One of the greatest challenges of online searching is that too much information is a bad thing – boolean is the answer to this.

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Learn to Boolean

Basic boolean works with

- and
- or
- not

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Learn to Boolean

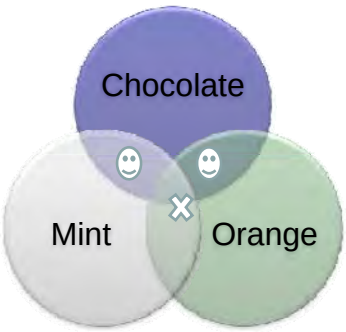
Visualize a venn diagram...



COURTHOUSE LIBRARIES BC

Learn to Boolean

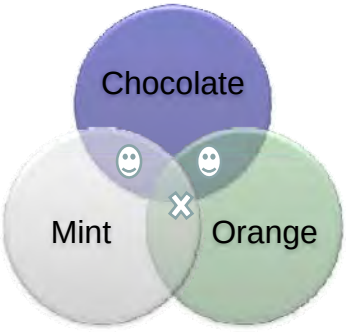
I am looking for recipes online that have either chocolate and mint or chocolate and orange but I don't like mint and orange.



COURTHOUSE LIBRARIES BC

Learn to Boolean

(chocolate AND mint) OR (chocolate AND orange) NOT (mint AND orange)



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Learn to Boolean

Boolean Extras

"_" – phrase

eg. *"chocolate mint"*

/s – in the same sentence

eg. *chocolate /s mint* – captures mint chocolate and chocolate mint

/p – in the same paragraph

eg. *chocolate /p orange* – captures the recipe that says, "...melted chocolate. Next add orange peel..." as long as there is no paragraph return.

/15 – within 15 words

eg. *chocolate /15 orange* -

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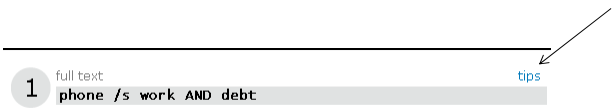
CanLii Search Tips



Find	Operator (case sensitive)	Example
This exact **PHRASE**	""	"R. v. Douglas"
ALL these words	**AND**, no operator	permit hunting
ANY of these words	**OR**	city **OR** municipality
NONE of these unwanted words	**NOT**	custody **NOT** child
Words within the same **PARAGRAPH**	**/p**	levy **/p** probate
Words within the same **SENTENCE**	**/s**	tax **/s** income
Words within *n* words	**/***n*	letter **/5** credit
Exclude **PLURALS** and **DERIVATIVES**	**EXACT()**	**EXACT**(translator)

More

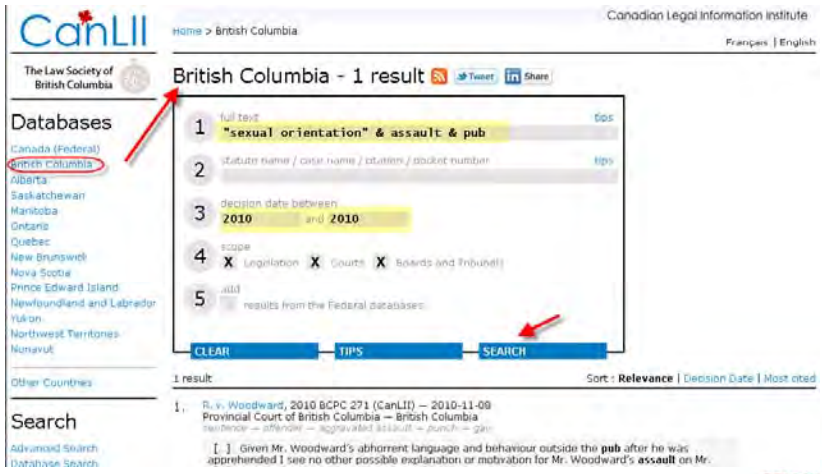
COURTHOUSE LIBRARIES BC

Find a Specific Case

You heard about the case in the news where a man was assaulted in a pub regarding his sexual orientation. You remember it happened in 2010and you'd like to read the decision.

COURTHOUSE LIBRARIES BC

Search in CanLII



COURTHOUSE LIBRARIES BC

Finding Cases on a Specific Issue

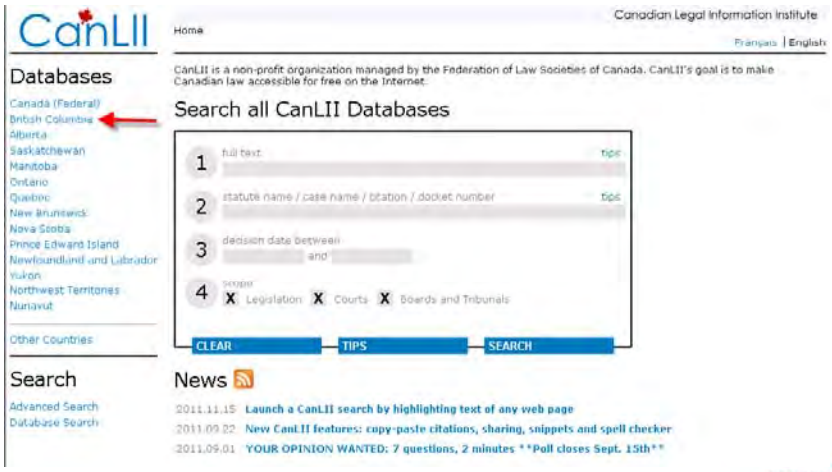
Harry and The Cat

Harry has had his cat for 7 years and now his landlord wants to evict him because of it, despite not having brought it up previously. You want to see if the Courts in BC have ever dealt with this issue.



COURTHOUSE LIBRARIES BC

From CanLII, select BC



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Search in full text for landlord & evict /p pet



COURTHOUSE LIBRARIES BC

Results



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The introductory paragraph usually lets you know if you're on the right track

Counsel for the Petitioner — S. Andrew

Counsel for the Respondent — C. Charbonneau

Date and Place of Hearing — March 28, 2001 Kelowna, BC

landlord evict pet

INTRODUCTION

[1] In this application for judicial review of an arbitrator's decision under the ***Residential Tenancy Act***, R.S.B.C. 1996, c. 406, the issue is whether the arbitrator erred in disallowing an eviction notice that was based upon the violation of a "no pet clause".

REVIEW OF EVIDENCE AND FINDINGS OF FACT

[2] The petitioner, Al Stober Construction Ltd. ("Stober"), owns a residential townhouse complex known as Coronation Village at 1099 Hillside Road in Kelowna, British Columbia. The respondent, Charles Long, has been a tenant there since June 2, 1990. Mr. Long had a pet cat. On November 15, 2000 Stober gave Mr. Long notice that it considered he was in breach of the "no pet clause" of the Tenancy Agreement. That clause provides:

No pets will be permitted in the premises: No dogs, cats or other animals.

[3] Because Mr. Long failed to rectify what the landlord considered to be a breach, on November 25, 2000, Stober served on him a Notice to End the Residential Tenancy pursuant to section 36 of the ***Residential Tenancy Act***. Section 36 of the ***Residential Tenancy Act*** states:

COURTHOUSE LIBRARIES BC

Note it up – who else talked about it?

CanLII — Canadian Legal Information Institute

Home > British Columbia > Supreme Court of British Columbia > 2001 BCSC 762 (CanLII)

Français | English

Al Stober Construction Ltd. v. Long, 2001 BCSC 762 (CanLII)

Date:	2001-05-25
Docket:	52219
Parallel citations:	90 BCLR (3d) 360
URL:	http://canlii.ca/t/4xc5
Citation:	Al Stober Construction Ltd. v. Long, 2001 BCSC 762 (CanLII), <http://canlii.ca/t/4xc5> retrieved on 2011-11-21
Share:	Tweet Share
Print:	PDF Format
Noteup:	Search for decisions citing this decision
Reflex Record:	Related decisions, legislation cited and decisions cited

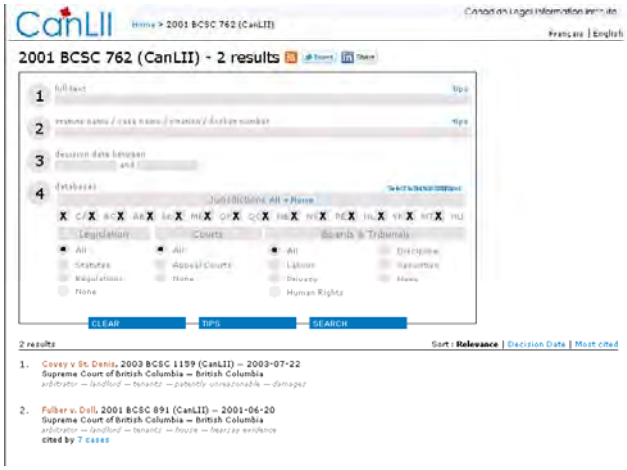
Citation: Al Stober Construction Ltd. v. Long
2001 BCSC 762

Date: 20010525
Docket: 52219
Registry: Kelowna

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

2 Results



COURTHOUSE LIBRARIES BC

Let's go back and look at what section of the Act this case considered

INTRODUCTION

[1] In this application for judicial review of an arbitrator's de... landlord evict pet
Tenancy Act, R.S.B.C. 1996, c. 406, the issue is whether the arbit...
eviction notice that was based upon the violation of a "no pet clause".

REVIEW OF EVIDENCE AND FINDINGS OF FACT

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> No pets will be permitted in the premises: No dogs, cats or other animals.

[3] Because Mr. Long failed to rectify what the landlord considered to be a breach, on November 25, 2000, Stober served on him a Notice to End the Residential Tenancy pursuant to section 36 of the ***Residential Tenancy Act***. Section 36 of the ***Residential Tenancy Act*** states:

> 36(1) A landlord may, at any time, give the tenant a notice of the end of the tenancy agreement in accordance with subsection (2) if any one of the following events has occurred:
>
> ...

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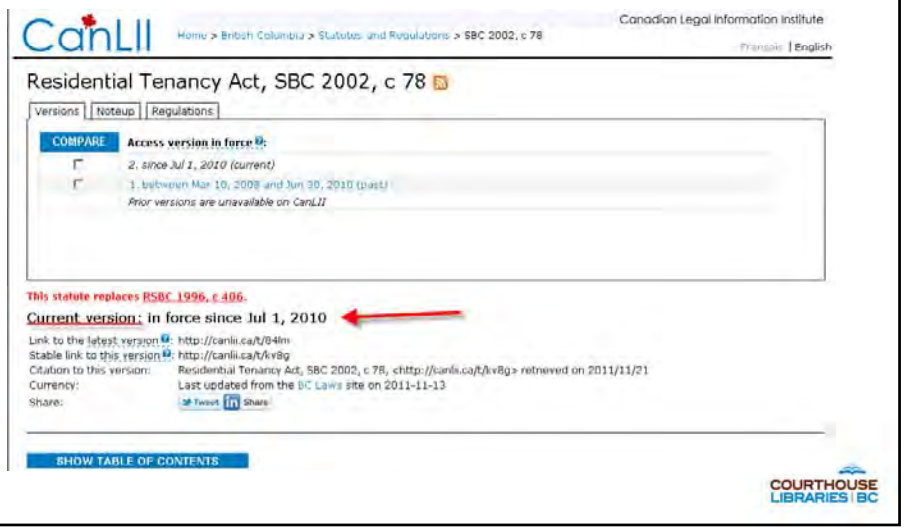
Uh Oh – the Act is no longer in force



Using link to new slide



Or Find a Statute



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So does the new Act have a similar provision to section 36?

- Can use compare legislation feature if recent enough (not in this case)
- Can check the same section number just by chance (doesn't work in this case)
- Can search for terms directly out of old section – in this case try "material term"
- Can also scan table of contents

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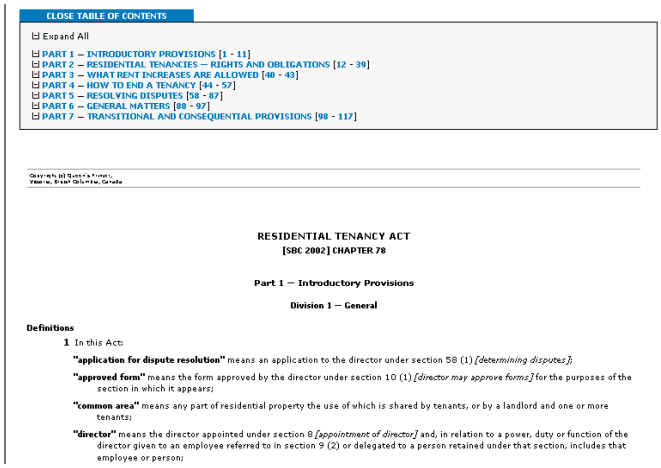
Text of Act (searchable)



CLOSE TABLE OF CONTENTS

Expand All

PART 1 – INTRODUCTORY PROVISIONS [1 - 11]
PART 2 – RESIDENTIAL TENANCIES – RIGHTS AND OBLIGATIONS [12 - 39]
PART 3 – WHAT RENT INCREASES ARE ALLOWED [40 - 43]
PART 4 – HOW TO END A TENANCY [44 - 57]
PART 5 – RESOLVING DISPUTES [58 - 87]
PART 6 – GENERAL MATTERS [88 - 97]
PART 7 – TRANSITIONAL AND CONSEQUENTIAL PROVISIONS [98 - 117]

RESIDENTIAL TENANCY ACT
[SBC 2002] CHAPTER 78

Part 1 — Introductory Provisions

Division 1 — General

Definitions

1 In this Act:

"application for dispute resolution" means an application to the director under section 58 (1) *[determining disputes]*;

"approved form" means the form approved by the director under section 10 (1) *[director may approve forms]* for the purposes of the section in which it appears;

"common area" means any part of residential property the use of which is shared by tenants, or by a landlord and one or more tenants;

"director" means the director appointed under section 8 *[appointment of director]* and, in relation to a power, duty or function of the director given to an employee referred to in section 9 (2) or delegated to a person retained under that section, includes that employee or person;

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Other Law Finding Tools

So you know that there is an Act in B.C. governing assistance for people with disabilities and the Forms to apply are found in the Regulations. You also know the forms were changed recently and you want to see the changes. You don't remember the exact name of the Act but you want to look at the Regulations that go along with the Act and compare the changes.

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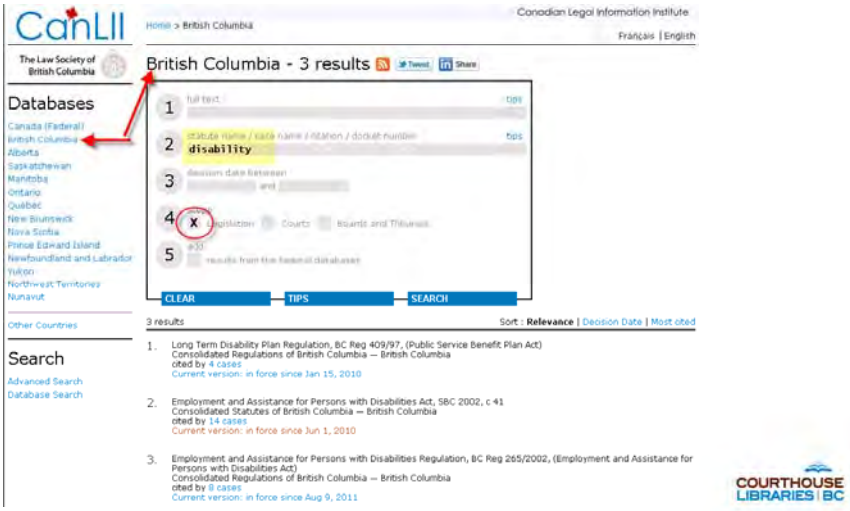
Search for the Act

Select BC, limit to legislation , type “disability”



Multiple options from the Act



Can Access Regulations



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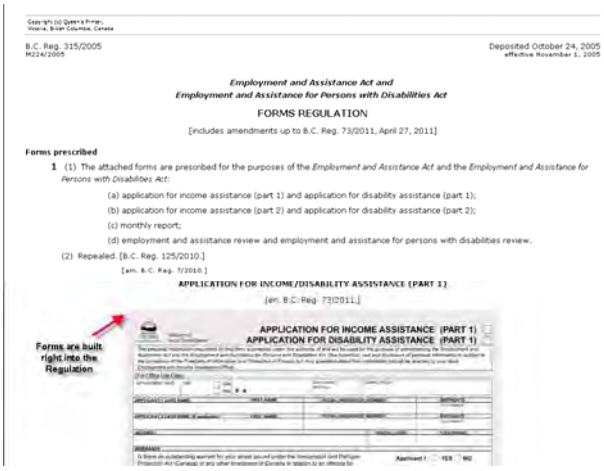
Forms Regulation



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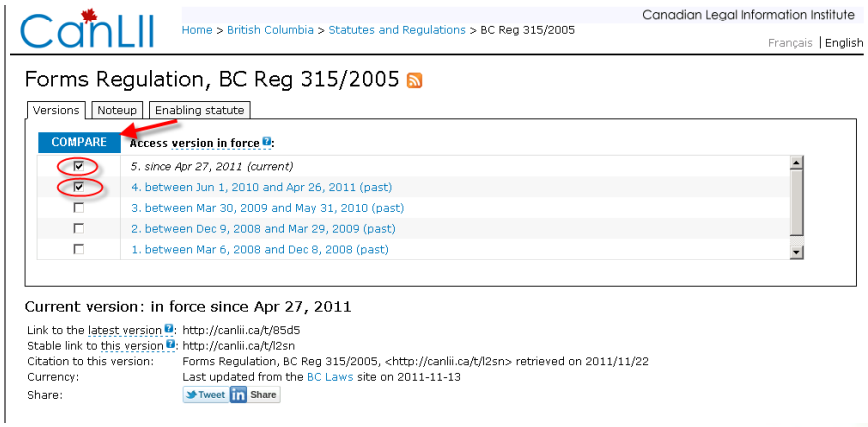
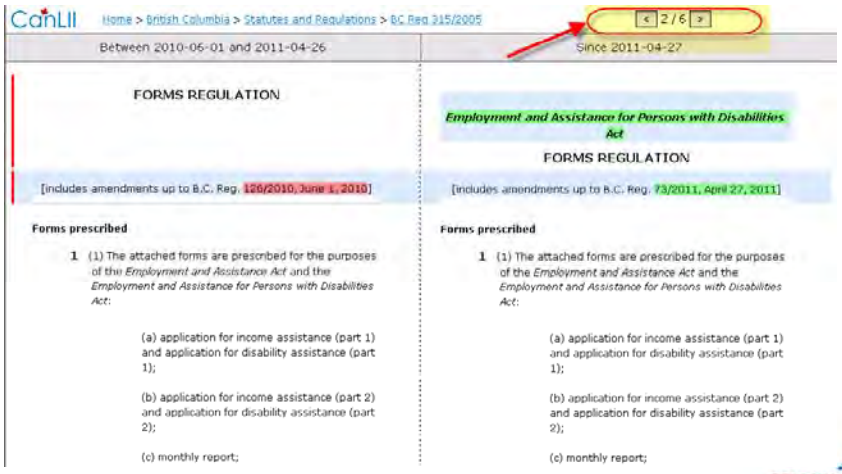
Compare Old and New Versions



Scroll between changes



Noting Up

What if you want to read about cases where the Judges have considered your Act?

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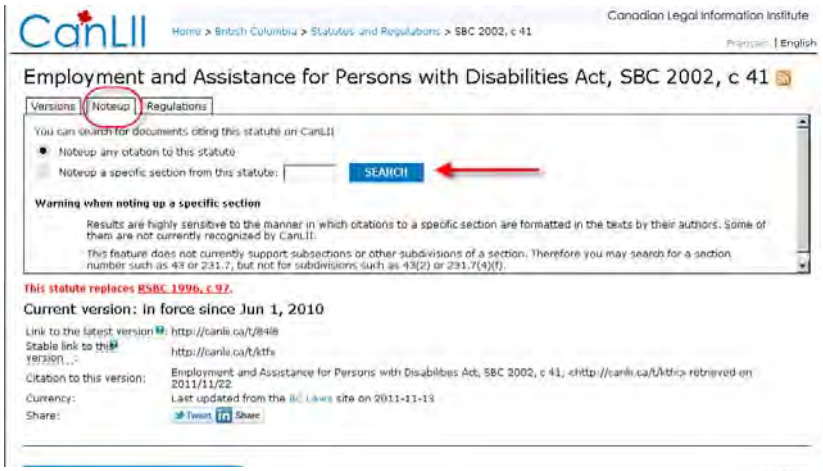
Note Up



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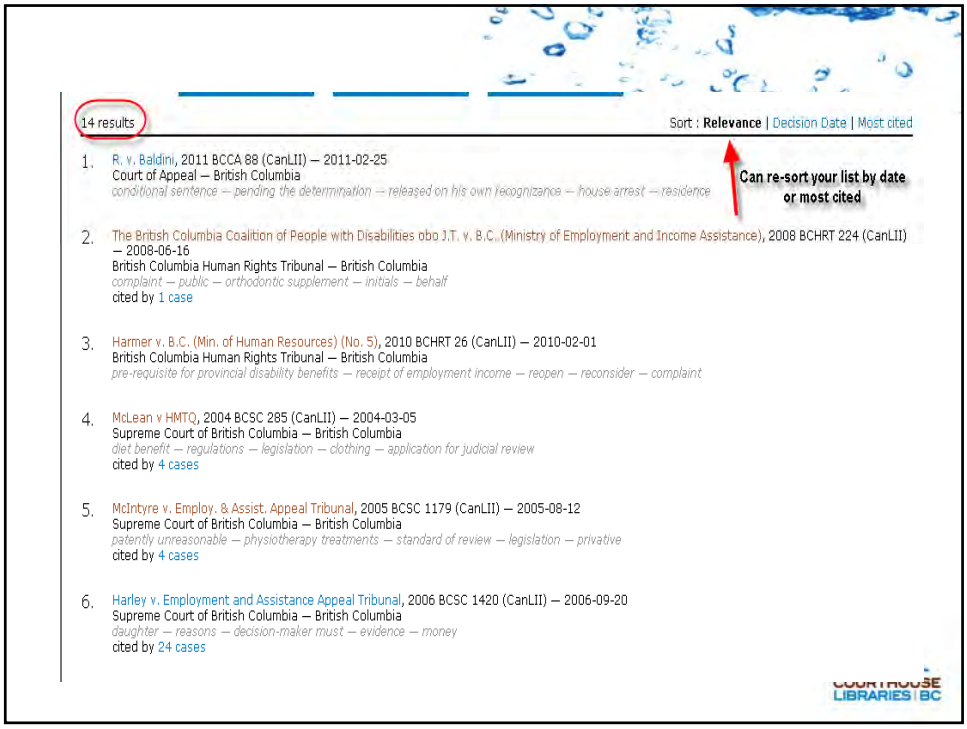
14 results
Sort : Relevance | Decision Date | Most cited
Can re-sort your list by date or most cited
1. R. v. Baldini, 2011 BCCA 88 (CanLII) — 2011-02-25
Court of Appeal — British Columbia
conditional sentence — pending the determination — released on his own recognizance — house arrest — residence
2. The British Columbia Coalition of People with Disabilities obo J.T. v. B.C. (Ministry of Employment and Income Assistance), 2008 BCHRT 224 (CanLII) — 2008-06-16
British Columbia Human Rights Tribunal — British Columbia
complaint — public — orthodontic supplement — initials — behalf
cited by 1 case
3. Harmer v. B.C. (Min. of Human Resources) (No. 5), 2010 BCHRT 26 (CanLII) — 2010-02-01
British Columbia Human Rights Tribunal — British Columbia
pre-requisite for provincial disability benefits — receipt of employment income — reopen — reconsider — complaint
4. McLean v HMTQ, 2004 BCSC 285 (CanLII) — 2004-03-05
Supreme Court of British Columbia — British Columbia
diet benefit — regulations — legislation — clothing — application for judicial review
cited by 4 cases
5. McIntyre v. Employ. & Assist. Appeal Tribunal, 2005 BCSC 1179 (CanLII) — 2005-08-12
Supreme Court of British Columbia — British Columbia
patently unreasonable — physiotherapy treatments — standard of review — legislation — privative
cited by 4 cases
6. Harley v. Employment and Assistance Appeal Tribunal, 2006 BCSC 1420 (CanLII) — 2006-09-20
Supreme Court of British Columbia — British Columbia
daughter — reasons — decision-maker must — evidence — money
cited by 24 cases
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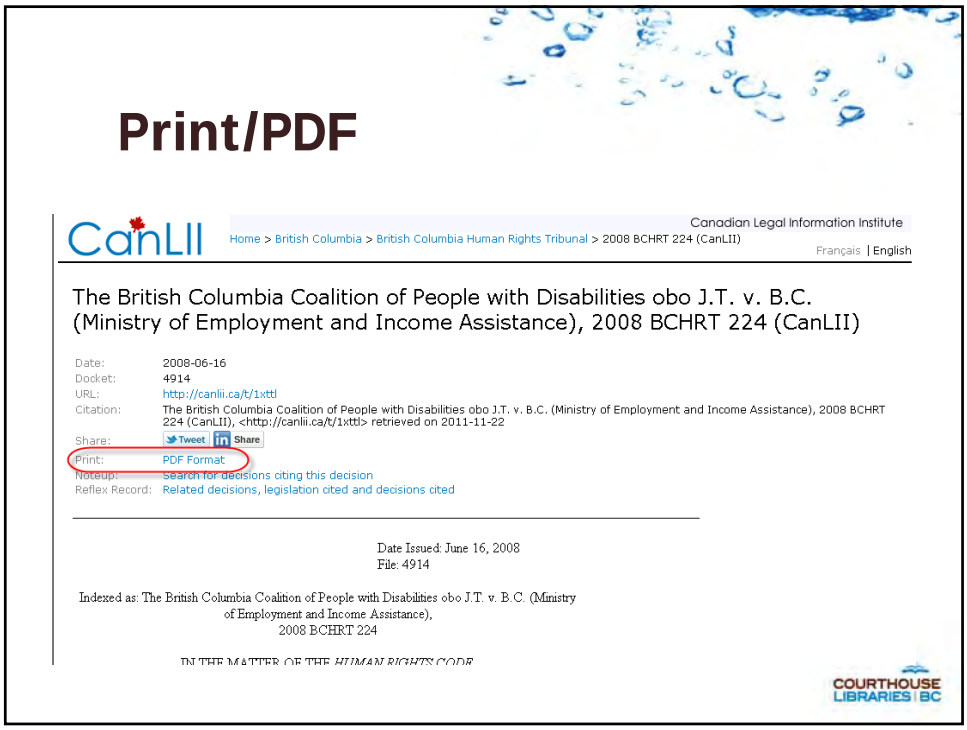
Print/PDF


CanLII
Canadian Legal Information Institute
Home > British Columbia > British Columbia Human Rights Tribunal > 2008 BCHRT 224 (CanLII)
Français | English
The British Columbia Coalition of People with Disabilities obo J.T. v. B.C. (Ministry of Employment and Income Assistance), 2008 BCHRT 224 (CanLII)
Date: 2008-06-16
Docket: 4914
URL: http://canlii.ca/t/1xttl
Citation: The British Columbia Coalition of People with Disabilities obo J.T. v. B.C. (Ministry of Employment and Income Assistance), 2008 BCHRT 224 (CanLII), <http://canlii.ca/t/1xttl> retrieved on 2011-11-22
Share: Tweet Share
Print: PDF Format
Noteup: Search for decisions citing this decision
Reflex Record: Related decisions, legislation cited and decisions cited
Date Issued: June 16, 2008
File: 4914
Indexed as: The British Columbia Coalition of People with Disabilities obo J.T. v. B.C. (Ministry of Employment and Income Assistance),
2008 BCHRT 224
IN THE MATTER OF THE HUMAN RIGHTS CODE
COURTHOUSE LIBRARIES BC

Print/PDF

Can now be printed in a more streamlined version or saved

Date Issued: June 16, 2008
File: 4914

Indexed as: The British Columbia Coalition of People with Disabilities obo J.T. v. B.C. (Ministry of Employment and Income Assistance), 2008 BCHRT 224

IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before the British Columbia Human Rights Tribunal

BETWEEN:

The British Columbia Coalition of People with Disabilities on behalf of J.T.

COMPLAINANT

2008 BCHRT 224 (CanLII)

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Now it's your turn!



COURTHOUSE LIBRARIES BC

Practice Questions

You are helping a client who couldn't access services at a local business because it was not wheelchair friendly. You have been told that there was a major case coming out of Saskatchewan where an employee of a movie theatre told a man that he could only sit at the very front of the theatre because of his wheelchair.

You would like to find this case. You then want to see if any judges in BC have ever talked about this case.



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Practice Questions



A woman comes in and wants to read about family custody cases. She says that she specifically wants to know about cases that have talked about "parental alienation" from the last two years in British Columbia.

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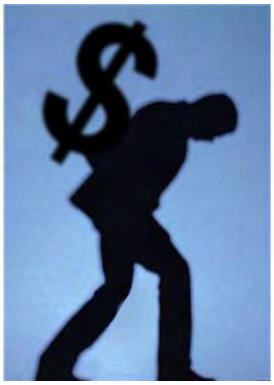
Practice Questions



A man comes in and explains that he wants to research interest rates charged by pay day loan places. In particular, he has heard that section 347 of the Criminal Code says that some interest rates are criminal. He would like to read that section and then read cases from BC that have dealt with that section, particularly as they relate to pay day loan businesses.

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RSS What?

Harnessing the Power of RSS



Just what is RSS?

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RSS stands for…

“really simple syndication”

Still confused? That’s okay.



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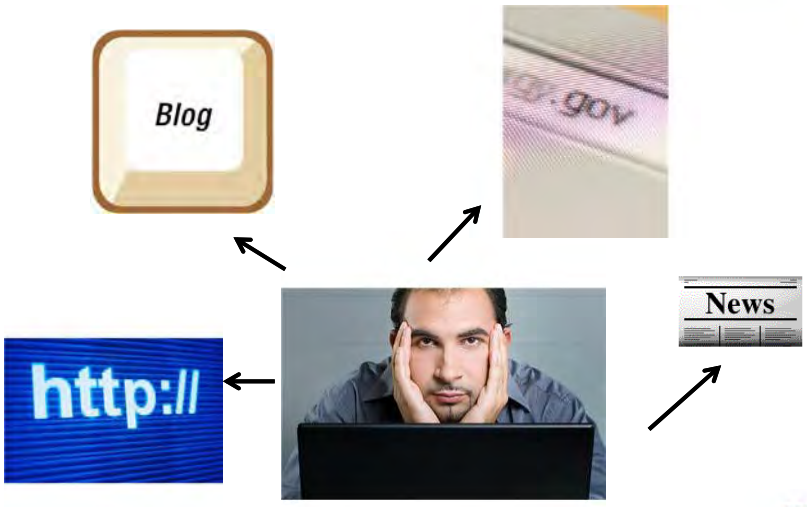
So much information!



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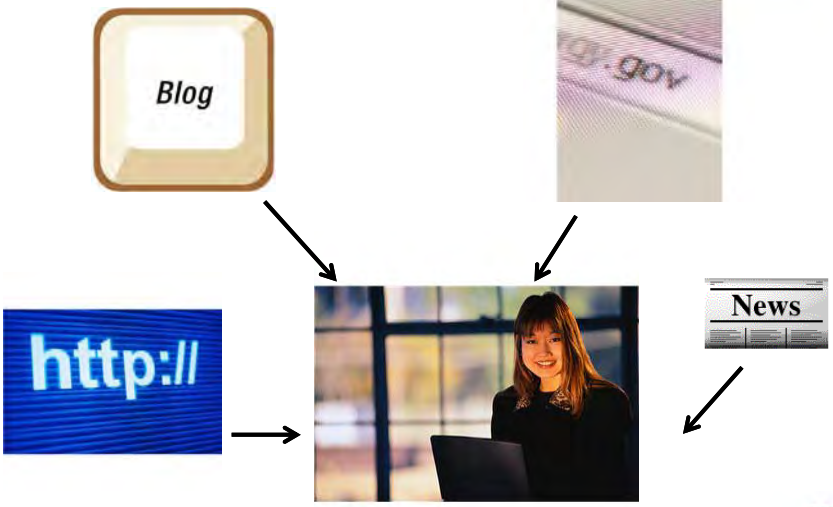
RSS brings it to you



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To Get Started

You will need an 'aggregator'. This is just a fancy word for an account that will hold all of your info in one spot.

Today, I'm going to show you all Google Reader. There are many others which you are welcome to explore but today we're going to keep it simple!



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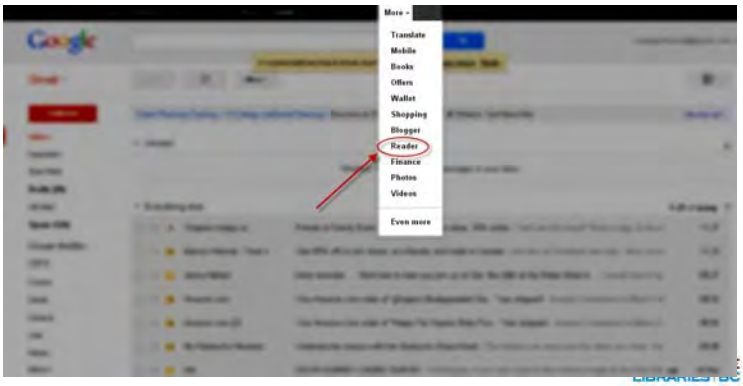
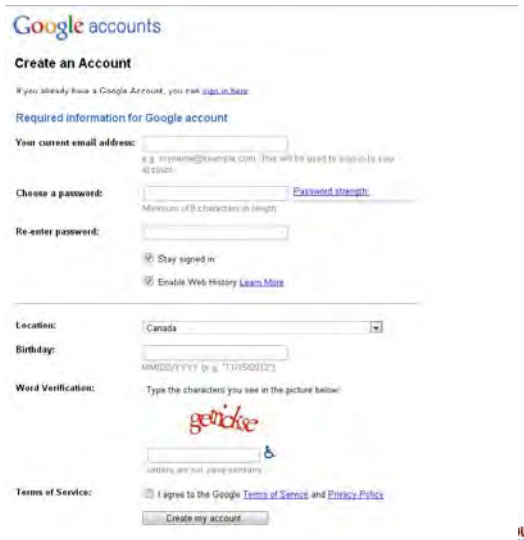
Getting a Google Reader Account

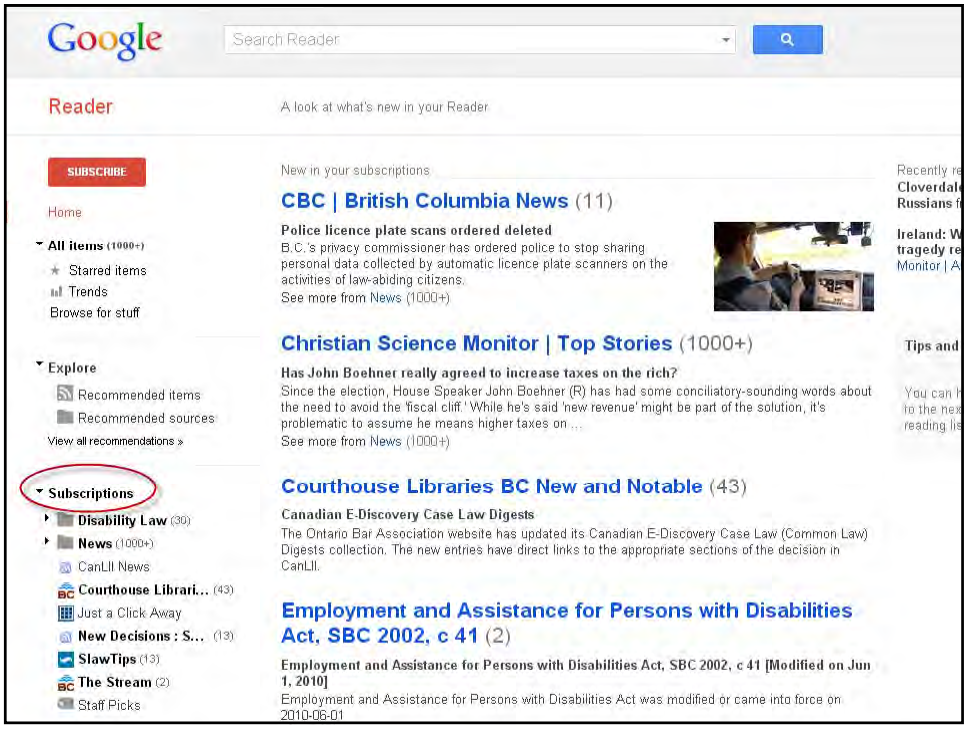
If you have any Google account (like Gmail) you already have a Google reader account.

You only need to access it here:



Otherwise sign up is a snap!





Now it's time to play!

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You can…

Subscribe to new decisions coming out of a particular court or new legislation.



Pressing the Orange RSS tab will bring you…



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But even more importantly you can do things like

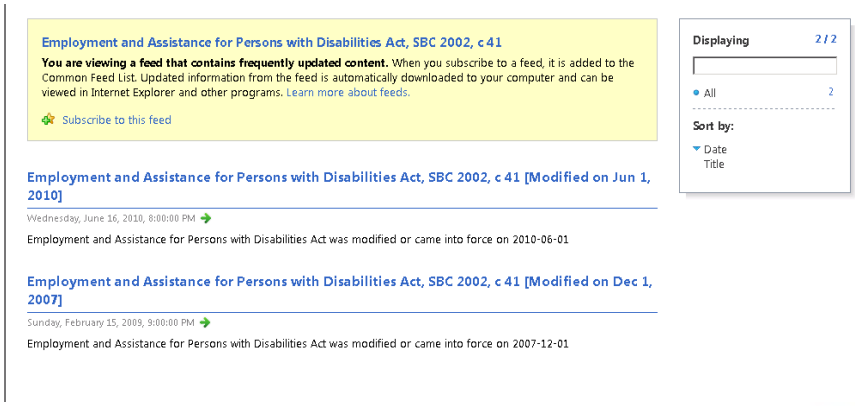
Keep up to date on changes to legislation!



RSS Feeds – Know about changes



RSS Screen



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And perhaps more exciting yet…

Note up notification!



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Time to explore?

Google Reader:

http://www.google.ca/reader/view/#overview-page

CanLii:

http://www.canlii.org/en/

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How we can help

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www.courthouselibrary.ca

What you will find at the library:

- Free access to **expensive subscription products**
- **WIRELESS, workstations and computers**
- Helpful **staff**
- **Good practice materials and leading texts**– a much better starting point for research
- **Cases and statutes**
- Lots of **forms and precedents**
- **CLE materials, legal journals**



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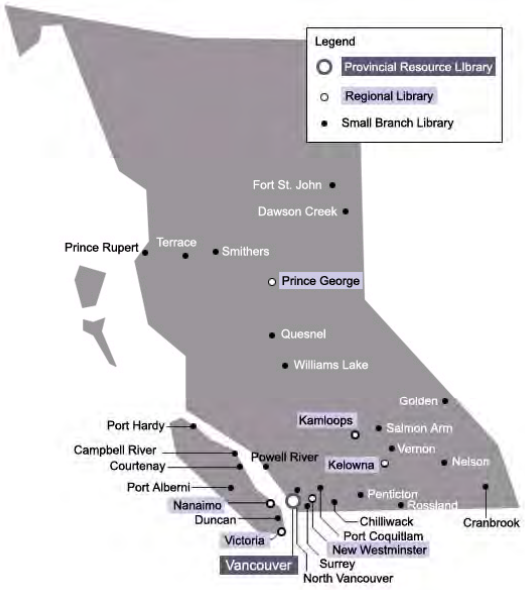
Not Just Downtown Vancouver



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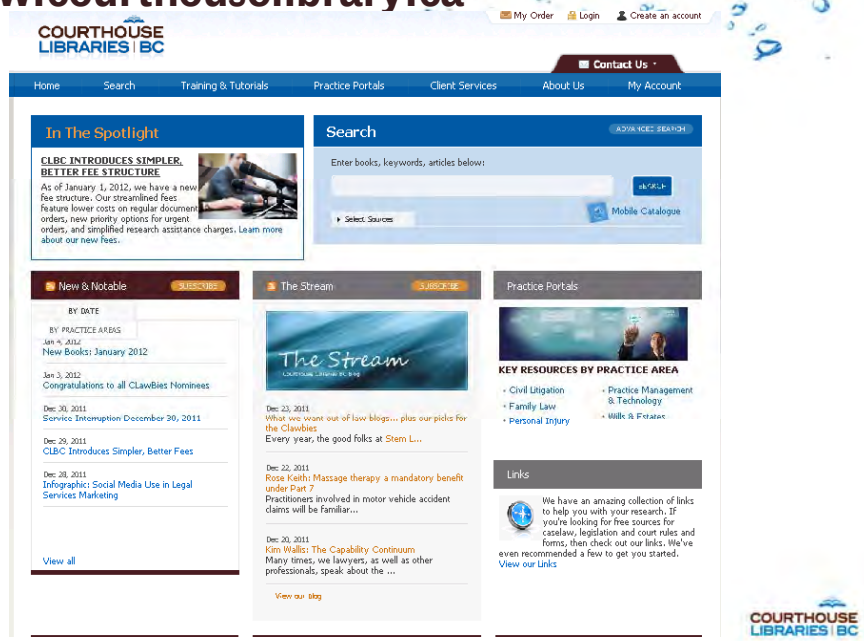
Find Us Online

Use the Library without leaving your office

www.courthouselibrary.ca



Answering your Questions

You need to know what legislation covers medical marijuana.

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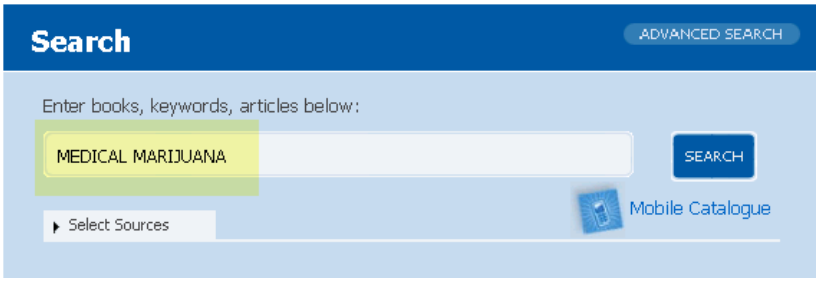
Answering your Questions



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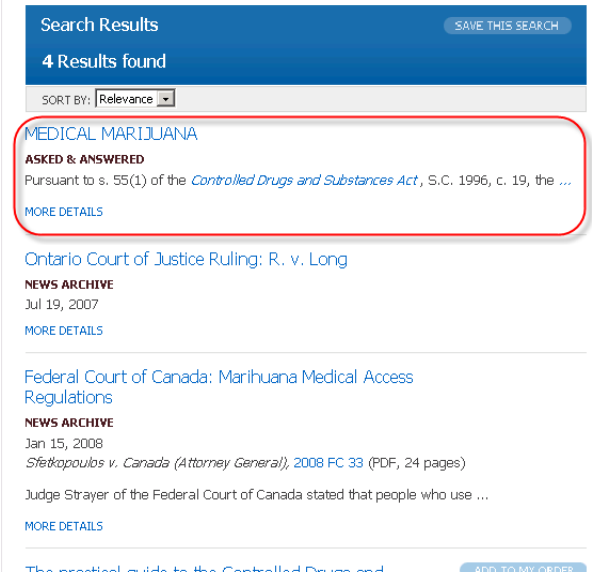
Answering your Questions



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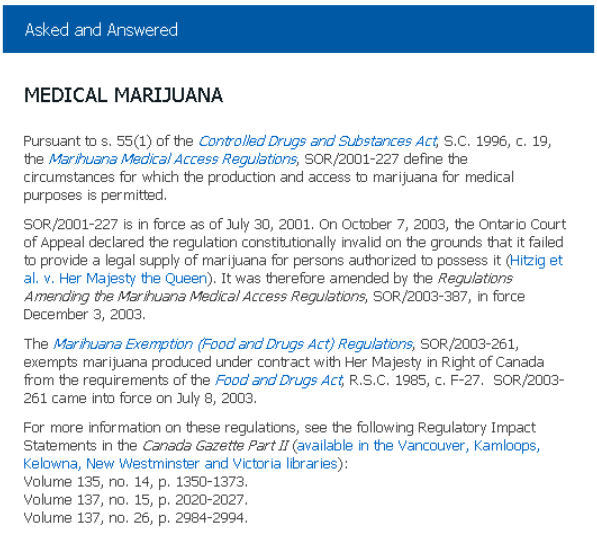
Answering your Questions



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Take a Crash Course

CLICKLAW

For You

For Your Clients



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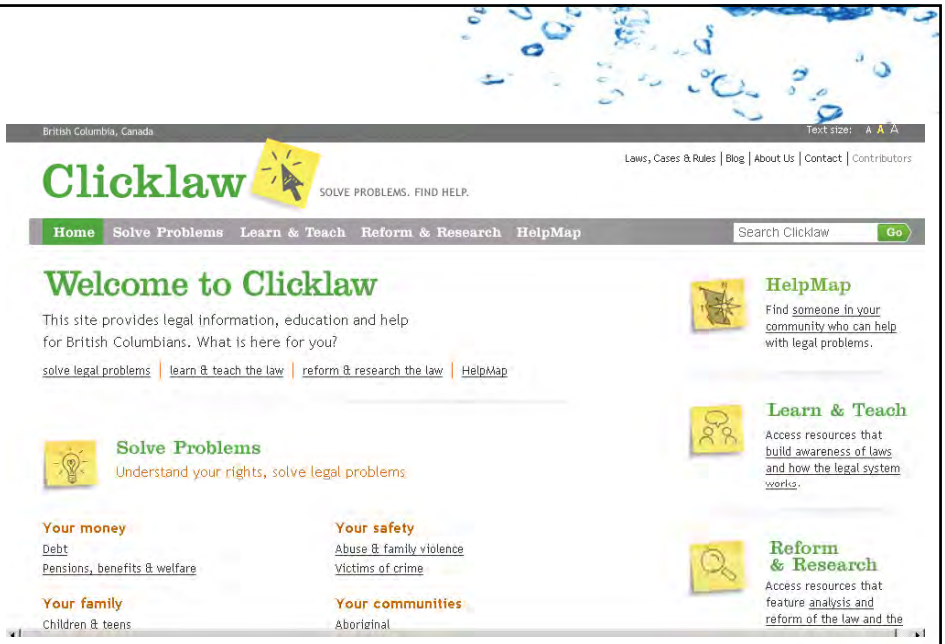


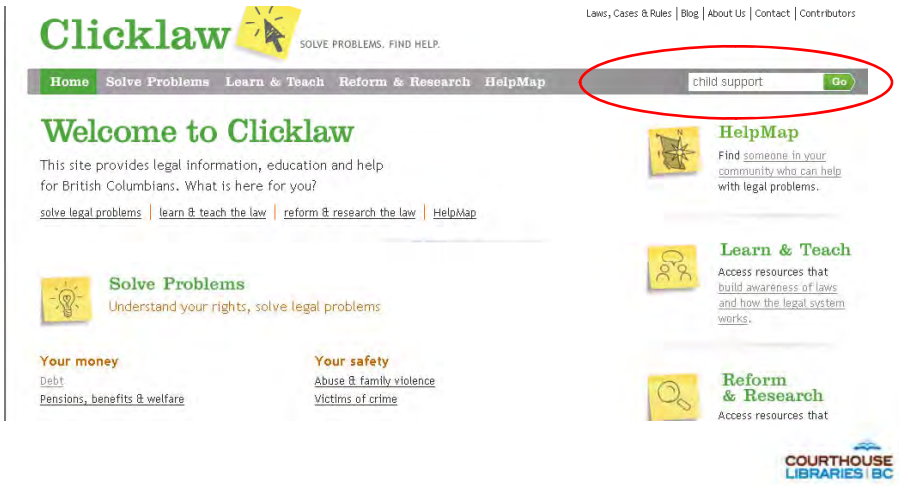
www.clicklaw.bc.ca

Example

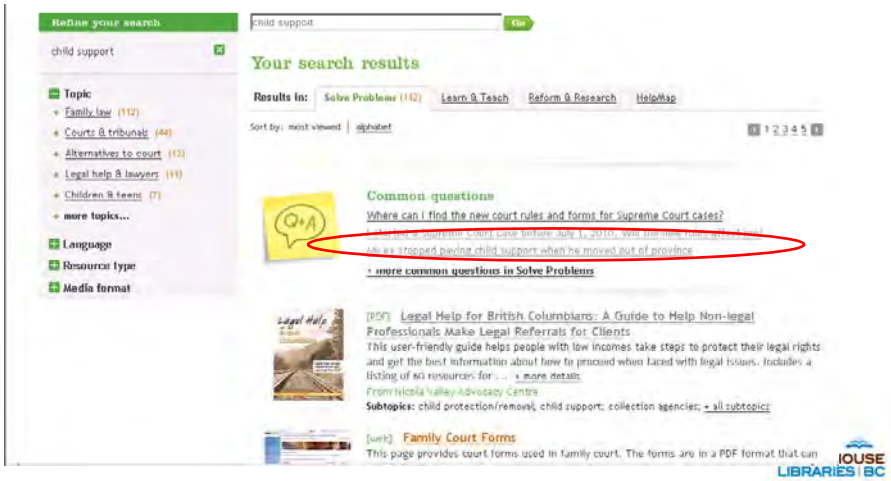
A client comes in and tells you that his wife moved to Alberta, left him with the kids and is not paying her child support.

You need a crash course in inter-jurisdictional child support payments.

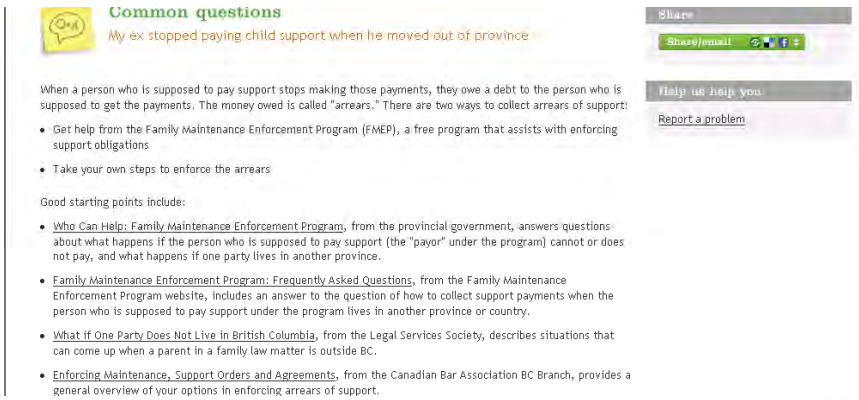
Search – "child support"



Results



Answer



Common questions

My ex stopped paying child support when he moved out of province

When a person who is supposed to pay support stops making those payments, they owe a debt to the person who is supposed to get the payments. The money owed is called "arrears." There are two ways to collect arrears of support:

- Get help from the Family Maintenance Enforcement Program (FMEP), a free program that assists with enforcing support obligations
- Take your own steps to enforce the arrears

Good starting points include:

- Who Can Help: Family Maintenance Enforcement Program, from the provincial government, answers questions about what happens if the person who is supposed to pay support (the "payor" under the program) cannot or does not pay, and what happens if one party lives in another province.
- Family Maintenance Enforcement Program: Frequently Asked Questions, from the Family Maintenance Enforcement Program website, includes an answer to the question of how to collect support payments when the person who is supposed to pay support under the program lives in another province or country.
- What if One Party Does Not Live in British Columbia, from the Legal Services Society, describes situations that can come up when a parent in a family law matter is outside BC.
- Enforcing Maintenance, Support Orders and Agreements, from the Canadian Bar Association BC Branch, provides a general overview of your options in enforcing arrears of support.

Share

Share/email

Help us help you

Report a problem

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Example

A client's mother has just passed away, leaving him a small estate. He can't really afford a lawyer, doesn't qualify for help but wants to know if you can give him some information on doing it himself.

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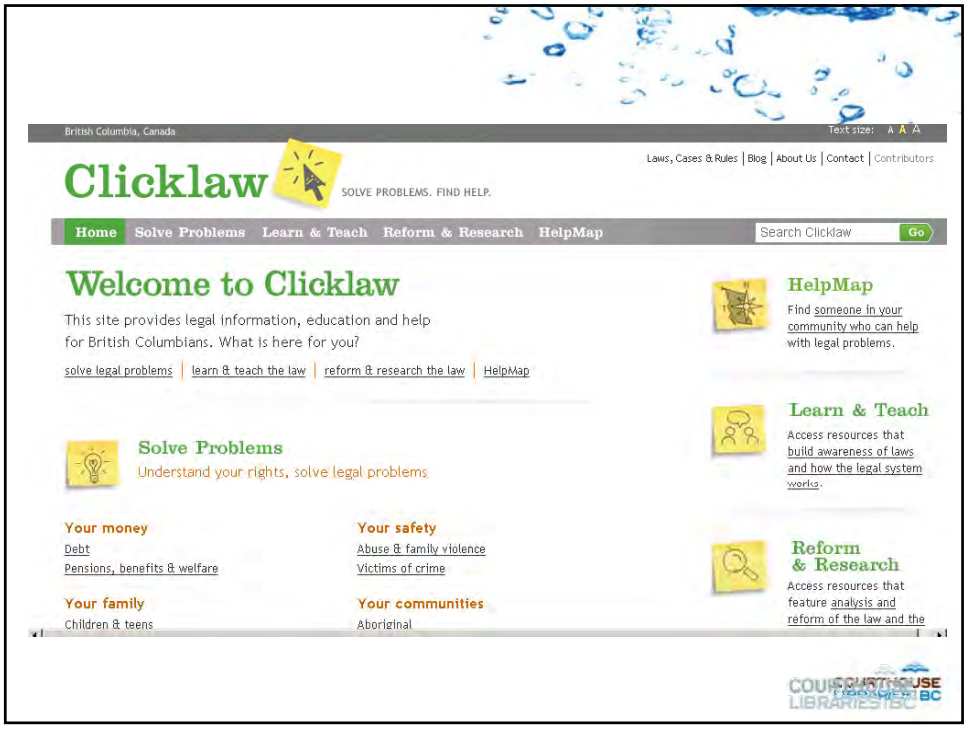
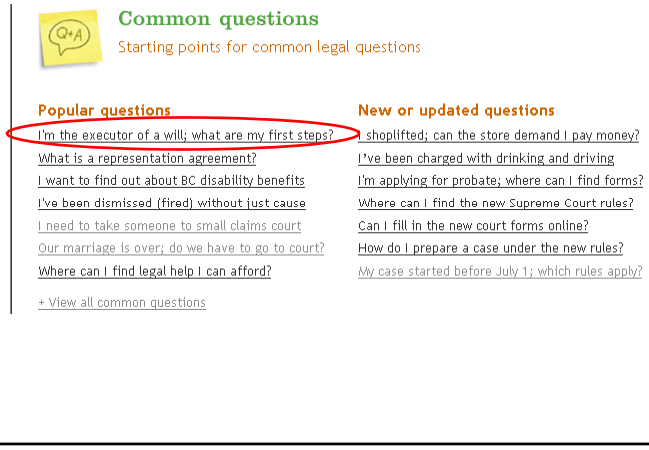


Go to Common Questions



Common questions

I am the executor of my mother's will and am doing the work myself

An **executor** is the person named in a will to carry out the instructions contained in the will. The executor is responsible for settling the person's affairs after death. The person's estate (everything he or she owned) passes temporarily to the executor. In general, the executor gathers up the estate assets, pays the funeral costs, debts and taxes, and then distributes what remains of the estate to the beneficiaries in the will.

If you are the executor of a will, good starting points include:

- Your Duties as Executor, from the Canadian Bar Association BC Branch, provides an overview of what is involved in being an executor and the steps in the process.
- Being an Executor, from People's Law School, outlines what is involved in being an executor and the steps you take as an executor. It provides answers to such questions as: Do I have to act as executor? Does an executor get paid? What do I do first?

Probate is a legal procedure that confirms the will can be acted on and that you have the authority to act as executor. Be aware that you don't always have to apply for probate. It depends on the type of assets in the estate. The procedure includes submitting special forms and the original will to the Probate Registry of the Supreme Court.

Good starting points on probating a will include:

- Your Duties as Executor, from the Canadian Bar Association BC Branch, explains some of the situations that require probate.
- Being an Executor, from People's Law School, outlines the steps involved in probating the will. It includes a checklist of tasks for the executor after probate.
- About Wills and Estates, from the provincial government, has basic information about what the Probate Registry does, and information about estates and the executor's role.

HOUSE ...IES | BC

Example

A client comes in and wants advice on fighting a traffic ticket …

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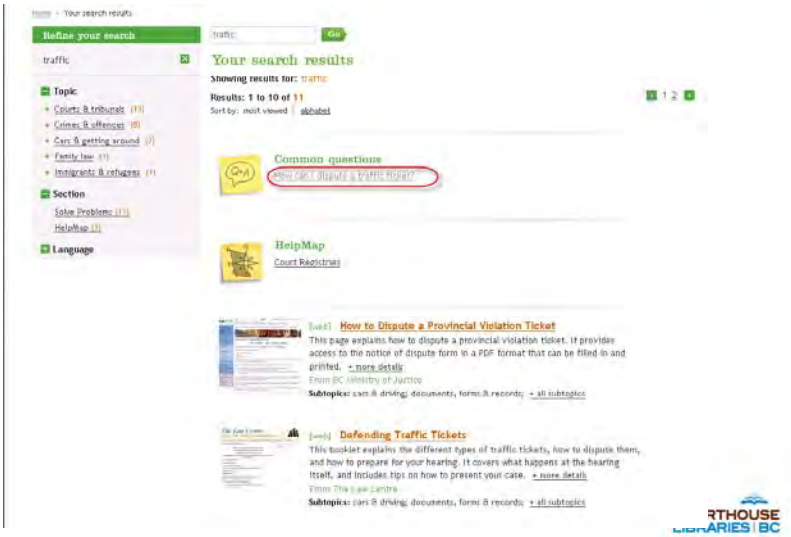
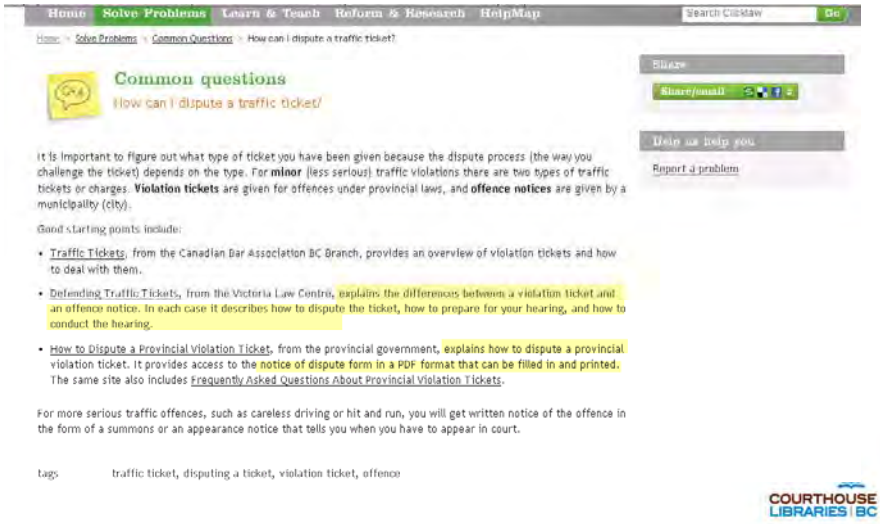
Search – “traffic”



Results



Answer



Home | Solve Problems | Learn & Teach | Reform & Research | HelpMap | Search Clicklaw | Go

Home > Solve Problems > Common Questions > How can I dispute a traffic ticket?

Common questions

How can I dispute a traffic ticket?

Share

Share/email

Help us help you

Report a problem

It is important to figure out what type of ticket you have been given because the dispute process (the way you challenge the ticket) depends on the type. For **minor** (less serious) traffic violations there are two types of traffic tickets or charges. **Violation tickets** are given for offences under provincial laws, and **offence notices** are given by a municipality (city).

Good starting points include:

- Traffic Tickets, from the Canadian Bar Association BC Branch, provides an overview of violation tickets and how to deal with them.
- Defending Traffic Tickets, from the Victoria Law Centre, explains the differences between a violation ticket and an offence notice. In each case it describes how to dispute the ticket, how to prepare for your hearing, and how to conduct the hearing.
- How to Dispute a Provincial Violation Ticket, from the provincial government, explains how to dispute a provincial violation ticket. It provides access to the notice of dispute form in a PDF format that can be filled in and printed. The same site also includes Frequently Asked Questions About Provincial Violation Tickets.

For more serious traffic offences, such as careless driving or hit and run, you will get written notice of the offence in the form of a summons or an appearance notice that tells you when you have to appear in court.

tags traffic ticket, disputing a ticket, violation ticket, offence

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Any Questions?

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Practice Questions for CanLII

Scenario 1

You are helping a client who couldn't access services at a local business because it was not wheelchair friendly. You have been told that there was a major case coming out of Saskatchewan where an employee of a movie theatre told a man that he could only sit at the very front of the theatre because of his wheelchair.

You would like to find this case. You then want to see if any judges in BC have ever talked about this case.

Scenario 2

A woman comes in and wants to read about family custody cases. She says that she specifically wants to know about cases that have talked about "parental alienation" from the last two years in British Columbia.

Scenario 3

A man comes in and explains that he wants to research interest rates charged by pay day loan places. In particular, he has heard that section 347 of the Criminal Code says that some interest rates are criminal. He would like to read that section and then read cases from BC that have dealt with that section, particularly as they relate to pay day loan businesses.

Leveraging the Power of RSS Using *Google Reader*

RSS (Rich Site Summary or Really Simple Syndication) is a simple yet amazing tool that has the ability to streamline the way you currently view many of the websites that you click through on a daily basis. This is done by way of a special (XML) file that sits alongside of a Web page file on a website. The file strips the website of all of its bells and whistles and brings the user a basic chronological summary of updates to the website. Usually, these updates contain a headline, a brief description, a URL to the full story being summarized, a date and the creator's name.

By now, you're probably thinking that this doesn't sound all that amazing. Well, let's put it another way. Think of the four or five most intelligent people you have ever had as a teacher. Now, pair them up with all of those people out there who you respect and learn from on a daily basis. Combine those with people who have similar interests to you who you have not even discovered yet. Finally, mix in a variety of news sources that you rely on to get the news you are interested in hearing. Take all of this information, funnel it into one location (without constantly having to search it out), and you now begin to gain an understanding of what RSS has to offer.

Once you grasp the concept of RSS and begin making its use a part of your daily routine, you will feel like you have never learned so much in your life. You will quickly see that your RSS feeds have the potential to become an extremely valuable source of professional development.

Getting Started with RSS

Getting started with RSS is very easy. You only need two things: an aggregator and a feed. Once you have these two things, you're off to the races.

- An **aggregator** is a piece of software that takes in all of the ugly XML pages that you have subscribed to and puts them in a form that is easy to read, all in one location. Think of an aggregator in the same way that you think of an email program that brings all of the email that is sent to you into one place.
- As with email programs, there are two main types of aggregators that you can choose from. Computer-based aggregators run on a single computer, while Web-based aggregators are globally available on the web. There are many different aggregators to choose from, and all of them are slightly different, but after trying out several, our preference is the Web-based aggregator, *Google Reader*. It can be used on any computer, anywhere in the world.
- The **feed** is the information that you are subscribing to. Just as I compared the aggregator to an email program, I can also compare the feed to the email. Simply put, the feed is the XML file from a website that I subscribe to. It's the information that my aggregator is pulling in. It's the stuff I want to read. Unlike email though, NO SPAM!

Registering for a *Google Reader* Account

If you already have a *Google* account, you're ready to go. If not, click on the sign in link that's found at the top of http://www.google.com. This will take you to a place where you can sign up. Once you're all registered, and your account has been confirmed, you can get to *Google Reader* at http://www.google.com/reader. You're now ready to get started.

Searching for RSS Feeds

If a site has an RSS feed, it will tell you. Look around the site. Sometimes, RSS is represented by an orange badge that says RSS or XML. On other sites, you will simply see text that says, *Subscribe to this*

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site by RSS. More universally, sites are using this icon to represent sites powered with RSS. When you see this icon, right click on it to copy the feed address. You will use this feed address in the next step.



You can find feeds pertaining to most interests that you might have. Additionally, all blogs and most major news sources also publish their content with RSS feeds. So if you have a particular news source or blog that you follow regularly, start there. One way to go is to search within a search engine for a term plus RSS (example: math k12 rss). Or you might consider beginning your search on an RSS search engine like *Search4RSS* (http://www.search4rss.com). Finally, you can use Google Reader to find feeds. Simply click on the red *Subscribe* button, and type your search term in the box. Google Reader will suggest some appropriate feeds.

Adding Feeds

Once you are finished registering for *Google Reader* and are on your main *Google Reader* page, and once you have found your first feed that you wish to subscribe to, click on the add button on the red *Subscribe* button. You will see a space in the right column where you can paste in the URL of the website that contains your desired feed.

After you type or paste in the feed's URL and hit *Add*. If successful, you should see a feed on the left hand side of your screen that has the name of the blog or site you just subscribed to as well as the number of feeds currently waiting for you, if any.

Uses for RSS

Once you get a few feeds set up within your aggregator, I guarantee that you will see that this is a tool with some potential. But how can you move from using this simply as a tool for convenience and on to using it as a tool for true learning? Below, are a few different ideas.

- **Using RSS to monitor blogs and news sources**
  This is probably one of the first things that you and your students might use an aggregator for. Use an RSS search tool to find some blogs that concern issues that you or your students are interested in. You might consider subscribing to political blogs, professional blogs, social blogs or blogs based around a hobby or topic of study. It really doesn't matter. It's your choice. Remember, you can add or delete feeds as much as you would like to.

  If you have your students creating their own blogs, this is a great time saver. As a teacher, you can subscribe to all of your students' blogs. From this point on, you never have to wonder if they are posting. Anytime a student posts a new entry, you get the entry in your aggregator. If you want to respond to one of their postings, simply click on the entry heading within the aggregator, and you are off to their blog to post your comment.

- **Using RSS to monitor news searches from a news search site like *Google* or *Yahoo***
  If you are familiar with how to do a search on *Google* or *Yahoo*, you are ready to get RSS feeds of your news searches. Simply visit *Google News* (http://news.google.com) or *Yahoo News* (http://news.yahoo.com) and perform a news search. For example, go to one of the two search sites and do a search on a topic (example: blogging literacy). Once I click search, I will see all of my results. "Great!" you say. Well, it gets better. These two sites are RSS enabled. This means that you can use the URL of the search results to subscribe to the news search as a feed. Find the RSS icon, right click on it and copy the feed address. Subscribe to it in *Google Reader*, and

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now, anytime a new article is written that fits your search term, you will get it into your aggregator. Suddenly, you and your students are researching 24/7 without having to lift a finger. You can refine your results by refining your search terms just as you normally would in *Google* or *Yahoo*.

- **Using RSS to monitor bookmarks**
  Are you into using social bookmarking sites like *Diigo* (http://www.diigo.com)? If so, you'll love this. If not, here is a quick description. You go to one of these sites, register for an account, and use your account to organize all of your bookmarks online. Your bookmarks are organized with keywords called tags. When you want to search your bookmarks, you have two options. You can search within your own bookmarks, or you can search all accounts that used the same tag as you. Need an example?

  Let's say you find a great website on frogs. You decide to bookmark this site, and you tag it with the keywords *frogs* and *amphibians*. Later on, you are doing a report on frogs and go look into your account for sites that you tagged with the keyword *frogs*. Unfortunately, you only have one site with that tag. So now, I look at the tag itself and pull up all of the sites that all users who have bookmarked with the tag, *frogs*.

  Let's bring this a step further. Using RSS, I can subscribe to a particular tag within *Diigo*. Now, anytime someone bookmarks a website with that tag, I will get it in my aggregator. Just be warned, with common tags, you might get inundated with a lot of information. That's okay. You can always delete the feed and try to be more specific with a different tag.

  You can learn more about Diigo at http://www.novemberlearning.com/bookmarkingwithdiigo.

- **Using RSS to monitor online photo albums**
  Flickr (http://www.flickr.com) is a social, online photo-sharing site. Users can upload photos from their digital cameras to *Flickr* with descriptions and tags like the ones used to keyword bookmarks. Using RSS we can subscribe to a tag within *Flickr* to receive pictures people have taken of something that fits into a particular category.

  For example, let's say you are a big Civil War buff, and you would love to see the pictures people take of various battlefields and Civil War artifacts. Again, do a search within *Flickr* for *Civil War* and subscribe to the results feed. Now, whenever someone takes a picture and tags it *Civil War*, it comes straight to you.

- **Using RSS to subscribe and listen to podcasts**
  As with blogs, podcasts can also be subscribed to through RSS. Take our November Learning podcast for example (http://feeds.feedburner.com/blc06). We can subscribe to this site, and whenever we post a new podcast, we will get it in our aggregator. We can even listen to the podcast without ever visiting the site.

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7. Skills

- **Power Advocacy A and B**
  - Checklist
  - Interviewing
  - Negotiation
  - Statutory Interpretation

THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

ESSENTIAL CHECKLIST FOR ADVOCATES

Power Advocacy Course, November 20-22, 2012

Presented by Kendra Milne and Jess Hadley
Community Legal Assistance Society
604 685-3425

This checklist will take you through some key steps in handling a client file that is going to a hearing. We hope it will give you some helpful ideas to handle these files with skill and confidence!

We have also provided separate handouts on the following topics:

- Interviewing
- Negotiation
- Statutory interpretation

Contents

Initial assessment of your case 2

Case planning for hearings 3

Evidence-gathering 5

Preparing to present your evidence 6

Challenging the other side's case 8

Preparing to present your argument 10

Procedural requests and objections 11

Written submissions 13

The hearing itself 15

Prepared by Jess Hadley of Community Legal Assistance Society for the Law Foundation advocate training conference held November 20-22, 2012 in Richmond, BC. Revised from a similar handout for hearings, provided at the 2011 conference.

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 and 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?
- ☐ Are there other options that you and the client should explore as well or instead?

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?
- ☐ 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?

Only commit to doing a hearing when you're satisfied there is a good reason to do so.

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.

Case planning for hearings

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. (Also, get your client to sign a release enabling you to get any additional documents you may need.)

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 the lower level decision-maker.

☐ **Think about the nature of the tribunal.**

How are hearings done at this particular tribunal? Formal or informal? In person, by phone, or in writing? How long are the hearings?

What are the rules governing procedure at this tribunal? If the rules are published, get a copy and read them. Pay particular attention to timelines.

You can usually get this information from the tribunal's website.

☐ **Take the time to identify any deadlines you will need to meet.** Carefully note these deadlines, as well as the time and date of the hearing.



☐ **Locate the law.**

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.

☐ **Come up with 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.

CASE PLAN

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 the legal tests that apply 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.*

4) Theory of the case / Opening statement.

- Come up with a brief (1-3 sentence) statement summarizing how you will argue the case. Think of this as an opening statement you can use at the beginning of the hearing to explain what the case is about.

Evidence-gathering

☐ Decide what documents you need for evidence. If you have them already, great. If not, go get them!

You might be able to get some documents yourself. Others you may have to get from the client or a third party.

Keep these documents organized in a sensible way. We recommend an evidence folder *separate from the rest of the file.*

☐ Decide what witnesses you might need, and talk to them right away.

Make sure each prospective witness's evidence is actually going to be helpful to your client. If so, make sure they can attend the hearing.

Keep a list of witness names and phone numbers in your evidence folder.



☐ Think about both sides of the case – what witnesses and documents do you think the other side will use? Does that change what evidence you may want to call?

Once you have gathered your evidence, it should be sent in to the tribunal (and to the other side) well in advance of the hearing, and within the tribunal's timelines.

It is okay to send in additional evidence later if you need to, but keep in mind if it's sent in after the deadline it might not be accepted.

Some tips about documentary evidence:

☐ 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.**

☐ Ideally, try to create **a list of your documents,** 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 (p. 17).

Preparing to present your evidence

☐ **Prepare a list of direct examination questions for each of your witnesses.** If you don't have time to do a full list of questions, at least write out the key points you want to get across, in chronological order.



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 leading questions (questions that suggest an answer, e.g. "Your tenancy started on September 1, 2010, right?")*

Then, move on to questions that lead the witness through her testimony in an orderly way. *These cannot be leading questions. The goal is to stay out of the witness's way as much as possible. Some tribunals won't even want you to ask questions and will just want to hear from the witness.*

In direct examination it can help to start with descriptive questions that "set the scene", and then move on to questions about sequences of events.

☐ **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 very 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.

Explain the duty to tell the truth.

Tell the witness how to address the decision-maker. It's usually appropriate to address him/her by surname (e.g. Mr. Wong or Ms. Smith).

Go over the "4 S's" – 4 basic principles for direct examination:

1) Simple questions; simple answers.
2) Slow answers: allow time for the decision maker to absorb information.
3) Specific answers: do not generalize.
4) Systematic testimony: let the advocate guide the way.

Go over the 3 or 4 key points you need the witness to get across.

☐ **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>

Use 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?"

Challenging the other side's case

A key task for the advocate at a hearing is to keep an eye on the other side's evidence (including documents and witnesses), and also on what the other side is *saying* about the evidence in the course of their argument, and to challenge it as appropriate.

We suggest you think about this task as having 2 distinct aspects:

1) Attacking a witness's credibility via cross-examination, when there is reason to think the witness is either being dishonest, or is simply mistaken.

2) Identifying other problems with the other side's evidence, including: gaps or inconsistencies in the evidence, or statements about the evidence that are incorrect, exaggerated, or not supported by the documents or witness testimony.

These two aspects are quite different. Here are some tips for each one.

Attacking a witness's credibility via cross-examination

☐ It's usually only a good idea to try and attack a witness's credibility via cross-examination if you can come up with a concrete plan for doing so and you think it's likely to work. For this reason, it's important to prepare in advance to challenge a witness's credibility.

☐ Often it's more convincing to show that a witness is mistaken, or making a faulty assumption – rather than trying to show that she is being untruthful.

☐ Before trying to attack a witness's credibility, it's important to come up with a good series of leading (narrow!) questions. Such questions are really more like statements that you ask the witness to agree with. For example, here is a possible series of questions to challenge a witness's credibility:

- "You weren't actually there when the disturbance was reported, were you?"
- "You didn't get there until after the police arrived, right?"
- "And this tenant isn't the only person living in that hallway, is he?"
- "In fact there are 10 other units on the 5th floor, right?"
- "And they're all occupied?"
- "So you can't be sure that it was this particular tenant who damaged the drywall in the hallway, and not someone else, can you?"
- "You just assumed he was the one who did the damage, didn't you?"

☐ When do you cross-examine? At the hearing, wait until the witness you want to cross-examine has given his/her evidence. After that, it's time to cross-examine him/her. Before you do so, think carefully:

- Sometimes the witness will have demonstrated his/her lack of credibility during his/her direct testimony. If that happens, there's no need to cross-examine.

- Sometimes unexpected evidence will come out at the hearing that dramatically changes the case. If that happens before cross-examination, you might need to change your cross-examination plan to take into account the changed circumstances.

☐ As you cross-examine, remember:

- Often a gentler and more respectful approach to cross-examination is more effective than an aggressive one.

- The witness might not go along with the final question or two in your series of questions. That's not a problem if their answers to your previous questions have already proven your point.

- Having said that, if your cross-examination really isn't getting anywhere, just stop and move on. *A key skill of cross-examination is to know when to give up.* Continuing in a failed cross-examination can just dig you into a deeper hole as the witness shows in convincing detail why their evidence is reliable.

- If done poorly, cross-examination can create problems by eliciting unhelpful information or antagonizing the tribunal. If possible, get input from a supervising lawyer if you're thinking of cross-examining on an important point.

Identifying other problems with the other side's evidence

☐ During the hearing you may notice that there is room to challenge statements that the other side puts forward about the evidence, especially statements that are incorrect, or exaggerated, or not supported by the documents or witness testimony.

☐ You might also notice that there are gaps in the evidence or the evidence conflicts.

☐ It isn't usually helpful to point out such conflict to the other side's witnesses during cross-examination (*evidence*) since that may give the witness a chance to straighten out the conflict.

☐ Unless you are cross-examining to attack a witness's credibility, it's probably better to wait until you present your *arguments* to challenge any problems in the other side's evidence.

Preparing to present your argument

☐ If you have done a written argument, pat yourself on the back because you can use this as a template for most of your argument to the tribunal.

☐ Whether or not you have done a written argument, 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.

(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.

Procedural requests and objections

Tribunal hearings are meant to respect the principles of procedural fairness. The core elements of procedural fairness are:

- Each party has the right to know the case against him/her;
- Each party has the right to respond to the case against him/her; and
- Each party has the right to present his/her own case.

When you are handling a hearing for a client, you might need to make procedural requests, or objections. **The purpose of making such requests and objections almost always relates to one or more of the above elements.**

☐ Before a hearing, think about any procedural requests you expect to have. For example:

Do you need an adjournment?

Do you need a witness to testify by phone?

Do you need to ask the tribunal to accept documents you filed late?

Does your client need a translator?

Does your client need a special accommodation due to a disability?

☐ For each procedural request, think about the reason *why* you will be making the request. Why does procedural fairness make it important for the tribunal to grant the request?

☐ If possible, make any procedural requests to the tribunal in writing, well in advance of the hearing. Even better, get the other side to agree to your request before contacting the tribunal.

☐ If you will be making the procedural request at the hearing itself, make a note of exactly how you plan to express the request, clearly and simply, at the outset of the hearing. Include a simple explanation for why you didn't make the request sooner. Again, try to get the other side to agree to your request before you raise the issue with the tribunal.



☐ **If the request is denied at the hearing, then you may have to make an objection**. If you end up making an objection at the hearing, be sure to do the following:

- Clearly state that you object to the proceeding going ahead without granting your client's request, and relate your objection to the principles of procedural fairness;

- Request that the decision-maker note on the record that you objected; and

- Make a detailed note about the objection in your own hearing notes.

☐ **You might also have to object to something on the fly at the hearing, if something happens that seems procedurally unfair**. If that happens:

- Clearly state that you object to whatever it is that has happened and relate your objection to the principles of procedural fairness;

- Request that the decision-maker note on the record that you objected; and

- Make a detailed note about the objection in your own hearing notes.

Written submissions

You might not always have enough time to prepare a full written argument. But at minimum, try to prepare the following written materials:

☐ **A written opening statement,** no more than half a page long, that sets out an overview of the case.

NOTE: *the elements of your case plan (see 2 pages back in this checklist) can be modified to create your written opening statement!*

Good things to include in an opening statement:

- Who the parties are and what the case is about (in one sentence if possible);
- The key legal issues;
- The key factual points, and what you expect the evidence at the hearing will show on each point – BUT DO NOT OVERSTATE THE EVIDENCE; and most importantly,
- What, exactly, you are asking the tribunal to do for your client.

☐ **A list of the documents that you are putting in**. If possible, structure the list to help the decision-maker see what the documents prove.

- See the example list of documents at the back of this checklist (p. 17).

☐ And if you have to explain sums of money, prepare **a table showing how the numbers add up.** This is helpful, for example, any time your client is claiming monetary damages at the RTB, or arguing about assets or income in a welfare case.

- See the example table at the back of this checklist (p. 18).

☐ **Wherever possible, prepare a full written argument.** This is because a written argument forces you to think through the case in detail, and ensures that your ideas get across to the tribunal. A written argument also protects your client by creating a record of what was argued, which is essential if your client loses at the tribunal and needs to seek judicial review in court.

A good written argument is brief and to the point, and includes the following elements:

- ☐ It is in a decent sized font.
- ☐ It has the case name and file number at the top.
- ☐ It is well organized and uses headings to help get the information across.
- ☐ It starts with an opening statement.
- ☐ It then gives a brief statement of the facts and refers to specific pieces of evidence. Stick to the relevant facts and don't get bogged down in excessive detail.
- ☐ It then states the applicable law and refers to specific legal authorities. Again, stick to the key points and don't get bogged down.
- ☐ It then provides a simple outline of your legal arguments about the case.
- ☐ It concludes with a simple statement of what you are asking for.
- ☐ It is signed and dated.

If possible, send your written argument to the tribunal (and to the other side) well in advance of the hearing.

Ideally it should be sent in along with your documents.

Having gone over this checklist you should now be feeling prepared for your hearing. Good luck! ☺

The hearing itself

The day of the hearing:

☐ Have paper and a pen handy.

☐ Have all the documents organized and ready. If the hearing is in your office and you are attending by phone, clear away any other files.

At the start of the hearing:

☐ Politely introduce yourself and explain you are acting as an advocate for your client.

☐ Write down the names of everyone attending.

☐ Check that the tribunal, and the other side, have received your documents and your written submissions.

☐ Make any procedural requests you may have.

☐ Ask permission to make an opening statement.

Throughout the hearing:

☐ Keep in mind the "ideal structure" of a hearing:

(1) Applicant gives an opening statement;
(2) Respondent gives an opening statement;
(3) Applicant presents his/her evidence (witnesses and documents);
(4) Respondent challenges the applicant's evidence;
(5) Respondent presents his/her evidence (witnesses and documents);
(6) Applicant challenges the respondent's evidence;
(7) Applicant makes his/her argument; and
(8) Respondent makes his/her argument.

☐ With this structure in mind, try to make sure you get a chance to present your case and challenge the other side's case.

☐ <u>However</u>, be aware that many tribunal hearings follow this structure quite loosely.

☐ Use your written argument as a template for your argument.

☐ Take detailed notes (as much as you can).

At the end of the hearing:

☐ Summarize your case in a closing statement.

- This can be loosely based upon your opening statement, but be aware that you cannot plan it in advance, because it will depend on what has happened at the hearing.

- A good closing statement should briefly reiterate the key evidence that supports your client's case, and reiterate why you say the tribunal should give your client what he/she is asking for.

GOOD WORK!

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**	

INTERVIEWING

Power Advocacy Course, November 20-22, 2012

Presented by Kendra Milne and Jess Hadley
Community Legal Assistance Society
604 685-3425

This handout will give you a very general suggested framework for an initial client interview.

1) Introduction/welcome

- Who you are, what your role is
- Confidentiality of the meeting
- General structure of the interview ("I will ask you to tell me what brought you here, then I will ask some questions to make sure I understand, and then we will try and identify some options for you.")
- Timeline (how much time do you have for the interview)

2) Broad initial questioning to identify all the client's legal issues

- Open-ended questions – the more open the better. "What can I do for you?" or "How can I help you?" are good ways to start.
- Follow up questions should remain broad: "Can you tell me more about that?" Don't go to narrow questions yet!
- Ask scoop questions (e.g. "Is there anything else?") until there is nothing else the client can tell you.
- Check your understanding of the main issues by summarizing them for the client. (E.g. "It sounds like you have an issue with your landlord issuing you an eviction notice, and then you also have an issue with the Ministry cutting off your benefits. Does that sound right?")

Created by Jess Hadley and Kendra Milne, of Community Legal Assistance Society for the Law Foundation advocate training conference held November 20-22, 2012 in Richmond, BC.

3) Funnel questioning <u>on each issue</u>

- For each issue you've identified, continue asking open ended questions. (E.g. "Can you tell me anything else about your situation with your landlord?" / "Can you tell me anything more about what's been going on with your benefits being cut off?")

- *Once open ended questions are exhausted*, follow-up with narrower questions. (E.g. "What date did you get the notice to end tenancy?" / "Do you have a copy of the notice to end tenancy?")

- Check your understanding of the issues by summarizing for the client - "Does that capture it?"

- Ask a scoop question on each issue before moving on: "Is there anything else you'd like to tell me on this topic?"

4) Final scoop question

- Before giving any advice ask a final scoop question - "Is there anything else you can tell me that might be important?"

5) Any initial advice you are able to give (ONLY do this after all the questioning is done)

- Explain the client's legal situation, to the extent you can.

- REMEMBER: if you need to think about it, do some research, or talk it over with someone before you can give them advice about what to do, or how strong their case is, <u>say so</u>. It is normal and perfectly fine not to know the answer right away! Even if it's an urgent situation it is <u>never</u> a good idea to guess.

6) Come up with a plan for next steps

- What does *the client* need to do next? (E.g. bring you documents, fill in a form, get a potential witness to call you.) Come up with a plan including timelines, and write it down if you think that will help.

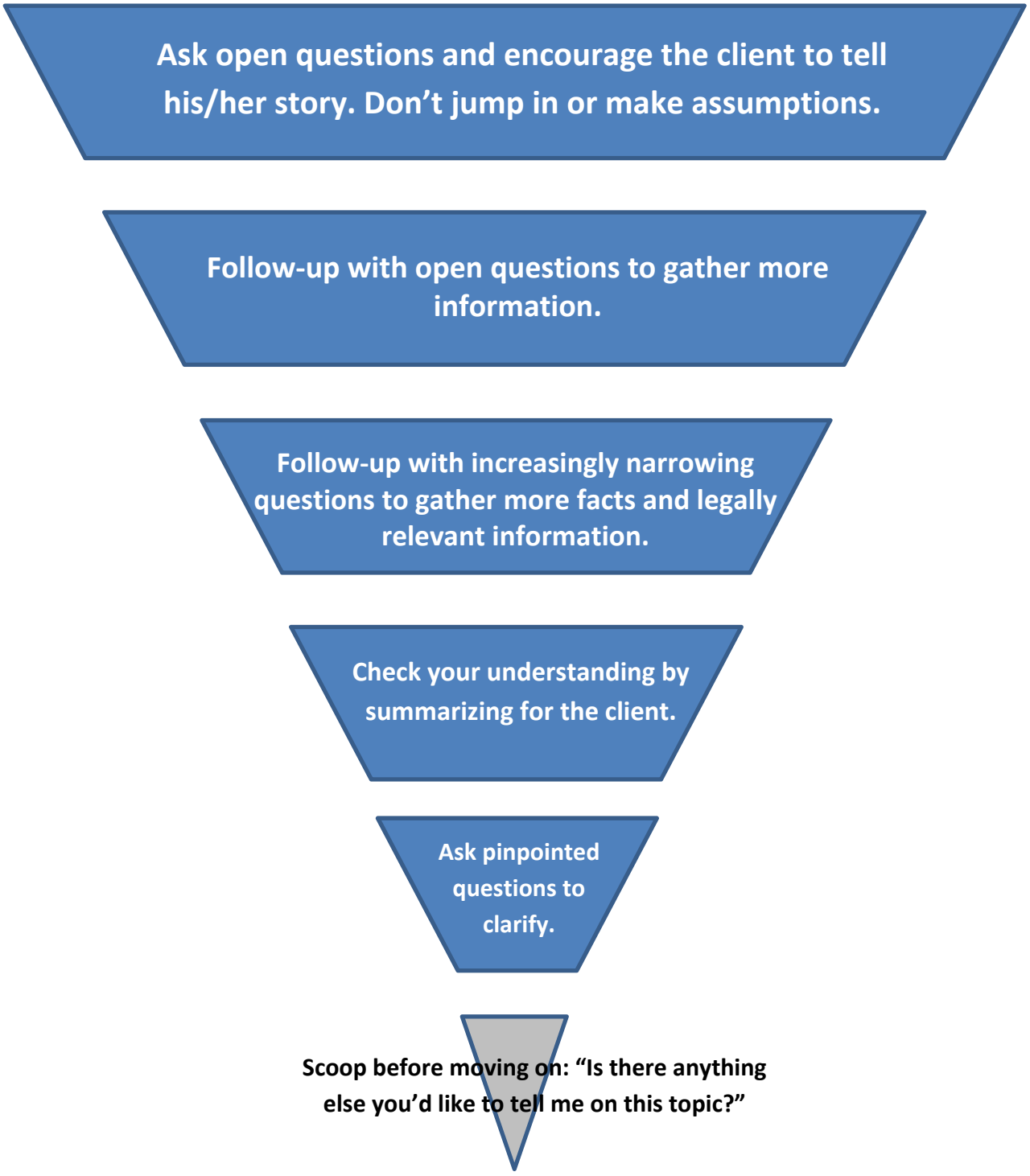
- What do *you* need to do next? (E.g. fax in a notice of appeal, call a District Supervisor, call the client's landlord.) Come up with plan and tell the client what to expect.

- Usually a good idea to get the client to sign release of information form(s) so that you can obtain any additional documents you may need.

7) Ending the interview

CLIENT INTERVIEW QUESTION FUNNEL

For every separate legal issue:



NEGOTIATION
(ALTERNATIVES TO GOING TO A HEARING)

Power Advocacy Course, November 20-22, 2012

Presented by Kendra Milne and Jess Hadley
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 an 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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Prepared by Kendra Milne and Jess Hadley of Community Legal Assistance Society for the Law Foundation advocate training conference held November 20-22, 2012 in Richmond, BC.

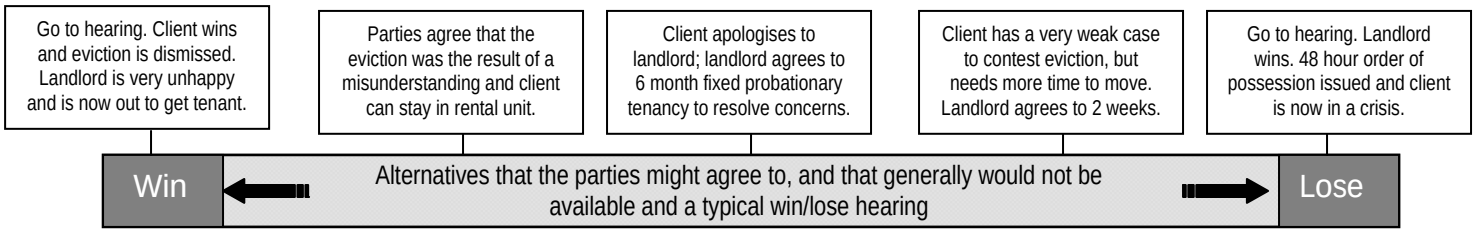
Negotiating an alternative resolution: the basics

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 conceded 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:

Step 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.

Step 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.

Step 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 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, etc.).

- Pros for the client: she can assert her right to be accommodated but also work with the landlord to try to come up with a reasonable accommodation that meets both parties' needs.
- Cons for the client may be uncomfortable disclosing medical information. She may also not want to participate in some of the accommodation suggestions.

- The client could simply move.

  - Pros for the client: she would not have to deal with the landlord or the complaining tenants anymore and she could find a new rental where her noise would be less of an issue. She would have control over the situation and not take any risk of losing her housing without notice.
  - Cons for the client: obviously this would require her to give up her housing. She may not have the resources to do that and simply may not want to move.

Note that many of the pros and cons for the tenants are going to be dependent on your assessment of her case to oppose the eviction. If she has a good case, offering to move will be a big concession for her. If she has a very weak case, offering a move out date that she has control over may not require her to concede much.

When thinking of the pros and cons for your client, it is important to keep in mind the strength and weakness of the case should it proceed to hearing.

Exercise: Brainstorm some alternatives to a win/lose hearing

For the following client situations, brainstorm some alternative resolutions that do not involve only a win/lose outcome:

1) Your client is facing eviction from his housing co-op. The co-op is claiming that he did not pay his housing charges last three months and that he is deemed to have withdrawn his occupancy agreement. The Co-op is now threatening to go to court.
2) Your client has been asking her landlord to fix a broken window in her rental unit for several weeks. The landlord is saying that he does not have the money to fix it right now.
3) Your client is being evicted because her roommate has been playing music loudly late at night. Other tenants have complained several times to the landlord.
4) Your client 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 pay the rent on the 6th day after the Notice to End – but the landlord has now applied for an Order of Possession. **(Sam's scenario)**

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 we've come up with and determine what leverage your client might have.

1) Your client is facing eviction from his housing co-op. The co-op is claiming that he did not pay his housing charges last three months and that he is deemed to

have withdrawn his occupancy agreement. The Co-op is now threatening to go to court.

2) Your client has been asking her landlord to fix a broken window in her rental unit for several weeks. The landlord is saying that he does not have the money to fix it right now.

3) Your client is being evicted because her roommate has been playing music loudly late at night. Other tenants have complained several times to the landlord.

4) Your client 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 pay the rent on the 6th day after the Notice to End – but the landlord has now applied for an Order of Possession. **(Sam's scenario)**

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 and 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.

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 compnesation 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]

EXAMPLE OF SETTLEMENT AGREEMENT

SETTLEMENT AGREEMENT

Dated for reference _____, 2012

BETWEEN

[redacted]

(the "Tenant")

AND

[redacted]

(the "Landlord')

WHEREAS:

- The Tenant resides at a manufactured home pad at [redacted] (the "pad"), which she rents from the Landlord;
- The tenancy is governed by the BC *Manufactured Home Park Tenancy Act;*
- The Tenant has sought judicial review of an October 4, 2011 Dispute Resolution decision and order of possession relating to her manufactured home tenancy (Action No. [redacted] Kelowna Registry);
- The Landlord wishes the tenant not to have an unregistered pet in her home;
- The Landlord and Tenant both wish to resolve their dispute and continue with an amicable tenancy relationship;

THE PARTIES HEREBY AGREE THAT:

1. The Tenant will remove her cat from her home within one month of the date when both parties have signed this settlement agreement.
2. The Tenant will promptly discontinue her petition for judicial review and the parties will bear their own costs for the judicial review.

... Continued on page 2

3. The Tenant agrees to a 4.3% rent increase effective June 1, 2012, to $354.62. This amount shall be inclusive of all services except electricity (as per clause 5), and no HST shall be payable by the tenant on her rent.

4. In future the Landlord may give notice of annual rent increases, or may apply to the Residential Tenancy Branch for additional rent increases, and any such future rent increases will be in accordance with the *Manufactured Home Park Tenancy Act* and Manufactured Home Park Tenancy Regulation.

5. The Tenant's rent will include 500 kw/month in electricity.

6. Each party releases the other from any claims arising from the subject matter of RTB file #[redacted] or from the subject matter of the judicial review (BCSC Action No. [redacted] Kelowna Registry).

ALL OF WHICH IS AGREED TO BY THE PARTIES, WHO SIGN THEIR NAMES BELOW:

_____ _____

[redacted] Date

_____ _____

Witness to [redacted] signature Date

_____

PRINT WITNESS NAME

_____

WITNESS ADDRESS

_____ _____

Representative of Landlord Date

_____

PRINT NAME OF LANDLORD REPRESENTATIVE

_____ _____

Witness to Landlord's signature Date

_____

PRINT WITNESS NAME

_____

WITNESS ADDRESS

STATUTORY INTERPRETATION

Power Advocacy Course, November 22-22, 2012

Presented by Kendra Milne and Jess Hadley
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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Original materials by Kendra Milne and Devyn Cousineau of Community Legal Assistance Society, November, 2011. Revised by Kendra Milne for the Law Foundation advocate training conference held November 20-22, 2012 in Richmond, BC.

Introduction to statutory interpretation

When you are faced with a section of a statute and you are trying to determine what that sections means, it is important to remember that there is usually no right or wrong answer. There is also no silver bullet or sure fire way to determine the answer. Unless a superior court has expressly determined that the provisions cannot be interpreted in a given way, your job will generally be to look at what the plain meaning of the language could mean, and what meaning the "context" of the legislation supports. Generally, each statutory provision can be interrupted in more than one way, and you can often argue that an interpretation that helps your client is the one that a decision maker should adopt.

Think about a statutory provision like a painting:



How do you determine the meaning of the painting?

1) Plain meaning: What can you see from the physical face of the painting?
    - Are some interpretations ruled out?
2) Other interpretations: Do you look at what others have said the painting means?
    - What have others said this painting means? How valuable are their opinions (what weight can you give them)?
3) Specific context: Do you use information you can find about the content of the painting?

- Who is depicted in the painting? Where was it painting? How was it painted? Are there any other specific elements of the painting that might provide information?

4) Intention: Do you use what the artist intended the painting to mean?
    - Is there any evidence of what the artists meant the painting to mean?
5) Wider context: Do you use the wider context of the painting, and how it fits into broader developments?
    - Who painted the painting? What was going on with the artist when it was painted? Where does the painting fit in art history? What was happening in the broader social history when it was painted?

This process is similar to trying to determine what a statutory provision means. You need to think of a statutory provision as something that can be capable of different interpretations. Your job is to find an interpretation that supports your client's case and that you can realistically persuade a decision maker to adopt.

To determine whether there is an interpretation that supports your client's case, and whether or not that interpretation will be persuasive to a decision maker, you need to ask the same questions we asked with the painting:

1) Does the **ordinary meaning** of the text support this interpretation?
2) What **specific context** supports this interpretation?
3) Has the section been **interpreted by others** and are those interpretations persuasive (or binding)?
4) Does the **intention or purpose** of the provision support this interpretation?
5) What **wider context** supports this interpretation?

General rule for interpreting legislation[1]

There are many different theories, approaches and latin rules that you can use to interpreting legislation, but there is one general rule that will probably be the most effective in your practice. That general rule is called "Driedger's Modern Principle". The rule essentially boils down to this:

> *When determining the meaning of a provision, you need to look at the ordinary meaning of the actual text, together with the context of the provision.*

If you follow this general rule when interpreting a statute, it will allow you to determine what interpretations the language of the statute can support and to find the supporting context you need to persuade a decision maker to adopt the interpretation you are putting forward.

The general idea is to look at:

(1) What interpretations are supported by the actual text of the statutory section (in our painting example, this was question #1); and

(2) What interpretations are supported by the context – everything other than the text of the specific provision (in our painting example, this includes questions #2 to #5).

[1] These materials refer to statutes and regulations somewhat interchangeably, or refer simply to "legislation". There are some basic differences to remember: statutes are enacted by the legislature or parliament, and are generally the main framework for a statutory regime. Regulations are often enacted outside of the legislature (by the cabinet) and are sub-ordinate to a specific statute. The must comply with their governing statute and generally contain most of the details of the regime.

The ordinary meaning(s) of the text

Going back to our painting example, at this stage you are looking at the face of the painting (with no additional research or knowledge) to see what the painting means. This was question #1. Can the face of the painting, for example, support an interpretation about the relationship of man and animal? Probably not.

Obviously, language is more definite than art so a statute's ordinary meaning will probably support fewer interpretations than a painting, but the process is similar: which interpretation(s) can the face of the statutory provision support?

With a statute, you are determining what interpretations can be supported by the ordinary meaning(s) of the text. There is a general presumption that the legislature intended to use language in the ordinary grammatical sense when it drafted the statute. Unless there is a reason to reject it, the ordinary meaning(s) of the text will prevail (in other words, if the wording and punctuation of the text cannot support an interpretation, it's generally not going to fly with a decision maker).

You do not look at dictionary definitions or external sources at this point. Instead, you are looking for the meaning(s) that a regular person with basic language comprehension would find when reading the provisions.

READ THE WORDS AND PUNCTUATION – WHAT MEANING(S) CAN THEY SUPPORT?

Because some language can be ambiguous, there may be several reasonable interpretations of the face of the text. This is where the context comes in. You will need to look for external information that will help you understand what the text means and where the provisions fits into the larger picture.

The context of the provision

Once you've determined what interpretation(s) the face of the provision can support, you need to think about the context of the statutory provision. The context is everything outside the ordinary language of the provision – what external information can you find to help you determine what the section means? Just like in the painting example, we can divide our search for context into four questions:

- What does the **specific context** suggest?
- How has the section been **interpreted by others** and are those interpretations persuasive (or binding)?
- What is the **intention or purpose** of the provision?
- What does the **wider context** suggest?

Specific context

You can also use the specific context of the statutory provision to support (or to refute) the interpretation you'd like to put forward. The specific context refers to external aides you can use to interpret the specific language of your provision. You're still focused on the text of the provision, but you are now looking outside the section of the statute to determine what it means. You have the text and now you are researching for external aids to help you understand what that specific text means.

1) Definitions in legislation: the first place to look is the definition section of the statute. Many statutes have defined terms, either at the beginning of the statute or at the beginning of the section you are dealing with.

   Look at the statute you are dealing with to see if there is a defined terms section and, if so, if any of the terms in your provision are there. If you find them, those definitions will generally be binding and you will not be able to suggest that different meanings should be adopted.

2) Interpretation Act: the next place you can look for an explanation of the specific terms of your provision is the *Interpretation Act*. There are provincial and federal interpretation acts that set out some definitions for common terms and also some general rules about some statutory interpretation issues. Specifically, it may be helpful with the calculation of

time, defining some generic terms, and determining which version of a statute applies to your client's case.

For example, see s. 8 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.

3) Other sources specific to the statute: are there any rules of practice and procedure for the decision maker that offer insight into what the provision means? Some decision makers, like the Residential Tenancy Branch, offer definitions of a handful of procedural terms in its rules of practice and procedure.

4) Policy guides: many government branches provide policy guides designed to assist in understanding the statutes and regulations that the branch administers. These are generally non-binding (which means that the decision maker is not bound to follow them), but often give an idea of what the legislature was aiming for. Be careful when using the guides – don't necessarily restrict yourself to what they say the provision means, and make sure they reflect the current version of the statute and case law.

   Some relevant examples:

   Residential Tenancy Branch Guides and Policy Guides, which can be found here: http://www.rto.gov.bc.ca/content/publications/default.aspx

   Ministry of Social Development Online Resource, which can be found here: http://www.gov.bc.ca/meia/online_resource/

   Employment Insurance Digests of Benefit Entitlement Principles: http://www.servicecanada.gc.ca/eng/ei/digest/table_of_contents.shtml

   Worksafe BC's policies can be found here: http://www.worksafebc.com/publications/default.asp
   (NOTE: many of the Worksafe BC policies, like the Claims Manuals, are binding on WCB and WCAT decision makers)

5) Dictionary: if you cannot find a term in the definition in the statute or in the Interpretation Act, you can try looking in a regular english dictionary or a legal dictionary. The definitions you find will not be binding but they

may be helpful in establishing what the ordinary meaning of a provision is, or what other reasonable interpretations might exist.

Interpretations by others

It is important to know how others have interpreted the provision. Even more importantly, you want to know how important that other interpretation is – on other words, what weight can you give it, or how much authority will it carry with the decision maker.

1) Previous decisions: if a superior court or a binding decision maker has previously considered the provision you are dealing with, obviously that is going to be very important to your case because the decision maker in your case will be obligated to follow that interpretation.

   A previous interpretation will be binding if it is made by a superior court (BCSC for provincial decision makers) or an administrative decision maker that binds the decision maker you are dealing with. That being said, most tribunals' decisions are not binding on each other – each tribunal panel or decision maker gets to make its own decision in each specific case. To determine whether a former decision is binding, look at the statute governing the decision maker you are dealing with.

   Even if a former tribunal decision is not binding on your current decision maker, if the decision supports your client's interpretation of the provision, it may help you to persuade your decision maker to adopt it as well.

   Previous court decisions can be found on CanLII: http://www.canlii.org/

   Previous tribunal decisions, if publicly available, can usually be found on the webpage of the tribunal you are dealing with.

2) Secondary sources: your statutory provision may also be addressed in a secondary source, like a textbook or annotated statute. Again, it is helpful to look through these to see if the materials support your interpretation because, if so, you can use them to persuade your decision maker to adopt your interpretation.

   If you don't have secondary sources at your office, try looking at the BC Courthouse library website to see if the local branch has relevant textbooks or annotated statutes: http://www.courthouselibrary.ca/

The key to using others interpretations is to decide how much weight, or importance, you can give the interpretation. Remember that, if a binding

decision has been made interpreting the provision a certain way, it may carry the day.

The intention or the purpose of the provision

When trying to determine what a statutory provision means, an obvious solution is to ask the person who wrote it what she actually meant. Although we cannot speak to the individual drafters of our legislative, we do have tools to look at what the legislature, or the body that enacted the provision, intended it to mean.[2]

There are generally three places to look for evidence about what the legislature/parliament intended the provision to mean:

1) Legislative debates: when enacting a statute, the legislature often debates the content of the statute, and sometimes sends the act to committee so that each provision can be separately debated and examined. All of these materials can give you an idea of what the legislature intended the statute to mean – why was the section enacted? Was there an existing problem it was meant to address? Did the Minister specifically say that it was not intended to mean one interpretation?

   BC legislative debates can be found at: http://www.leg.bc.ca/hansard/

   Canada parliamentary debates can be found at: http://www.parl.gc.ca/

2) Other public statements about the meaning or intent of the provision: there may be other evidence out there about the enactor's intent in enacting the provision you are interpretation. This might include press releases or consultation materials.

These sources can provide evidence about what the body that enacted the provision intended for it to mean. Remember, though, that this evidence must be read with the ordinary meaning of the provisions as well as the rest of the context.

Wider context

Finally, you can look at the wider context of the provision, or where and how it fits into the larger picture. Like in our painting example, we are now looking

[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.

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 of the legislation to see of any of the other sections might be helpful. Or, look to see if other sections can provide you with more information about what the provision was designed to do.

2) Related legislation: if your provision is part of a larger legislative regime that involves more than one statute or regulation, make sure you look at related legislation (this is especially true if you are dealing with a regulation – make sure you look at the enabling statute!). Again, use the index. It is an invaluable tool that can give you a quick overview of the content of the entire piece of legislation. If similar terms or phrases are used in related legislation, those uses can inform how your provision should be interpreted.

   All BC legislation can be found here: http://www.bclaws.ca/

   All federal legislation can be found here: http://laws.justice.gc.ca/eng/

3) Purpose of the entire statutory regime: the first external aid that you might be able to use is the purpose of the entire statutory regime. If you know that the entire regime is designed, for example, to confer last resort benefits, then you can use that information to decide what your provision might mean. Generally, you can interpret your provision in line with the broader purpose of the regime is trying to achieve.

   To find the broader purpose of the regime, you can look at past decisions, the preamble of the statute (if there is one) or legislative debates on the regime more generally. (You may have come across more general information in your hunt for evidence of the specific intention of your provision.)

4) Specialized method of interpretation: some specific types of statutes have specialized methods of interpretation that you can use. They are usually not going to carry the day – you still have to make sure the text of the provision supports the interpretation you are putting forward – but they may assist the decision maker in decision which interpretation they want to adopt.

For example, benefit conferring social welfare legislation is generally interpreted in a liberal manner and any doubt about its interpretation should be resolved in favour of the claimant.

Penal legislation, on the other hand, is generally interpreted in a strict manner and any doubts about its meaning are resolved in favour of the accused.

Again, these tools are not about the specific language of your provision, but instead provide you with information about how and where your provision fits into a wider picture. This wider picture may give you insight into how the provision should be interpreted.

Conclusion

In summary, your goals when interpreting a legislative provision are to first determine what interpretations the ordinary language can support, and second find external evidence of the context of the provision that supports the interpretation you want to put forward.

The external context is key in persuading a decision maker to adopt the interpretation you are putting forward, and can provide you with clues about the meaning when the ordinary language of the provision is unclear.

Ethical and Professional Issues in Poverty Law

Presented at the Law Foundation Provincial Training Conference for Advocates

November 21, 2012

By: Amber Prince, Legal Advocate
&
Sarah Khan, Lawyer

Summary: We will explore ethical and professional issues that arise in poverty law advocacy, including ethical issues at the start, duration and end of an advocate-client relationship. There will be room for questions and discussion on each topic. Reference materials on each topic are enclosed for workshop reference and future use.

OUTLINE

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    a. Conflict of interest
    b. Legal advice/info & boundaries
    c. Obtaining instructions

2. **Ethics throughout the advocate-client relationship**

    a. Confidentiality and privilege
    b. Client accused of fraud / overpayments
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Code of Ethics and Principles for advocates to better help clients:

This Code of Ethics for advocates appeared in *The Advocacy News*, which is a special edition newspaper produced by the Penticton Advocacy Network, with funding from the Law Foundation of BC
(retyped by Tor Sauder, Student Advocate with Atira, July, 2008).

1. Advocates encourage and support others to advocate for themselves as much as they can.
2. Advocates make sure they are aware of advoc-acy resources, *before* they start to help others.
3. Advocates obtain consent before they act on someone's behalf.
4. Advocates make sure that their own values and belief systems do not interfere with the right of individuals to make their own choices.
5. Advocates place the interests, preferences and decisions of the individual above their own in all advocacy.
6. Advocates avoid any false, misleading or unfair statements or claims about the advocacy process, their role, skills or qualifications.
7. Advocates advise individuals to be honest, informing them about the consequences and risks associated with any planned actions.
8. Advocates inform others of their right to confidentiality, their right to give consent prior to release of information, *and* the legal limitations of confidentiality.
9. Advocates declare any potential conflict of interest in their advocacy activities.
10. Advocates do not behave in ways that could cause fear, discomfort or harm to others.
11. Advocates respect and understand cultural, social and individual diversity.
12. Advocates use respectful and non-labeling language.
13. Advocates maintain their skills and knowledge about advocacy issues.
14. Advocates withdraw, in a professional manner, when their involvement is no longer appropriate or useful.

The following principles can be used as a tool to promote advocacy as a legitimate activity and as good practice. The Penticton Advocacy Network feels that advocacy, when it's well done, contributes to good decisions, better outcomes, and the self-determination of those who participate in the process.

- Advocacy is everyone's responsibility; it is a right and an obligation.
- A commitment to advocacy is based on belief in the dignity, worth and uniqueness of every individual and on his or her right to the best possible life, and on the belief in the capacity of communities to care and respond.
- The advocacy process can be supported by making policies and procedures accessible, and by providing information about complaint and appeal processes and about alternative resources.
- Advocacy will achieve acceptance by being enshrined in the mandates of community organizations and agencies.
- Access to advocacy training and education are essential to creating a climate in which advocacy is welcome in the community.
- Tension, which is inevitable in the advocacy process, can be reduces by creating accessible, non-threatening environments in which individuals can safely express their opinions and concerns .

THE LAW FOUNDATION OF BRITISH COLUMBIA

DRAFT 5

BEST PRACTICES FOR ADVOCATES

This document is intended to serve as a guide to advocates funded by the Law Foundation as to what practices and level of conduct are expected of them. The document does not deal with why these are the best practices to be followed, nor does it explain how to implement these practices. Rather it is meant to provide a touchstone regarding the professional fulfillment of the duties of an advocate. If an advocate does not understand why a particular best practice exists or how to meet the standard expected, they should follow up with their supervisor at work, their supervising lawyer or their program director at the Law Foundation for clarification.

Client Relationships and Professional Responsibility

1. Maintain strict confidentiality regarding all information with respect to a client's file
2. Avoid any conflict of interest regarding a client's file.
3. Treat all clients with respect and courtesy
4. Clients are entitled to have their files handled in a competent, thorough and timely manner
5. Communicate clearly with clients regarding what you can do for them, and what you cannot do for them, in order to mange client expectations and establish boundaries for your professional well being
6. For every full representation file provide the client with a retainer letter setting out what you will be doing, and what you will not be doing, for that client
7. Respond promptly to any communication from clients
8. Keep clients regularly updated on the status of their file
9. Make use of the Community Advocate Support Line lawyer
10. Know what other resources there are, both within your community and elsewhere, to refer clients to
11. Maintain a collection of current Public Legal Education and Information materials to provide to clients

Opposing Parties

1. Treat all opposing parties with respect and courtesy

2. Respond promptly to any communication from opposing parties

Tribunals and Courts

1. Treat all administrative tribunal members and judges with respect and courtesy

2. Ensure that all procedural requirements of any tribunal or court are met

3. Respond promptly to any communication from tribunals, courts or other government agencies

File Management

1. Utilize the Foundation's key precedent documents, or equivalent documents, for full representation files (intake form, file opening checklist, retainer letters, authorizations to release information, consent for disclosure of information and waiver of confidentiality, file closing form).

2. Any consent for disclosure of information form used must include permission for Law Foundation staff or their agents to review the file.

3. Maintain a formalized intake process (what is the process once people contact the office, what happens when they arrive, what are the income criteria, what paperwork is to be completed, what happens at the end of the initial interview)

4. Maintain a bring forward system for all open client files

5. Maintain a conflicts check system for all new clients

6. Maintain a system for identifying and monitoring any limitation periods

7. Have file contents organized chronologically (and in accordance with organization's protocol)

8. Keep and date notes of all substantive conversations and meetings with respect to client files, in particular information received from and advice given to clients

9. Maintain a system for work load management (what types of cases are taken, merit assessment, time allocation parameters)

10. Maintain a system for storing open and closed client files securely and separately

11. Maintain a central file index with a list of all open files and all closed files (containing information such as client name, address, legal matter, file number, date file opened, date file closed)

12. Maintain a list of all open files

13. Ensure the safekeeping of all original documents

14. Maintain a formalized file closing process (criteria for when to close a file, completion of a file closing form, review file with supervising lawyer, file closing letter to client, return of any original documents to client, physical storage of closed files)

Legal Supervision

1. Be familiar with the Foundation's Legal Supervision Requirements, which set out a supervising lawyer's responsibilities in supervising advocates. Bear in mind that the Foundation expects that each advocate should be supervised according to his or her level of competence and experience in each area of law. It is for the supervising lawyer to assess an advocate's competence and experience in each area of law, and to then determine the level of supervision required. A supervising lawyer is responsible for the supervision of an advocate's work in regards to substantive and procedural legal matters.

2. Respond promptly to any communication from your supervising lawyer

3. Hold regularly scheduled meetings with your supervising lawyer, and at other times as needed

4. If you think you should ask your supervising lawyer about something, no matter how small – ask

Professional Education

1. Participate in ongoing professional education (Provincial Training Conference, the Foundation's Education and Training Fund)

2. Participate in PovNet

3. Participate in regional calls with the Ministry of Social Development or meetings of groups such as the Front Line Advocacy Workers, as appropriate

4. Keep current on relevant legislation

Law Foundation

1. Respond promptly to any communication from the Foundation
2. Assist with the provision of activity reports to the Foundation, as required by the Foundation's grant
3. Assist with the provision of monthly statistics to the Foundation, as required by the Foundation's grant
4. Be familiar with the Foundation's Advocacy Program Guidelines
5. Comply with any conditions attached to the Foundation's grant

Legal Services Society

Providing legal aid in British Columbia since 1979

Suite 400
510 Burrard Street
Vancouver, BC V6C 3A8

Tel: (604) 601-6000
Fax: (604) 682-0985
www.lss.bc.ca

LawLINE

November 6, 2007

Manjeet K. Chana
Provincial Training Advocacy Conference

Myth vs. Fact: Conflicts of Interest

1. Myth or Fact: **It is a conflict of interest to represent both parties in the same matter (for example, where you are representing both the landlord and tenant in a residential tenancy matter or a husband and wife in the early stages of a family law matter).**

   Fact. You cannot act for both parties in the **same** matter in light of these considerations:

   - Duty to give undivided loyalty to each client. This duty cannot be met if you determine that the two parties have very different interests;
   - Each party may have information that they do not want to the other to know.

   However, you can act for clients who have opposing interests in **different** matters where:

   - The matters you are representing both parties on are substantially unrelated;
   - Both parties are informed you will act for each of them and they both consent;
   - You do not have confidential information about one of them that might reasonably affect the representation of the other.

2. Myth vs. Fact: **It is a conflict of interest to act for multiple clients who appear to be on the "same side" (eg. co-tenants in a residential tenancy matter or a spouse and his or her c/l spouse in a child protection matter).**

   Myth. You may act for two or more clients who may be "on the same side" as long as:

   - You tell each client that you have a duty to give undivided loyalty to each of them and each of them gives their informed consent (in writing, if possible) for you to represent both of them;

- You tell each client that if you get confidential information from one of them, it will have to be disclosed or told to the other;
- You get each client's informed consent for what to do in case you later get information from one client that is relevant to you representing both clients. Your clients agree that if this situation arises, you either (1) cannot disclose the information to the other client and you withdraw from representing both or (2) they agree that you must disclose the information to the other client and continue acting for the clients jointly.

3. Myth vs. Fact: **It is not a conflict of interest to represent a party in a matter where the opposing party is a former client of yours (eg. a wife that you formerly represented in a family law dispute is now a client of another advocate on the other side of your current client, the husband, in the same ongoing dispute);**

Myth. The correct principle is: if you have acted for a client ("A") in a matter, you should not act against "A" in the same or any related matter because you may have confidential information that might affect your representation of your current client ("B"). The exceptions to this rule are:

- "A" is told that you are going to be acting for "B", who is someone adverse in interest to him/her in the same or related matter and "A" gives you informed consent to do so; or,
- your representation of "D", a new client, is substantially unrelated to the representation of "C", your former client, and you do not possess confidential information arising from representing "C" that might reasonably affect the representation of "D".

4. Myth vs. Fact: **It is a conflict of interest to act for a client where his or her interest in a matter competes with a personal or financial interest you have or that of a third party with whom you have a relationship (eg. a family member of yours).**

Fact. Generally speaking, a legal advocate must, if he or she has a financial interest in a matter they are conducting for a client, adopt the position of saying "I can be your business partner or I can be your legal advocate but I cannot be both". Note that a

transaction of sale or purchase between a legal advocate and client will be upheld if the legal advocate can prove:

- that he or she made full disclosure to the client of all relevant information known to him or her;
- that the price was fair; and
- that the client was advised by an independent solicitor to whom all circumstances were disclosed

5. Myth vs. Fact: **When you are sharing an office space with another advocate, it is not a conflict of interest to act on behalf of a client who has an opposing interest to that of a client of another advocate.**

Myth. It is a conflict of interest for an advocate to represent a client whose interest is adverse to a client of another advocate in a space-sharing arrangement. One exception to this is where each advocate who is sharing space discloses in writing to all of his or her clients:

- that an arrangement for sharing space exists;
- the identity of all the advocates who make up the office acting for the client, and;
- that advocates sharing space with the office are free to act for other clients who are adverse in interest to the client.

6. Myth vs. Fact: **A conflict of interest can arise as a result of an advocate transferring from one advocacy office to another.**

Fact. A conflict of interest exists if you transfer from one office to another office and:

- either you or your new office knows or later learns that your former office and your new office each represent a client in the same matter;
- the clients have interests that conflict (opposing co-tenants/co-defendants); and,
- you actually have relevant information about the case that may result in prejudice or unfairness to your former client if the information is disclosed to your new office.

In this situation, your new office has to stop acting for its client unless 3 criteria are met:

- the former client consents to your new office continuing representation; or
- your office can show that it is in the interests of justice that your new office's representation of the client continue; or
- your new office has taken reasonable steps to ensure that there will not be disclosure of the former client's confidential information to anyone else at your new office. This means you cannot participate in any way in your new office's representation of the new client unless the former client consents.

This does not apply to a government employee transferring from one department, ministry or agency to another.

NAME OF ORGANIZATION
ADDRESS

PERSONAL AND CONFIDENTIAL

Date:

CLIENT ADDRESS:

Dear CLIENT:

Re: DESCRIPTION OF LEGAL MATTER

As we discussed during our meeting, before we could agree to assist you in this matter, we had to investigate whether this assistance could adversely affect existing or former clients' interests or if there might be some other reason that we would be unable to adequately represent your interests.

We have performed a conflict of interest check and found that we do indeed have a conflict of interest in this case. Unfortunately, we can therefore not assist you.

Please be aware that whatever claim you have may be barred by the passage of time. Since time limitations may be critical in your case, we recommend that you immediately contact a lawyer or another agent for assistance regarding this matter.

Yours truly,

NAME OF ORGANIZATION
ADDRESS

PERSONAL AND CONFIDENTIAL

Date:

CLIENT ADDRESS:

Dear CLIENT:

Re: DESCRIPTION OF LEGAL MATTER

After considering the facts and legal issues involved in your case, we regret that we cannot provide further assistance. As we discussed in our meeting of _____:

SET OUT REASONS YOU CANNOT ASSIST THIS PERSON WITH THEIR PROBLEM
1.
2.
3.

This letter is not intended to be an opinion about the merits of your case. In declining to assist you, we are not expressing an opinion as to whether you should take further action in this matter.

You should be aware that there may be strict time limitations within which you must act in order to protect your rights. Failure to begin your lawsuit by filing an action within the required time may mean that you could be barred forever from pursuing your action. Therefore, you should immediately contact a lawyer to obtain advice about any deadlines and to obtain legal representation. We cannot be responsible for your meeting any outstanding deadlines or limitation dates.

Yours truly,

1. Sample file management forms (also in electronic form*)
    - File Opening Checklist
    - File Opened
        - Intake Form*
        - Retainer Letter*
        - Authorization/Waiver of Confidentiality*
        - Medical Authorization*
        - Consent to Disclosure/LF funded groups*
    - File Not Opened - declined
        - Declined for conflict*
        - Declined for other reasons*
    - File Closing Form
    - Other sample forms
        - Bring Forward Form
        - Telephone Log Sheet
        - Activity Sheet
        - Volunteer activity sheet
        - Brief service
        - Clients with income assistance issues
2. 5 File Management Tips
3. Ownership of File Contents
4. Myths vs Fact: Conflict of Interest

File Opening Checklist

- ☐ Intake Form Completed
- ☐ Conflict Check Completed
- ☐ Limitation Dates Checked
- ☐ Retainer Letter Sent
- ☐ Authorizations to Release Information to an Advocate Obtained
- ☐ Consent for Disclosure of Information and Waiver of Confidentiality

Date: _____

NAME OF ORGANIZATION
ADDRESS

INTAKE FORM

Last Name: _____ Middle Name: _____

First Name: _____

Phone-Home: _____ Phone-Work: _____

Phone-Cell: _____

E-mail Address: _____

Birth date: _____ Birthplace: _____

Marital Status: _____

Alias or other names you are known by: _____

BC Medical Card #: _____

Driver's License #: _____

S.I.N.: _____

Status Card #: _____

If you are of Native Ancestry, please indicate the following:

- ☐ Status
- ☐ Non-Status
- ☐ Métis/Inuit
- ☐ Off Reserve
- ☐ On Reserve

Band Name: _____
Nation/Ancestry: _____

If applicable, name the opposing parties in this matter and their relationship to you:

_____

_____

_____

If applicable, name the opposing lawyer or advocate: _____

Briefly give an overview of your problem:

Signature: _____

atira WOMEN'S RESOURCE SOCIETY *Atira Women Resource Society Legal Advocacy Program* **CLIENT INTAKE FORM** Date: _____

Full legal name: _____ Other names used: _____ (circle preferred name)

DOB: _____ Telephone: (H) _____ (C) _____ (O) _____ Fax: _____

E-mail: _____ Are phone messages ok? Y / N, comments: _____

Home address: _____

Other address (specify): _____

Which address should correspondence be sent to? ☐ Home ☐ Other ☐ E-mail Fax: _____

Source of Income: ☐MHSD ☐PPMB ☐PWD ☐CPP ☐Employment, employer: _____ Other _____

Housing: ☐Homeless ☐Shelter/Transition ☐SRO ☐BCH ☐Market rent ☐AWRS _____ ☐APMI _____ ☐Other _____

Other Parties: _____ ☐**Conflict check done** ☐ **Any Applicable consent forms complete**

Area of Law: _____ **Any Limitation periods:** _____

Legal Issue(s): _____

Is there a current and / or past (circle applicable circumstance) issue of violence? ☐Yes ☐ No ☐ Unknown

Safety Plan: _____

Check if applicable: ☐Self-identified Aboriginal ☐Status ☐Treaty ☐Bond Member First Nation _____

Check if applicable: ☐Canadian Citizen ☐Landed Immigrant ☐Work Permit ☐Refugee ☐Other _____

If Applicable: Marital status: ☐Single ☐Common law ☐Married ☐Separated ☐Divorced ☐Widowed Spouse's Name _____

If Applicable, Children:

Name	Date of Birth	Who do they live with?

Other Contacts:

Name:	
Relationship to client:	
Phone:	Alt #:
Fax:	Email:
Address:	

Name:	
Relationship to client:	
Phone:	Alt #:
Fax:	Email:
Address:	

Name:	
Relationship to client:	
Phone:	Alt #:
Fax:	Email:
Address:	

Other Contacts: _____

Other Important Information:

_____

_____

_____

Special needs: Language _____ Other: _____

Do you have legal aid? ☐ Yes ☐ No If not, are you eligible for legal aid? ☐Yes ☐No

Are you currently represented by a lawyer for this legal issue? ☐ Yes ☐ No Lawyer name/Contact info: _____

Referral source: _____

Client Goal(s) in this issue: _____

_____

_____

To Do:

☐ _____ ☐ _____

☐ _____ ☐ _____

☐ _____ ☐ _____

☐ _____ ☐ _____

☐ _____ ☐ _____

☐ _____ ☐ _____

☐ _____ ☐ _____

☐ _____ ☐ _____

☐ _____ ☐ _____

☐ _____ ☐ _____

Outcome: ☐Resolved prior to hearing ☐Client abandoned ☐No legal recourse / unlikely to succeed ☐Client self-resolved ☐Internal review request / tribunal hearing ☐Court proceeding ☐Advice/Information given ☐Outside jurisdiction ☐Other _____ Referrals to: _____

Other comments: _____ Date closed: _____

Any after care / file closure plan: ☐ Can contact program again if further assistance needed ☐ Other:

_____

16

TIME RECORD

CODES FOR TIME RECORD:

Acc - Court or other Accompaniment
PC - Personal Conference
TC - Telephone Conference
P - Preparation
R - Research
Tr - Travel
Fx - fax
DD - Document Drafting
F - Filing
E- Email
Rep – Representation
M – Mail sent

DATE: 2012	CODE	DESCRIPTION	TIME

NAME OF ORGANIZATION
ADDRESS

CONSENT FOR DISCLOSURE OF INFORMATION AND WAIVER OF CONFIDENTIALITY

I give my permission to NAME OF ORGANIZATION for my file to be reviewed by designated employees of NAME OF ORGANIZATION on a need to know basis.

I give my permission to NAME OF ORGANIZATION to discuss and disclose all relevant information regarding my file with any organization or individual deemed necessary by NAME OF ORGANIZATION for the proper conduct of my file.

I understand that NAME OF ORGANIZATION receives funding from the Law Foundation of British Columbia. In order for the Law Foundation to evaluate the effectiveness of the advocacy programs it funds, Law Foundation staff or their agents may request to review your file. This review would be solely to evaluate the services NAME OF ORGANIZATION provides and information would be kept in the strictest confidence. I give my permission to NAME OF ORGANIZATION to allow Law Foundation staff or their agents to review my file.

Name: _____

Signature: _____

Date: _____

NAME OF ORGANIZATION
ADDRESS

To Dr. NAME
ADDRESS

MEDICAL AUTHORIZATION

You are hereby authorized to provide NAME OF ADVOCATE with any and all information and opinions that they may require regarding my present or past physical condition and treatment, together with your prognosis, and to allow them to see or copy any x-rays, records, or other documents or instruments that you may have regarding my past or present condition or treatment.

You are not to disclose any information concerning myself to any persons other than NAME OF ADVOCATE, without written authority from me to do so.

All prior authorizations of disclosure are hereby cancelled. I hereby waive any privilege I have to the said information.

Name: _____

Signature: _____

Date: _____

S.I.N.: _____

Birthdate: _____

NAME OF ORGANIZATION
ADDRESS

AUTHORIZATION AND WAIVER OF CONFIDENTIALITY

To: **NAME AND ADDRESS OF ORGANIZATION OR INDIVIDUAL YOU WANT TO OBTAIN INFORMATION FROM**

This is to notify you that I, _____ do hereby authorize the person(s)/organization listed below to act as my representative.

You are hereby authorized to release any and all information regarding my case, including that deemed confidential, as may be requested.

My authorized representative is: **NAME OF ADVOCATE** _____

Signature: _____

Date: _____

S.I.N.: _____

Birthdate: _____

NAME OF ORGANIZATION
ADDRESS

Date:

CLIENT'S NAME
ADDRESS

PERSONAL AND CONFIDENTIAL

Dear CLIENT:

Re: DESCRIPTION OF LEGAL MATTER

You have asked the NAME OF ORGANIZATION to assist you with the above matter. This letter sets out the terms and conditions for our assistance to you.

YOUR LEGAL PROBLEM

Describe why the client has come to you for legal assistance

WHAT WE HAVE AGREED TO DO

1.

WHAT YOU HAVE AGREED TO DO

You have agreed to do as much as possible to assist us with your own case. This will include:

1. informing us promptly of any change of address or other contact information;

2. informing us promptly of any new facts or changes in circumstances that may affect your case; and

3. giving us copies of all documents in your possession, or that you may be able to obtain, that may be necessary or helpful for your case.

CONFIDENTIALITY

NAME OF ORGANIZATION will keep your case confidential unless you authorize us to release information. However, you specifically authorize us to do the following:

1. To disclose to the co-petitioners, if any, all aspects of the case as are necessary in order properly pursue the case.

2. To discuss within our office, or with other appropriate advocacy services, details of all aspects of your case as may be necessary for the proper conduct of your case.

3. If this is a case which raises an issue of concern to low income people throughout the province, to discuss the case with other lawyers, advocates and community groups.

FILE

Your file and all its contents belong to NAME OF ORGANIZATION. Any papers or documents that you give us will be returned to you at the conclusion of the case, if requested. However, the rest of your file belongs to NAME OF ORGANIZATION and will remain with us.

WITHDRAWAL BY YOU

You are free to end our services for any reason and at any time by writing us a letter to that effect.

NAME OF ORGANIZATION WITHDRAWAL

We also have the right to terminate our services at any time if we have good reason which includes, but is not limited to, the following:

1. You fail to make full disclosure of all facts and all documents (both for and against you) relating to your problem;

2. You fail to keep us informed of your current contact information;

3. We are of the opinion that your case no longer has a reasonable likelihood of success;

4. You fail to co-operate with us regarding any reasonable request or to accept our advise;

5. You have misrepresented facts or failed to disclose important facts;

6. You ask us to do something unethical or illegal;

7. If there are threats, inappropriate language or behavior directed at advocates, staff, or other agencies including government staff or agencies;

If there is anything in this letter that you do not understand or if you have any questions about the services we will be providing you, please contact us.

Yours truly,

ADVOCATES NAME
NAME OF ORGANIZATION

PERSONAL & CONFIDENTIAL

Reply to: Amber Prince, Legal Advocate
Direct: 604 331 1407 ext 105
E: legaladvocate@atira.bc.ca

atira
WOMEN'S RESOURCE SOCIETY

T 604 331 1407
F 604 688 1799
E office@atira.bc.ca

101 East Cordova St.
Vancouver, BC V6A 1K7

October 24, 2012

Attention:

Vancouver, BC.
Delivered in hand & via email

Dear,

Re: Your Application for Dispute Resolution with the Residential Tenancy Branch (File #:)

You have asked me, in my capacity as Legal Advocate with Atira Women's Resource Society (Atira), to assist you with the above matter. This letter confirms the level of assistance I can provide in this matter, and outlines your rights and responsibilities as well as other important information as we work on your case together.

YOUR LEGAL PROBLEM

You have asked for my assistance with preparing for and attending your upcoming Residential Tenancy Branch hearing set for:

IMPORTANT TIME TIMITS

You should be aware that your evidence in this case must be submitted by:

Should you disagree with the decision of the Residential Tenancy Branch, you have a right to appeal that decision to the BC Supreme Court within 60 days of the date of the Residential Tenancy Branch decision. In the event you are unsuccessful in your Residential Tenancy Branch hearing, I recommend you seek the assistance of a lawyer as soon as possible to determine whether you can appeal the decision.

WHAT I HAVE AGREED TO DO

I have agreed to assist you with the following:

1. To assist you with preparing a submission to the Residential Tenancy Branch including applicable law and evidence per the rules and requirements set out by the Residential Tenancy Branch;

2. to provide legal information, general guidance and advice on this matter, in my capacity as a Legal Advocate;

3. to attend, as your legal advocate, at the Residential Tenancy Branch hearing set for November 1, 2012, and make submissions at the hearing on your behalf as permitted by the Dispute Resolution Officer at the hearing; and

4. to debrief the hearing with you and inform you of any applicable next steps.

5. My legal advocacy services are funded by the Law Foundation of British Columbia for the purpose of providing advocacy for low-income / marginalized women. Therefore, Atira's legal advocacy services are provided at no charge.

6. I will assist with your case in my capacity as a legal advocate and to the best of my ability. However, it is impossible to predict or guarantee any particular outcome in your case.

YOUR ROLE & NEXT STEPS

It is important that you also provide me with any necessary / relevant information about your case. Here is what I will need from you to continue to assist you to the best of my abilities:

1. That you inform Atira as soon as possible of any change of address or other contact information;

2. that you inform me promptly of any new facts or changes in circumstances that may affect your case; and

3. that you provide me with copies of all documents in your possession, or that you may be able to obtain, that may be necessary or helpful for your case.

4. That you provide me with specific information, including:

   (a) Your tenancy agreement with the landlord;

   (b) The amount of the security deposit you paid and any proof of payment

25

(c) Details and any proof that you served the landlord with your Application for Dispute Resolution.

(d) All photographic evidence to support your Residential Tenancy Branch claim;

(e) Names and contact information of all potential witnesses.

(f) Any other information you believe is relevant to your Residential Tenancy Branch matter.

CONFIDENTIALITY

Atira will keep your case confidential unless you authorize us to release information. However, please be aware that:

1. Your case may be discussed within Atira, only to the extent necessary, for the proper conduct of your case.

2. Your case may be discussed with a lawyer, only to the extent necessary, for the purpose of obtaining legal advice on your case.

3. Aspects of your case may be discussed in a non-identifying manner with other lawyers, advocates and community groups, if your case raises important legal principles or issues.

4. Non-identifying information about your case may be recorded, as required, for statistical purposes.

5. There is a small possibility that information in your file could be subpoenaed to court. In this unlikely circumstance Atira would oppose the release of your file to court. There is law to support Atira's position but we cannot guarantee any particular outcome should your file information be subpoenaed to court.

6. In the event you disclose information that a child is in danger or that you are considering harming yourself or another person, Atira could be required by law to release that information without your consent.

FILE

Your file and all its contents in Atira's possession will be housed securely by Atira. Copies of any papers or documents that belong to you and are in your file will be provided to you within a reasonable time period upon your request.



Please note that we may be required by law to retain a copy of some of your file contents for a certain time period. Certain documents such as a legal advocate's own notes belong to Atira.

WITHDRAWAL BY YOU

You are free to end my legal advocacy services, or Atira's services generally, for any reason and at any time by writing us a letter to that effect.

ATIRA WOMEN'S RESOURCE SOCIETY WITHDRAWAL

We also have the right to withdraw from your case for good reason. Those reasons include:

1. We determine that our continued involvement in your case will place us in a conflict of interest.

2. It is determined that we are not competent to handle your case or it is no longer within our jurisdiction.

3. You take a position which is solely to harass or maliciously injure another

4. You do not keep us informed of your current contact information;

5. You do not provide adequate instructions in order to proceed with your matter.

6. You do not accept and act on our advice on a significant issue;

7. You have misrepresented facts or failed to disclose important facts;

8. You ask us to do something unethical or illegal;

9. There is a serious loss of confidence between you and myself and/or Atira.

If there is anything in this letter that you do not understand or if you have any questions about the legal advocacy services I can provide please contact me.

Sincerely,

Amber Prince
Legal Advocate

Memo: Confidentiality and Privilege for Advocates

- *by Robyn Gifford, law student volunteer with Pro Bono Students Canada, for Atira Women's Resource Society's Legal Advocacy Program, November 7, 2012*

Summary

You asked me to consider whether communications between advocates and clients are protected by privilege.

Issues

1. Are communications between advocates and clients covered by privilege?

2. Do legal advocates enjoy solicitor-client privilege?

Analysis

1. Are communications between advocates and clients covered by privilege?

Within the common law there is a fundamental principle that all relevant evidence is admissible until proven otherwise.[1] While there are several established common law and statutory exceptions to the general duty to give evidence, including solicitor-client privilege and spousal communications, these 'class' exemptions are few in number.

As a result, for communications not covered by the blanket exemptions, there is a *prima facie* presumption of admissibility. The party wishing to establish privilege therefore bears the onus of establishing privilege on a case-by-case basis. While in theory it is possible for the court to find a new 'class' exemption, this seems highly unlikely given the jurisprudence of the Supreme Court of Canada. Instead, the Supreme Court favours a more flexible approach, in which the particular facts of each case are considered.[2]

Privilege is therefore assessed on a case-by-case basis using an application of the four-part "Wigmore" test:[3]

1. The communications must originate in a *confidence* that they will not be disclosed.
2. This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
3. The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*

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[1] *R v Gruenke* [1991] 3 SCR 263 at 3; *M(A) v Ryan* [1997] 1 SCR 157 at para 19.
[2] *Gruenke* at 33; *Ryan* at para 21. See also *Globe and Mail v Canada (Attorney General)*, 2010 SCC 41 at para 22.
[3] The test was used by the Supreme Court of Canada in cases following *Slavutych v Baker* [1976] 1 SCR 254. The test originated in JH Wigmore, *Evidence in Trials at Common Law.*

4. The *injury* that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of litigation.

As explained by Lamer in *Gruenke*, the Wigmore criteria are not "carved in stone," but instead "provide a general framework within which policy considerations and the requirements of fact-finding can be weighed and balanced on the basis of their relative importance in particular case before the court."[4]

Overall, the Wigmore test involves the balancing of divergent social interests, such as the right to privacy on the one hand with the duty to ensure that courts have access to all relevant evidence on the other. Because of the fundamental common law duty to give evidence, privilege will only be recognized in rare instances in which it serves the greater public good. As a result, the mere fact that the communication was made in confidence, alone, is not enough to establish privilege.

In *M(A) v Ryan (1997)*, the Supreme Court of Canada provided a very useful discussion of Wigmore's four criteria. In *Ryan*, the plaintiff underwent psychiatric treatment with the defendant. She later accused him of sexually assaulting her and sued for damages. As a result of the assault, she sought treatment with a second psychiatrist. During the course of the litigation, the defendant sought the records of the second psychiatrist, who claimed privilege.

First step: the communications must originate in confidence

The first requirement is that the communications originated in confidence. In *Ryan*, the Supreme Court explained that the mere possibility that the communications might have to be disclosed in the future does not change the fact that they were made in confidence. In this case, for example, even though the patient feared that the doctor's notes might be disclosed in the course of future litigation, this does not change the fact that the communications were made in confidence. This step of the Wigmore analysis, therefore, does not require an absolute guarantee of confidentiality.[5]

Second step: confidentiality must be essential to the relationship

This step requires the person seeking privilege to demonstrate that confidentiality is necessary for the relationship. In *Ryan*, the court found that confidentiality was essential to both the general psychiatrist-patient relationship, as well as to the specific individuals in this case. Without the ability to speak in confidence, the psychiatrist would not have been able to help the plaintiff. In other words, confidentiality must be a "condition precedent" to the communications.[6] Moreover, the fact that the parties in the relationship feared potential future disclosure does not negate the essential importance of confidentiality.[7]

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[4] *Gruenke* (1991) SCC. This case involved the question of whether privilege exists for religious communications.
[5] *Ryan* at para 24.
[6] *R v National Post*, 2010 SCC 16 at para 56.
[7] *Ryan* at para 25.

In most cases, the first two steps (the existence and importance of the promise of confidentiality) will easily be met. The bulk of the analysis will thus be in step 3 and in particular step 4.[8]

Third step: the relationship must be one that should be sedulously fostered for the public good

This step involves an assessment of the nature of the relationship and whether it should be deliberately and consciously fostered in the public interest. In *Ryan* the court found that there was a "transcendent public importance" in assisting victims of sexual abuse. The court explained that not only do victims suffer serious trauma requiring professional assistance, but it is in society's best interest to ensure the "mental health of the citizenry."[9] Therefore, courts will consider both the interests of the specific individuals involved, as well as the interests of society as a whole.

In another example, *CFCSA & DMW and others (2005) BC Provincial Court*, a case involving a social worker being compelled to testify in litigation involving her client, the court granted privilege and allowed the social worker not to reveal confidential information. The court emphasized in particular the role that the social worker played as an advocate throughout legal proceedings involving her client. In the opinion of the court, such a relationship should be 'sedulously fostered', particularly consider the severe cutbacks to legal aid in British Columbia.[10]

Fourth step: balancing divergent interests

Finally, the court is required to balance the potential benefits of confidentiality on the one hand, with the deleterious effects of denying the court access to the full record of evidence. Having determined the importance of the relationship in step three, the court must consider the potential effects of denying privilege for communications of this kind in the future.

In terms of the benefits of privilege, courts will consider both the short-term interests of the specific parties, as well as the long-term consequences for society as a whole. In *Ryan*, for example, the court was extremely concerned that a lack of privilege would discourage others suffering from trauma from seeking mental health treatment. Also worrying for the court if disclosure was required, were the potential violations of privacy and the "inequalities which may be perpetuated by the absence of protection."[11]

While considering the benefits of privilege, the Court in *Ryan* emphasized the importance of *Charter* values in the development of the common law. *Charter* interests at issue in this particular case included privacy affirmed by s. 8 and equality under the law in s. 15.[12] In terms of s. 15, the court was concerned that by forcing disclosure, they would ensure that the plaintiff is doubly victimized: first by the sexual assault, and second, by the emotional cost of accessing the legal system for redress.[13] Similarly, in *Guernke*, while conducting the Wigmore analysis for

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[8] 1654776 Ontario v Stewart and The Globe and Mail (2012) ONSC at para 35; National Post at para 59.
[9] *Ryan* at para 27-28.
[10] *CFCSA & DMW and others* (2005) BC Provincial Court.
[11] *Ryan* at para 29.
[12] *Ryan* at para 30.
[13] *Ryan* at para 30.

religious communications, the Supreme Court placed heavy weight on both freedom of religion and freedom of expression.[14]

These potential benefits must then be weighed against the dangers of non-disclosure and the possibility of incorrectly determining the outcome of the litigation.[15] The "weighing up" also includes a consideration of the nature and seriousness of the alleged wrongdoing, the probative value of the evidence, and any potential threats to public safety.[16] In other words, the court must determine whether the public interest of respecting confidentiality outweighs the goal of determining the truth of the specific matter before the court. Overall, the court in *Ryan* explained that this balancing process is an exercise of "common sense and good judgment." The court also indicated that privilege is less likely to be protected in a criminal case because of the heightened public interest of preventing injustice.[17]

Result of case-by-case privilege

The court in *Ryan* explained that, unlike jurisprudence from the United States, they will not follow an all-or-nothing approach to disclosure. Instead, in some cases partial or conditional disclosure may be appropriate to prevent an unjust result. The court thus explained that: "disclosure will be ordered only where clearly necessary and then only to the extent necessary." For the majority in *Ryan*, the potential for injustice meant that partial disclosure was required in this case.[18]

Courts can thus order partial disclosure for certain documents, or require conditions attached to disclosure. In *Ryan* while privilege protected the psychiatrist's notes to herself, the court ordered disclosure of notes and records of consultations between the psychiatrist and the plaintiff. The court also attached multiple conditions on the disclosure, thus limiting who could see and copy the documents.

Overall, there is uncertainty about when and under what circumstances privilege will protect communications. Even if privilege protects certain documents, it is still possible for other communications not be protected by privilege. Moreover, it seems highly unlikely that the court would establish class privilege for advocates, given their reluctance to do so for psychiatrists in *Ryan*. Instead, the Supreme Court favours a case-by-case analysis that is sensitive to both the individual circumstances, as well as the particular documents at issue in each case.[19]

2. Do legal advocates enjoy solicitor-client privilege?

Solicitor-client privilege is a common law 'class' exception to the general duty to disclose evidence. The privilege arises where legal advice is sought from a professional legal advisor in

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[14] *Guernke* at 25.
[15] *1654776 Ontario v Stewart and The Globe and Mail*, 2012 ONSC 1991 at para 37; *Ryan* at para 30.
[16] *National Post* at 61; *Globe and Mail* at para 37.
[17] *Ryan* at para 32.
[18] *Ryan* at para 32.
[19] *Ryan* at para 37.

his or her capacity as such. The privilege will then protect all communications within that professional relationship (with a few exceptions). Solicitor-client privilege can also extend to third-party communications if the third party is an agent of either the solicitor or the client.

To determine whether a third party is acting as an agent, courts have taken a 'functional approach'.[20] Courts thus look to the true nature of the function that the third party was retained to perform: the function must be essential to the existence, maintenance, or operation of the solicitor-client relationship.[21] A third party who communicates information between the solicitor and client, or an expert hired by the solicitor to interview the client, for example, would both be considered agents. However, someone hired to gather outside information would not be considered to be an agent, because they are not essential for the solicitor-client relationship itself.

In theory, therefore, legal advocates working under supervising lawyers could be considered agents and their communications would thus be protected from disclosure. Such a determination would presumably depend on the closeness of the relationship between the supervising lawyer and the client.

There are also policy reasons for recognizing advocates as agents. In *R v Gruenke*, for example, the Supreme Court repeatedly stressed that solicitor-client privilege was established because the relationship and resulting communications were "inextricably linked" with the "effective operation of the legal system."[22] The Ontario Court of Appeal similarly argued in favour of recognizing third parties as agents as a mechanism of promoting access to justice. The court explained that doing so "allows the client to use third parties to communicate with counsel for the purpose of seeking legal advice and giving legal instructions in confidence."[23]

Conclusion

Overall, it seems possible that legal advocates working under the supervision of a lawyer would be protected under solicitor-client privilege or be granted a case-by-case common law exemption. Either way, such a determination would undoubtedly depend on the specific facts of the case, including the nature of the relationship with both the client and the supervising lawyer, the content of the communications, and a weighing of larger legal and societal interests.

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[20] *General Accident Assurance Company v Chrusz*, 1999 CanLII 7320 (ONCA) at para 121.
[21] *General Accident Assurance* at para 120, 126. See also David Paciocco and Lee Stuesser, *The Law of Evidence* (6th Ed) (Irwin Law, 2011), at 238.
[22] *Gruenke* at 32.
[23] *General Accident Assurance* at para 126.

Dealing with the Difficult Client

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Dealing with the Difficult Client

Carole Curtis

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Dealing with the Difficult Client

Carole Curtis

October 2003

1. Introduction

Lawyers often act for or deal with clients who are difficult. Dealing with a difficult client is one of the most challenging parts of legal practice and requires care, attention and planning. This analysis assumes that you have decided to act for this client and that you have identified the client as a difficult client.

Difficult is, of course, a relative term, that is, who is seen as a difficult client may be a function of the area of law you practice in, or the other clients you act for. Often clients are seen as difficult in comparison to the other clients in the lawyer's practice. Also, there's no doubt that the personal traits of the lawyer affect the lawyer's ability to deal with difficult clients. Some of us are just more tolerant than others. Some lawyers have a rescuer fantasy, which may increase the number of difficult clients they represent, and may affect the way in which they represent the difficult client.

As well, some lawyers have decision-making authority about the clients they represent, and as a result, have control over which clients they act for. Obviously, this allows a lawyer to act for fewer difficult clients, or even perhaps no difficult clients. However, that is not the case for most lawyers.

2. Why should you be concerned about the Difficult Client?

The difficult client is a very hard customer to satisfy. They can be frustrating, demanding, even upsetting. They can ignore your advice. They can treat you badly, or (even worse) treat your staff badly. They can be unhappy with the progress of the case, no matter how hard you have worked or how good the results are. In short they can be unreasonable.

The difficult client is more likely to do the three things that distress lawyers most:

- The difficult client is more likely to not pay the lawyer.
- The difficult client is more likely to complain to the Law Society about the lawyer.
- The difficult client is more likely to sue the lawyer for negligence.

It is important, in dealing with the difficult client, to protect yourself at all times, and to protect yourself at the same time that you are trying to serve your client.

3. The Basic Three Steps of your Involvement with the Difficult Client

a. Whether or not to Act for the Difficult Client

Lawyers can, under certain circumstances, refuse to act for a particular client. This is less difficult for lawyers who practice in large urban centres, where the client can usually find another lawyer, and is less difficult for lawyers who restrict their practice to certain areas of law.

With time, the lawyer can tell in the first interview if the client is going to be a difficult client (this is known as trusting your instincts). Often, the lawyer can even tell on the telephone that the client is likely to be a difficult client. This possibility is an added incentive for making your own appointments with new clients (rather than allowing the secretary to make your appointments), so that you have the opportunity to speak to every new client yourself on the telephone before they come in to see you. You might also consider not even offering a consultation to a client you assess as a difficult client in the initial telephone contact.

These are some questions to osk early in your contact with the client that will help you to identify a client who may be a difficult client:

- Am I the first lawyer dealing with this particular problem for you?
- How many lawyers have you consulted or retained about this problem?
- Why did you leave your previous lawyer(s)?
- Who are your previous lawyers?
- Can I talk to your previous lawyer(s)?
- What stage is this problem at (particularly if the problem is in litigation)?
- What are your expectations about the resolution of this problem?
    - What are your expectations about time to conclude?
    - What are your expectations about result?
    - What are your expectations about cost?

b. How to deal with the Difficult Client during the Retainer: 5 Tips to Stay Sane and Stay in Practice

i. Understand your role

Your role as lawyer is usually pretty straightforward, but may appear to be less clear with a difficult client. Your role is to analyze a given situation and offer a solution to the problem presented, or a means of achieving the goal the client has presented. Sometimes, there are several possible solutions or means, all of which should be offered to the client. Don't forget

that "do nothing" is always a possible solution (although that solution may have outcomes that are unacceptable to the client). The lawyer's role then is to advise on the consequences of the different courses of action. It is the client's job to make decisions about which course of action to follow, not the lawyer's. After all, it is the client's life, or the client's business, or the client's estate, or the client's litigation.

Some categories of difficult clients (dependant clients, for example) are often totally unwilling to make decisions about their legal issues and want the lawyer to do that. DO NOT DO IT. Let some other influential person in their life help the client with the decision. Your job is to help the client understand the choices.

ii. Protect Yourself Throughout

Document everything you possibly can, including telephone calls, voice mail messages and e-mail messages. The verb "document" means "to record in a document; to provide with citations or references to support statements made".[1] Confirm the client's instructions to you in writing, and confirm your instructions to the client in writing. It is also necessary to include, in writing, the possible consequences of various courses of action the client may be contemplating.

If you deal with this client or their work electronically, save messages and instructions in your usual way as part of the permanent record of the file (which may be electronic or on paper). The difficult client has a way of turning on the lawyer more often and with more damaging consequences than other clients.

Documenting (in this context) means recording sufficient details to assist you in a future disagreement. The record you make is not of any use if there are insufficient details to assist you. This means recording at least the following:

- the client's name,
- the file name,
- who the contact was with,
- the date of the contact,
- the nature of the contact (telephone call, meeting, voice mail, e-mail, etc.),
- how long the contact took,
- the details of the contact (who said what, including what the lawyer said), and
- any instructions given (by the client or by the lawyer) during the contact.

[1] Katherine Barber, ed., The Canadian Oxford Dictionary, Toronto: Oxford University Press. 1998. p. 409.

Practice management software programs can make this task less cumbersome and more reliable than scraps of paper the lawyer scribbles on.

It may also be wise to discuss the advice you give this client with a colleague, including discussing the fears you have about the client.

In notes of meetings or conversations with the client, be sure to record the information and advice you gave the client, not only the information the client gave you. Where there is a dispute between lawyer and client, this area may, in fact, be the biggest area of disagreement, and is also among the least documented. In litigation between the lawyer and the client, where there is disagreement about the information provided or the legal advice given to the client and that advice is not documented, courts have often preferred the evidence of the client on this issue.

Practice management software is undoubtedly the most powerful tool for keeping track of all the work that has to be done on a legal matter. The two most widely used practice management products - Amicus Attorney (www.amicusattorney.com) and TimeMatters (www.timematters.com) - are powerful law-office specific tools that allow you to collect and organize information around a single matter. These "practice management systems" contain, in one database, almost all the information you need to handle files and run a law practice. They provide functionality that was often found in separate, software programs, including time and billing accounting, automated document generation, document management. When used properly, a practice management software unifies all the data about a client, potential client or matter into a single point of reference. You can instantly and easily see, in one place, every letter, e-mail, appointment, to do and so on.

iii. Be Calm, Be Patient, Be Clear

Do not let the difficult client turn you into the difficult lawyer, or the unhappy lawyer, or the depressed lawyer (or worse, the yelling lawyer, the drinking lawyer or the swearing lawyer). It will require more patience than usual to deal with this client. If you find you are becoming the difficult lawyer, perhaps it is time to transfer the file to another lawyer.

Be explicit, and be very clear with the client, about everything. The more information given to the client in writing, the less likely there will be misunderstandings. It is also advisable to give the client this information early on in the retainer. Included are examples of information given to clients early on, to help avoid conflict in the retainer (see schedules attached, Administrative Information for New Clients and Billing information for New Clients, which clients are asked to read in the reception area before they meet with lawyers in this law firm).

Be clear with the client about the expectations you have of the client regarding the client's treatment of you and treatment of your staff.

Be sure the client understands whom to deal with on which issues (for example, who to call to get certain information, when they need to speak to the lawyer, when they can deal with staff). Many difficult clients want to deal only with lawyers, which is expensive, not very efficient and not often necessary (see Managing Expectations, below).

iv. Include your Staff in the Plan for the Client

Make sure the staff understands the risks of acting for a difficult client, so they can behave in ways that minimize those risks. Usually, the staff will easily be able to identify the difficult client. The staff may have identified this client as a difficult client before the lawyer. Make sure the staff is dealing with this client the same way that the lawyer is, especially in terms of documenting contacts, instructions or information.

Also, difficult clients are often much more difficult with the staff then they are with the lawyers. Trust your staff and believe them when they describe the client's behaviour. Deal directly and promptly with the client about bad or inappropriate treatment of the staff, to ensure that the client understands what the staff's role is in their retainer, and more importantly, to ensure that the behaviour is not repeated. . Never let the difficult client treat your staff poorly or abusively. No client is more important than your staff. Institute a zero tolerance policy on abusive behaviour towards staff.

v. The Lawyer's Job is Managing Expectations

Often clients are difficult for lawyers to deal with, at least in part, because they have unrealistic expectations about the services you will provide, or the outcomes you can achieve for them. Some clients' expectations or goals are totally outside the realm of what legal services could ever achieve. It is important to identify, as early as possible, what the client's expectations are in retaining a lawyer to deal with this particular issue. Consider asking the client to reduce their expectations to writing, or at least, have a frank, early discussion with the client about their expectations.

Clients' unrealistic expectations take many forms, but fall into the following general categories:

- expectations about service;
- expectations about time to conclude;
- expectations about result;
- expectations about cost.

Many difficult clients have very high service expectations. If the client has service expectations which are impossible to meet (e.g., phone calls always returned by the lawyer within 15 minutes, or performing all of the work for free) be clear from the outset that you cannot provide that level of service or that kind of service, and that perhaps the client should find a lawyer who can (good luck to them). If the client has service expectations which are unrealistic, or very expensive (dealing only with the lawyer, or having all work done only by the most senior lawyer) be clear with the client as to whether or not you can meet that expectation, or whether another kind of service will be provided. It is especially important to bill clients with high service expectations frequently and regularly, so they can understand the cost of those expectations.

Clients who are unlikely to be successful in achieving their goals need to be told that clearly and explicitly from the start of the retainer, or at the earliest possible moment in the retainer. It is far more important to be honest with the client who cannot achieve their goal, than it is with the client who can.

Clients are far more interested in honest and clear information about the cost of legal services that at any time in the past. The introduction of technology to the billing process has also changed clients' expectations and their tolerance. The difficult client is also a client who is likely to be unhappy about fees. Again, it is advantageous to ensure this client is billed frequently and regularly, and is provided with as much detail as possible.

b. Know When to Fold – Ending your relationship with the Difficult Client

It is not possible to satisfy all clients. In some lawyer-client relationships, there comes a time when the client no longer has confidence in the lawyer's advice or strategy, and that is the time to suggest that the client find another lawyer. With the difficult client, this may occur due to the client's unhappiness with the results. Know when to leave the file. If you cannot make the client satisfied with the progress of the work you are doing, or with the service you are giving, it may be time to let another lawyer try. If you are transferring an active file, you need to ensure that the client is not disadvantaged, and that all material needed to allow the client to move forward with the matter is released (even if the client owes the lawyer money).

4. Categories of Difficult Clients

a. Angry/Hostile

This client is unhappy before they retain a lawyer, and will continue to be unhappy. They usually cannot get at the person who is making them unhappy (the other side of the case), in order to tell them about it, but they can get to their own lawyer. As a result, often the angry/hostile clients will visit this anger on their own lawyer (and on the staff). This is known, in psychological circles, as transference. This is very unpleasant for the recipient of this anger, and is not an appropriate basis for a professional relationship.

If you could help this client reach the stage where they are not angry, the client may no longer be a difficult client. However, it may not be possible to get the client to the stage where they are not angry. Besides, that is the job of a therapist. And in certain of these situations, recommending the client see a therapist is the right course. But it is possible to get the client to understand that the lawyer is not the proper place for the outlet of this anger, that the lawyer works for the client and that the lawyer will not tolerate that treatment. Be clear about this the first time the client expresses that anger to you, or you will not easily be able to prevent it in the future.

This client requires a clear firm hand from the start. Be clear with the client about what level of expressed anger is acceptable for you (it may be "none"). Be clear about the treatment of your staff. This client seems to particularly visit their anger on those weaker (your staff). If you tolerate this client's outbursts, they will continue, and likely increase. You cannot change the fact that they are angry or hostile, but you can require that they not visit that behaviour on you or on your staff. Remind this client that this is a business relationship and that you work for them.

b. Vengeful/with a Mission

This client is a variant of the angry/hostile client. This client has come to you to accomplish a specific purpose, which purpose may have very little to do with the legal issues you were consulted about. They may actually be angry/hostile, but may not show this behaviour at all to the lawyer. The client is often focused on this purpose and quite tenacious. They have a strong personal sense of justice (and injustice) and will want to feel that your work for them has produced justice. They are also result-oriented in a way that may skew your ability to help them. If the lawyer is unable to achieve the specific result the client seeks, there will be trouble.

Often, they look for a lawyer who will share their definition of justice and the feeling that they have been wronged. This is a dangerous path for a lawyer to follow, even if you agree

that the client has been wronged. Lawyers should not be personally invested in the outcome of a client's case. Yet the vengeful/with a mission client will specifically seek a lawyer who is not indifferent about the outcome. They want a lawyer who "believes" in their cause.

Be very cautious in even agreeing to act for this client. This retainer is fraught with problems. Some vengeful/with a mission clients want to take steps that are problematic for the lawyer, highly inappropriate or even illegal. Some vengeful/with a mission clients are also secretive/deceitful/dishonest clients (see below). Remember that lawyers can be taken advantage of by unscrupulous clients. This is another retainer in which it is advisable to reduce to writing all instructions given (from both sides).

Also, although this client wants "justice", they are often unwilling to pay for the kind of service required to satisfy their definition of justice. Be sure to bill this client regularly and frequently.

c. Over-Involved/Obsessed

This client is related to the vengeful/with a mission client. This client may be focussing all their time and energies on the legal matter you are helping them with, often to the exclusion of all other matters in their lives. They are often needy, dependant and want a lot of attention. They want to see and read everything possible about their case. They are obsessed with collecting the paper their case produces, and often have binders or file folders full of material about their case. Ensure that they get copies of everything possible regarding their legal matter. The lawyer might also provide them with the legal research (the actual cases) if there is research done for their matter. This client may do their own research, as well.

The over-involved/obsessed client may be extremely well organized and have all the material regarding their case in an easy to access system. Or, they may be disorganized and the material may be virtually inaccessible. The over-involved/obsessive client will often provide copious written material to the lawyer, with the expectation that the lawyer will read it all. If an unreasonable (or impossible) amount of material is provided, try to get the client to identify what portion of it is essential for the lawyer to read (either by suggesting you can read a fixed percentage of it (40% of it, say) or you can spend a fixed amount of time (for example, 1 hour) reading it). Also, try to get the client to organize the material in whatever format is helpful to you (order of importance, chronological order, pleadings separate from correspondence, lawyers' letters separate from other correspondence). Remind the client that they pay for the time taken by the lawyer to organize material that is not organized, so it is in their interest to organize it first. Also, the over-involved/obsessive client likes it when the lawyer gives them homework related to the case, as it helps them to feel connected to the work that the lawyer is doing.

Like other difficult clients, the over-involved/obsessed client should be billed regularly and frequently, so that they have realistic expectations about the cost of their matter and the affect that their particular style of dealing with it has on that cost.

c. Dependant

This client has spent much of their life being dependent on others, in one form or another, and intends to continue that level of dependency with the lawyer. In part, this client is unwilling to take responsibility for their own lives and for their own decisions. This client will have surrounded themselves with others who are quite willing to be the decision-maker for them, and as a result, may have become even more dependant, and nearly incapable of making their own decisions.

Often the client merely transfers this dependency from someone else to the lawyer. This is not the right place for the lawyer to be. The lawyer's role is not to be the decision-maker, but rather to be the advisor about the choices available to the client. The dependant client will steadfastly refuse to make a decision, insisting that the lawyer do it.

It may suit some lawyers to be the decision-maker for the client, but it is a path fraught with problems and is not a path the lawyer should follow. When the results of the decision do not please the client, the lawyer will be blamed. Lawyers becoming the decision-maker for a dependant client is a no win situation.

Encourage the client to involve a trusted advisor (other than the lawyer) in the process. Encourage the dependant client to come to meetings with you accompanied by the trusted advisor. Let the advisor be the person the client depends on. If that person helps the client to reach decisions then the lawyer is better protected and better able to perform the proper role.

The dependant client will be dependant throughout the retainer, and often difficult to advise and keep focused. This client requires a fair bit of patience on the part of the lawyer. Also this client requires that much of the lawyer's dealings with the client, including advice, be reduced to writing so that the client can consider the recommendations in an unhurried atmosphere and in a context where they can consult other trusted advisors. It is also good practice to confirm this client's instructions in writing.

d. Secretive/Deceitful/Dishonest

This client's behaviour may run through a spectrum of behaviour, in which the client may exhibit only one aspect of the behaviour, or may move through the various phases. Secretive behaviour may be that which is that is merely suspicious (but unproven). The results of

deceitful behaviour may be reparable. However, dishonest behaviour may require the lawyer to end the retainer. Often the lawyer will not identify the behaviour or the severity of this behaviour until the client has moved fully into the dishonest category.

The client who is only secretive may have misunderstood the importance of openness and honesty in the lawyer-client relationship. Or, this client may have something to hide. The lawyer's level of concern about secretive behaviour will vary directly with the nature of the retainer. But the lawyer should never allow the client's inclination towards secrecy to prevent the lawyer from asking all the questions needed to properly do the work.

If the client has actually been deceitful or dishonest with the lawyer, this is a good reason to end the retainer. Once the lawyer learns of the deceit or dishonesty, it is unlikely the lawyer can feel confident in the future with that client. The outcome of dishonesty on the part of the client is an easier circumstance to handle than the secretive or deceitful client. It may be that the lawyer can continue to act for the secretive or deceitful client. But the lawyer needs to be very careful about being involved under circumstances where you cannot be confident that the client is telling you everything you need to know in order to properly do your job. Lawyers have run into difficulty when they have been taken advantage of by unscrupulous clients.

f. Depressed

The client who is depressed is not merely someone who is sad or unhappy; this is someone with clinical depression who has become withdrawn, passive, lethargic, unable to engage, perhaps even paralyzed in their day-to-day lives. Clinical depression can lead to an inability to perform even the most normal of tasks (e.g., returning phone calls). This client will be difficult because they may not be able to engage with the legal process sufficiently to properly instruct a lawyer. This is most problematic for the client who is involved in litigation, and who must respond to court documents in a time frame. However, the depressed client can also be a problem for lawyers in situations that do not involve litigation.

Similar to the angry/hostile client, the best step is to try to get the client some professional help so that they can move away from being depressed, and become better able to instruct their lawyer. If you could help this client reach the stage where they are not depressed, the client may no longer be a difficult client. However, it may not be possible to get the client to the stage where they are not depressed. And clearly, this is the job of a therapist.

If this client will not get help and wants to continue to be your client, you must document carefully the recommendations and advice you give the client. Put your advice in writing, and ask the client for clear written instructions. If you cannot get written instructions from the client, confirm the client's instructions to you in writing. If you cannot get any instructions, you may need to close the file, telling the client, in writing, that you will not take any further

steps on their behalf and that you will close the file in 30 days, absent specific instructions to proceed. It is advisable to be specific with the client about the consequences of this step, if there are consequences for the client.

g. Mentally Ill

The client who may be mentally ill is a particular challenge for the lawyer. Do not confuse a mental illness with the ability to instruct counsel. There are clients with mental illness who are capable of instructing lawyers. The lawyer must be satisfied that the client can properly instruct counsel. But the test for taking those instructions must be broad enough to ensure that clients are not denied access to lawyers merely because they are difficult, change their positions, or are hard to follow. This client may be less predictable than other clients and may change their instructions often, even regularly. As a result, the lawyer should confirm those instructions in writing and should ensure the instructions are fresh and still valid before acting on those instructions.

h. The Difficult Client with the Difficult Case

The difficult client with the difficult case is usually also the client who has totally unrealistic expectations about their case. Those unrealistic expectations may be about the outcome of the case, but this client often has unrealistic expectations that touch every aspect of the case, including the cost, the length of time involved, the importance of their case, and the kind of service the lawyer can provide. This client needs to hear, right from the first meeting, what the likely outcome will be. It is always advisable, also, to put bad news in writing, particularly to this client. This client may also need to hear that information repeatedly.

h. The Client who is Unwilling to Accept/Follow/Believe the Lawyer's Advice

To some extent, almost all clients fall into this category. In fact, clients often come to lawyers to determine the consequences of actions they have already taken or paths they have already decided to take. Many clients are just unwilling to follow or accept the advice their lawyers give. Sometimes this makes them difficult clients, and sometimes it does not.

Be clear with these clients about exactly what your advice is. Reduce it to writing, including, where possible, the likely outcome of following the advice and the outcome of rejecting the advice. If they choose not to follow it, at least they do so knowing the consequences.

There are lawyers who will refuse to act, or to continue to act for the client who does not follow their advice. This seems too rigid a position to adopt as a general rule. The better

path is to use your judgment about that kind of decision, reserving the decision to end the retainer for client who rejects or ignores advice that has consequences that are very serious. Lawyers may see their role as assisting the client with their legal problem, no matter what decisions the client makes about the conduct of that problem. After all, it is the client who will have to live with the consequences (not the lawyer).

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October 2003

Draft template letter to client when wrongdoing is suspected on part of client

Atira Women's Resource Society
101 E. Cordova Street
Vancouver, BC. V6A-1K7
Phone: 604.331.1407, Fax: 604.688.1799
www.atira.bc.ca

January 11, 2012

VIA REGULAR MAIL

Reply to: Amber Prince
Direct Line: 604.331.1407. ext. 105
E-mail: legaladvocate@atira.bc.ca

Attention: Jane Smith
Address
Vancouver, BC.

Dear Ms. Jane Smith,

Re: *Smith v. ABC Company Inc.* (your employment matter)

I write in response to the voicemail you left me on January 7, 2012 regarding this matter. In your voicemail you indicated that you would not be attending our scheduled appointment for January 6, 2012. The purpose of our appointment was for you to sign the release document provided by ABC Company Inc. on November 2, 2011. The release document forms part of the resolution both parties (yourself and ABC Company Inc.) agreed to. You indicated in your voicemail that you would not be signing the release.

You indicated in your voicemail that your reason for not signing the release is that ABC Company did not provide you settlement monies in the form of a certified cheque as we originally requested. The purpose of requesting a certified cheque from ABC Company was to ensure that there were no difficulties in obtaining the monies (*i.e.* to ensure the cheque was not returned as "Non-Sufficient Funds).

However, I understand that you were, nonetheless, able to successfully cash the settlement cheque provided by ABC Company quite some time ago with no issue. ABC Company has also provided the reference letter it agreed to provide.

As you know the Employment Standards Branch (ESB) has extended its own deadlines to await the outcome of the negotiations between the parties. Our contact with the ESB, Shirley, made it very clear to me in my last conversation with her that ESB would be closing your file with ESB if the matter was not resolved as we indicated it would during our scheduled January 6 appointment.

As the fundamental terms of the settlement agreement with ABC Company have been met, my advice in this matter is that you sign the release provided by ABC Company. Please note that I have also discussed this matter with my supervising lawyer who confirms my advice.

Given my advice **I am requesting that you sign the release from ABC Company no later than Friday January 15, 2012 by 4pm.** I am enclosing a copy which you can sign and drop off to me at Atira. Alternatively, I will also leave a copy of the release with our receptionist Sharon which you can come in to sign. We are open 8:30am-

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5:00pm on weekdays, but also have a mail slot at our front door where mail can be dropped off at anytime.

If I do not receive the signed release from you by 4pm on January 15, I will need to withdraw from this matter. To be clear, I will no longer be able to act for you in this matter. After 4pm on Friday January 15 I will advise both the Employment Standards Branch as well as ABC Company that I no longer act for you on this matter and that they should contact you directly.

Thank you for your attention to this matter.

Sincerely,

Amber Prince
Legal Advocate

PRACTICE MADE PERFECT CLE BC

FAMILY LAW DRAFTING BASICS—2012
PAPER 4.1

Remarks on Correspondence, Collegiality, and Courtesy

These materials were prepared by James A.W. Schuman, QC, of Schuman Daltrop Basran & Robin, Vancouver, BC and John-Paul E. Boyd of Aaron Gordon Daykin Nordlinger, Vancouver, BC, for the Continuing Legal Education Society of British Columbia, March 2012.

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I. Introduction

Language and the ability to use language to communicate effectively are fundamental elements of the lawyer's skill set. Although sonorous oratory and a well-timed indulgence in rhetoric can occasionally make or break a trial or appeal, trials and appeals are the exception to the sort of work that makes up the bulk of the family law lawyer's usual practice; facility with the written word is the lawyer's true bread and butter. We use the written word to draft affidavits, arguments and agreements, all important products to be sure, but in a family law practice the largest share of our written output is made up of our day to day correspondence with colleagues and clients.

The routine nature of correspondence should not be allowed to lull you into neglect and indifference, however. As language is the lawyer's essential skill, the lawyer's essential attribute is reputation, and the tone and tenor of your correspondence has a direct impact on your reputation.

The lawyer's reputation among the bench influences the court's willingness to take the lawyer at his or her word and rely on the lawyer to honour an obligation. The lawyer's reputation in the community has a direct impact on the quantity and quality of new work, and the client's opinion of the lawyer has an impact on the continuation of his or her retainer. The lawyer's reputation among the bar, however, is absolutely fundamental to success of his or her practice, and the lawyer's competence and character are measured in large part by the lawyer's written communication with colleagues.

This paper will discuss some practical issues arising from our written correspondence, our duties to our clients and to ourselves, and our responsibilities as professionals. It is less of a formal essay than a collection of observations from Jim, one of the silverbacks of the lower mainland family law bar, and JP, an upstart in his thirteenth year of practice, but should nevertheless prove useful for those entering practice.

II. Remarks on Style and Content

A. Courtesy and Professionalism

1. The Client

You owe a duty of respect and courtesy to your client; your client is, after all, the person who's paying your bills. Few lawyer-client relationships are entirely free of conflict, however. We act for people at one of the most vulnerable points in their lives, in respect of the things closest to their hearts and wallets, in a context that is often adversarial and is always fraught with uncertainty. Do not allow any such conflict to creep into your correspondence. Remember that clients are the largest source of complaints about family law lawyers to the Law Society, and the complaints investigator will almost certainly be provided with any intemperate correspondence.

When responding to hostile communications from the client, do not reply in a similar vein. Instead, reply—if reply you must—in simple, direct factual statements explaining how the current circumstances came to be. Except in potentially reportable situations where you must speak to our insurer before doing anything else, accept responsibility for what fault may be yours and if a solution can be offered, offer it. Clients uniformly appreciate a blunt, rational explanation of any difficulties and will welcome your frankness in refraining from gilding the lily.

Do not speak poorly of opposing counsel in your correspondence to your client. Not only is this highly unprofessional, if your comments escape into the community, as such remarks often do, you will earn the disapprobation and distrust of not only the target of your comments but many of your colleagues.

Do not speak poorly of the court to the client following an adverse result or otherwise. You are an officer of the court and must respect the institution, publicly and in private. Litigation is inherently uncertain, and the client should be told, and frequently reminded, that no result can be guaranteed.

2. Opposing Counsel

You owe a duty of respect to opposing counsel and should always strive to be collegial and courteous; unless you relocate your practice, the lawyers you are working with at present are the lawyers you will be involved with throughout your career. Entirely apart from all the nice things that the *Professional Conduct Handbook* has to say on the subject, life is too short to make enemies of those with whom you will inevitably wind up working time and time again.

It is especially easy to personalize disputes in family law matters; the reasons why an issue is important to a client tend to make it important to us too. It is, however, imperative that you rise above the fray. If you do not, you will be aggravating an already tense situation and you risk compromising your judgment. You are your client's advocate and an officer of the court, not a cobelligerent. Expressions of emotion rarely have a place in lawyers' correspondence.

You may experience some pressure from your client to fight fire with fire and be at least as sharply-tongued in your outgoing correspondence as opposing counsel is in your incoming correspondence. This will require a conversation with the client about your professional obligations. You set the standard for your correspondence, not the client.

This said, there are times when bombast and brimstone are what the situation requires, either in the hope of modifying the behaviour of the opposing party or mollifying the outrage of the client. Needless to say, these letters should be the exception rather than the rule, but when they are necessary, call opposing counsel to warn him or her of what's coming. With forewarning, most counsel will take your letter for what it is.

When corresponding to counsel about a fact or event, never impute motive to the opposing party and never presume to chastise the opposing party through the veil of your correspondence. This is unhelpful in the extreme and may lend the impression that you are a pompous ass.

You will find, however, that our colleagues do not universally follow this golden rule. That is their prerogative, but do not rise to the bait. If you must reply, do so in a calm and temperate manner.

3. The Unrepresented Party

The second largest source of complaints about family law counsel is, unsurprisingly, opposing parties. Govern yourself accordingly, and write to unrepresented parties as if you were copying the letter to your complaints investigator. Reply reasonably promptly, in a scrupulously accurate and factual manner, and without rancour, hostility or exclamation marks.

Although you cannot offer legal advice to the opposing party, explaining court processes, such as judicial case conferences or the deadlines for bringing an application in chambers, may help to: minimize unnecessary adjournments; improve the likelihood of the party's compliance with the rules; and, defuse some of the hostility that comes from anxiety and uncertainty. In providing this information, however, you must be factually accurate in your descriptions and ensure that nothing in your correspondence could be construed as bending the truth to your client's advantage. Consider providing links to neutral information available online, such as the courts' websites or the website of the Queen's Printer.

4. The Court

Correspondence to the court should be factual, courteous, devoid of argument and maximally concise.

B. Write for the Audience

1. The Client

Letters to the client are primarily written to obtain instructions, information and documentation, confirm instructions and dates, and provide information. The lawyer-client relationship is a professional relationship and demands a concomitant degree of formality; humour and salty language should be reserved for oral communication. Remember that if matters go awry, your correspondence forms a part of the record that may be considered on a complaint to the Law Society or claim in negligence.

Letters to the client should be written to the client's degree of sophistication and fluency. This will at times require adjustment to your choice of language and extra effort explaining legal concepts; there is little point in writing to the client to obtain or confirm instructions if your client doesn't understand the letter. Such letters should always invite the client's questions, comments and concerns.

2. Opposing Counsel

The intended audience of letters to opposing counsel is often not counsel but his or her client. This is particularly the case when writing to propose compromise, settlement or the use of dispute resolution processes other than court. If the handicap of the letter's origin is to be overcome, these letters should be written to persuade not with the use of rhetoric and appeals to sentiment but factual analysis and objective reasoning; your task is to convince the opposing party that your proposal is rational, and this may be at odds with the party's previous experience of your client.

Letters written to opposing counsel intended for opposing counsel should be brief, business-like and to the point, they should be purposeful and professional. These letters are functional and purpose-driven. Brevity will sharpen the purpose of your letter and help crystallize the issues you seek to address. Letters more than a page long should only be written for good reasons; length risks the dilution and obfuscation of the points you are trying to make. Since you are writing to counsel, but bearing in mind that the client will also want to read your letter, you are free to indulge in such legal shorthand as the situation warrants.

Where your letter is likely to spark a prolonged series of correspondence, as is often the case with offers to settle, make a point of numbering your paragraphs and consider using headings to divide the content by subject matter.

3. The Unrepresented Party

Unrepresented parties should be communicated with in writing to the extent possible; the printed word should be your preferred if not exclusive medium. The written record of your remarks is your first and best defence against the unlikely possibility that you will be misquoted, whether to the court or to the Law Society.

Letters to unrepresented parties are sent for all manner of purposes but are primarily sent to obtain or provide disclosure, arrange hearing and conference dates, and record agreements including agreements on administrative matters. They must be written in language the party is certain to understand, and where there is uncertainty as to the party's probable comprehension, legal advice should be recommended.

The unrepresented party is likely to be distrustful and suspicious of your motives, and you must be correspondingly vigilant against the possibility of misinterpretation and minimize your use of adjectives and adverbs as much as possible. Given that you are writing to someone with an inevitably divergent view of reality than your client, consider depersonalizing statements of facts and events by prefacing them with language such as "I am advised that ...," "I understand that ..." or "my client tells me that ..."

4. The Court

Letters to the Supreme Court on a proceeding are addressed to the manager of Supreme Court scheduling even where the intended audience is a specific judge or master. Be concise and to the point.

C. Grammar Errors and Spelling Errors

Nothing undermines one's impression of a lawyer quite like typographic mistakes. Our clients pay us sums most would think of as exorbitant and an appropriately professional attention to detail is expected. Grammar and spelling errors give the impression of haste and carelessness, and provoke the inference that sloppiness is a hallmark of the lawyer's work generally. They also give the opposing party the much-relished opportunity to deride you to your client: "Your lawyer doesn't know the difference between preemptory and peremptory! What a buffoon!"

Here is some particularly valuable advice: the red squiggly line beneath a word is your word processing program's way of alerting you to a spelling error. Although the red line isn't always right, it pays to pay attention when it pops up. The squiggly green line means one of two things, that your syntax is more sophisticated than your word processor is built to handle or that you've made a grammar error. Although the green line is correct less often than the red line, it is nevertheless also a helpful tool. If you never see the red line or the green line, make sure that your spell-check function is not disabled.

Minimizing the opportunity for typographic errors is, incidentally, another powerful argument for brevity in one's correspondence: the more verbose your disquisition, the more opportunity you have to screw it up.

D. Style and Layout

Issues about style and layout are kith and kin to issues about spelling and grammar. You are a professional and your correspondence should look professional. This is not to suggest that you should run out and hire a graphic designer, however a letter should employ the same font, type size, line spacing and justification throughout, and just as you should never use novelty fonts, you must also never use Courier or any of the other equally wretched monospaced fonts.

E. Mandatory Content, Helpful Content, and Content to Avoid

1. The Client

Section 9 of the *Divorce Act* requires counsel to point out the act's provisions for reconciliation, discuss the possibility of reconciliation and canvass the possibility of negotiation and mediation as a means of resolving disputes related to children and support. Sections 8 and 197 of the *Family Law Act* will impose additional duties. All can be efficiently addressed in a standard form client letter, and may even be dispensed with through your retainer letter.

Other subjects amenable to form letters include: explanations of the JCC and FCC processes, proceedings at examinations for discovery and the effect of divorce on wills and estates matters; instructions for securing the equalization of Canada Pension Plan credits; and, requests for the client's documents and execution of authorizations and releases.

2. Opposing Counsel

You may wish to refrain from marking your correspondence as having been copied to client. There are two reasons for this caution. First, what you provide to your client is a matter privileged to the

solicitor-client relationship and none of anyone else's business. Second, whether you've actually copied the letter to the client or not, it helps to protect the letter from being put to the client in cross-examination. "You've read this letter sent by your lawyer, haven't you?"

3. The Unrepresented Party

The *Professional Conduct Handbook* requires that you advise your client and an unrepresented party that you are not protecting the unrepresented party's interests; do so in your first letter to the unrepresented party. The Lawyers' Insurance Fund and the Law Society recommend that you also state that: you are the lawyer for your client; you are unable to provide legal advice to the opposing party; and, the opposing party should obtain legal advice if not actual legal representation.

Depending on the circumstances, it may be prudent to occasionally repeat your suggestion that the party obtain legal advice in subsequent correspondence.

4. The Court

Always copy correspondence to the court to opposing counsel and any unrepresented opposing parties, and be obvious about who has been copied with your letter. PD-27 requires that counsel or parties should consult with each other before writing to the court and that correspondence set out the opposing party's views if different from those of the writer.

III. Email

A. Email is Just like Ordinary Mail, but Faster and More Dangerous

The speed of email has resulted in at least three negative consequences for the family law lawyer: it has encouraged people to believe they will have a reply from us within the day, if not the hour; it has encouraged an informality which is at times inappropriate; and, the rapidity of reply robs us of the opportunity for sober second thoughts offered by the useful pause between the dictation of a letter and its availability for review.

Client expectations about the speed of your reply can be adjusted at the outset of the retainer by a simple warning about how busy you are and a caution that it may take you a day or two to reply. You may wish to make a point of not replying to client emails right away even when you can reply right away.

You must discipline yourself against an undue degree of informality when communicating with opposing counsel about a file. Some degree of informality is almost inevitable, but consider two things: the impression your client would draw from reading your email; and, the impression the court would draw if it were attached to an affidavit. At a minimum, write to opposing counsel presuming that his or her client will be copied on your correspondence.

Refrain from discussing more than one file in each email. You are obliged to protect the confidentiality of your clients and you should expect opposing counsel will want to do the same.

The speed and ease with which email is sent encourages a corresponding haste on the part of the writer. Most of our routine correspondence requires no special scrutiny, however we are particularly prone to sending imprudent emails when frustrated, stressed or angry; be alert to your emotional state, and consider shutting your email program down for the day when you realize that you are annoyed or angry. If you cannot down tools for some reason, at least delay hitting the send button for a few hours; all email programs, including web-based services like Hotmail and Gmail, have a draft option that will let you save unsent emails.

Haste should also be avoided when writing on a sensitive subject or issuing a settlement proposal. Take your time with such emails and make a point of reading through the entire email at least once before sending.

B. Copying, Blind Copying, and Forwarding

It will rarely be necessary to copy anyone other than the recipient on an email. Emails to the client are protected by solicitor-client confidentiality and are for your client alone. Emails to opposing counsel or an unrepresented party should not include your client as a recipient; either forward the sent email to the client for his or her records or blind copy the client on the email. However, emails to the court, to joint experts, to mediators and arbitrators, and to other persons with a mutual engagement on a file should be copied to opposing counsel.

Pay attention to who has been copied on an email; this may influence the content and tone of your reply. Be especially alert to the difference between "reply" and "reply-all." Much embarrassment has been caused by the inadvertent reply-all.

The ease with which email can be forwarded is yet another curse of the medium. This is both another reminder of the importance of maintaining a certain dignity and gravitas in one's communications and a warning of the potential for breaches of confidentiality. The client should be cautioned, perhaps in the lawyer's retainer letter, against forwarding any of your emails to the opposing party, and you must never forward your client's emails to anyone outside your office. If you simply must use something from a client's email, cut-and-paste the relevant portion into your own email without an attribution of authorship.

C. Helpful Content

In the good old days, mail would occasionally be lost. Although "lost in the mail" has a the-dog-ate-my-homework quality to it, it actually happens from time to time. Email is a surprisingly more vulnerable communications medium. Your email server may be down for reasons beyond your control; incoming email may be intercepted by your server's spam filter or by your email program's spam filter; or, the sender may have gotten your email address wrong.

The point here is that lots of things can go wrong with email, including errors of which you are unaware. As a result, you may wish to refrain from providing an email address for service.

Email signatures are an excellent way to address these and other problems. The footer to JP's email says this:

> IMPORTANT NOTICE: We do not accept ordinary service by email. Ordinary service may be effected by post, courier or fax.
>
> WARNING: Occasionally, our spam settings and service provider automatically eliminate legitimate emails. If your email contains important instructions or information, please ensure that we acknowledge receipt of your email and/or instructions.

IV. Demands and Settlement Proposals

A. Time Limits

Refrain from setting pointless and arbitrary time limits in your correspondence; such deadlines merely invite disdain and disregard. Although you may not have the same confidence when dealing with an unrepresented litigant, you should expect opposing counsel to attend to a matter with reasonable alacrity, subject to the occasional need for a collegial reminder.

Unless there is a good reason to demand documents, a reply or performance by a specific date, don't. The only time limits that matter are those prescribed by the rules of court.

B. Disclosure

Many lay persons find the basic disclosure requirements of the litigation process to be uncomfortably and unfairly broad; many do not appreciate their obligation to make production of all documents relevant to a matter at issue, especially those unhelpful to their own case, or see it as the lawyer's job to ferret everything out.

It can be helpful to point the party toward the sections of the rules and Child Support Guidelines that set out the minimum disclosure requirements when financial matters are at issue, or even reproduce those provisions in the lawyer's letter. When referring to legislation or regulation, provide a link to where these materials can be found online.

C. Proposals to Compromise or Settle

Some lawyers prefer to handle offers to settle as either a stand-alone document along the lines of a memorandum, others prefer to state the terms of the proposed compromise as a letter. Regardless of the method chosen, the offer must be stated in such a way that the terms of the proposal are sufficiently complete and clear so as to bind the party making the offer; correspondence between counsel may be used to demonstrate settlement when a party later seeks to resile from a deal.

From a drafting perspective, it can be helpful to lay out the separate terms of a settlement proposal in such a way as will facilitate protracted discussion and counter-offers; numbering each paragraph will usually suffice.

Where a case is likely to proceed to trial, remember to conclude your letter with the language required by SCFR 11-1(1)(c)(iii):

> The [claimant/respondent] reserves the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding.

D. Letters Written "Without Prejudice" and "With Prejudice"

The phrase "without prejudice" is used far too frequently and too often inappropriately.

"Without prejudice" means that the content of a letter is being transmitted with the intention that it cannot be used to the detriment of the client's position by being introduced in evidence. However, the phrase only operates to protect letters proposing or replying to a compromise of the client's position from use in evidence, and even then may only serve to protect the portions of a letter making or replying to a settlement proposal. To be completely clear: marking a letter "without prejudice" is ineffective to shield a churlish threat, a statement of facts or a relevant document.

The injudicious use of "without prejudice," particularly when the correspondence sought to be protected from production does not contain a proposal of compromise, reflects poorly on counsel and lends the impression of insincerity and an unwillingness to commit to a position on a matter.

Although it is entirely proper to protect a legitimate settlement proposal by marking the letter "without prejudice," it is not necessary to do so and you may wish to refrain from deploying the phrase unless the proposal represents a genuinely improvident compromise of the client's position that you would not want broadcast, as might be the case where:

(a) a cash settlement is offered to placate a party bringing a meretricious claim, in the expectation that payment of the lump sum will be less costly than payment of the legal fees required to defend the case; or

(b) the proposal goes further than counsel's estimate of the outer range of probable results at trial.

Absent circumstances like these, declining to mark a settlement proposal "without prejudice" emphasizes the client's willingness to be bound by the offer and the sincerity of counsel's belief that the proposal is fair and reasonable.

The phrase "with prejudice" is meaningless nonsense and adds nothing to your correspondence but a marginally diminished albedo.

V. Management Issues

A. Managing Incoming Correspondence

Some lawyers give the impression that they have just one file, the one they're writing to you about. These lawyers generate a tremendous volume of correspondence and will send four or more letters on the same file on the same day.

Other lawyers write as if you are responsible for the misfortune befalling their clients or somehow control your client's conduct. These lawyers write horrible letters, filled with vitriol and improper insinuations about your conduct and professionalism. Still other lawyers use italics, underlining, bold and all-caps, sometimes in combination, to emphasize the importance or irrefutability of a particular point. These letters tend to be angry and combative and can be taxing to read as a result.

These lawyers are generally not well liked.

No matter how provocative and bestial the correspondence you receive may be, you must never reply in kind; bite your tongue and rise above the fray. It can be difficult to refrain from the barrage of righteous criticism that you may wish to level, but engaging with the persons who author of this sort of correspondence only encourages them and risks an unwelcome escalation. Instead, post a copy on the fridge in the lunchroom.

For the lawyers with just the one file, you might consider allocating a specific time slot, perhaps once a week, which you will devote to addressing the correspondence accumulating thus far. When using this approach, send a letter saying so. "I will reply to your correspondence once each week unless a matter of genuine urgency arises. In the event you find it more efficient to consolidate your commentary in fewer letters, I invite you to consider so doing."

For counsel prone to personal attacks, reply to only those issues of actual substance, but let the lawyer know that you don't intend to get down into the gutter with him or her. "I write to address the legal issues raised in your recent letter; I do not, and will not in the future, respond to your *ad hominem* polemics."

Be creative in dealing with unpleasant and obstreperous counsel like this. You do not need to address every point in every letter; you do not need to answer every letter; you can control the manner and content of the dialogue.

B. When to Put Down the Pen and Pick Up the Phone

Although a certain degree of conflict between counsel is at times unavoidable, it can happen that the conflict escalates to a point where it threatens to affect the efficient carriage of a file. To distance ourselves from conflict, we naturally retreat from face to face communication to communication by

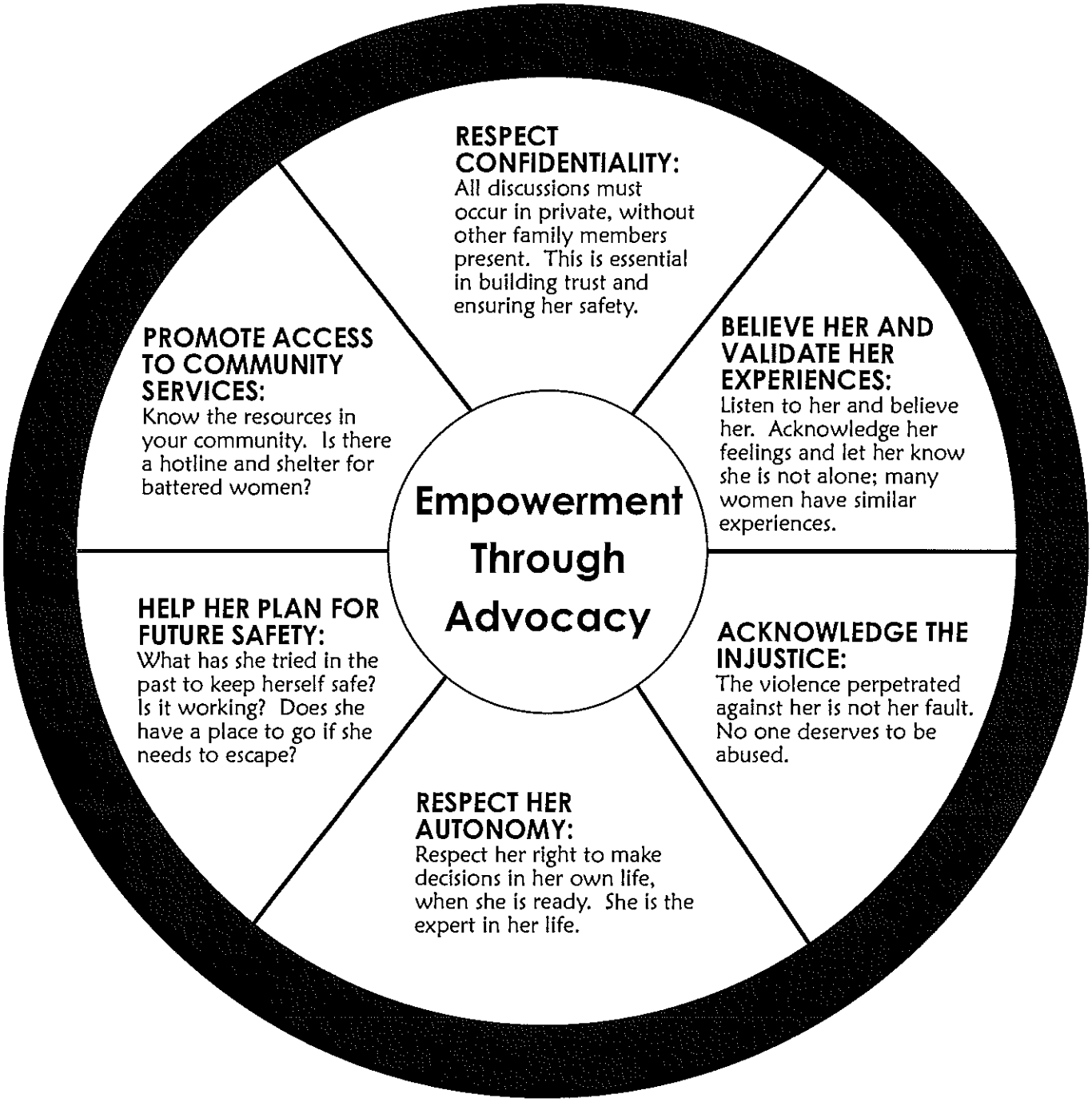
telephone, and from the telephone to written communication. Where counsel have gotten off to a bad start, their conflict will migrate with this withdrawal, and without the mediating influence of personal contact, conflict can escalate unchecked.

It can be difficult and at times extremely difficult, but when you begin to sense that things are going off the rails, it may be time to put your Dictaphone down and try to re-engage counsel by picking up the phone and addressing the problem. "Look, it seems to me that we're having an unusual amount of difficulty communicating, and I'm worried that the conflict between our clients is beginning to affect how we're managing this file, and I want to apologize for my part in that." Not all lawyers will hear what you're trying to say, but a failed effort costs you nothing. If you can restore the objectivity of the professional relationship and get a file back on track, you will have done your client a tremendous service and will have improved the quality of your practice.

VI. Comprehensive Checklist

☐ Would it embarrass me or my client for this correspondence to be attached as an exhibit to an affidavit?

Advocacy Empowerment Wheel



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February 2010

IS YOUR CLIENT SAFE?

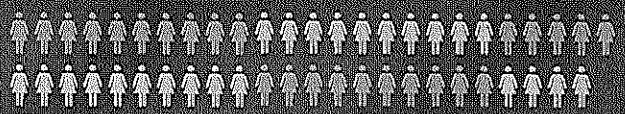
A Lawyer's Guide to Relationship Violence

If your client has suffered relationship violence, you can play a critical role in preventing more violence or even death.



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

ENDING VIOLENCE



In 2009, 49 women in Canada were killed by a current or former spouse.

What is relationship violence?

Relationship violence refers to any abusive, coercive, forceful, or threatening actions or words used by one person to control the behaviour of their intimate partner. Statistics show that women are far more likely than men to suffer the most severe forms of abuse, such as sexual assault, severe violence, and stalking. Women experience a much greater risk of serious injury or death in violent relationships. For these reasons, this brochure focuses on women in abusive relationships with men, and the victim is referred to as "she."

Relationship violence may include physical, emotional, psychological, sexual, and/or financial abuse. In extreme cases, it may result in serious injury or death. Relationship violence does not include situations where one partner uses reasonable force to protect themselves or others from harm.

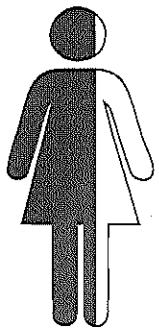
Although much relationship violence is a gendered crime, abuse can happen to anyone, regardless of age, gender, sexual orientation, race, culture, religion, education, employment, or socio-economic or marital status. Relationship violence may occur at *any time* during a short- or long-term relationship. It can happen when people are dating, while a relationship is breaking down, or after the relationship has ended.

Is your client safe?

During an interview, your client may report or disclose, in words or through behaviour or appearance, some or all of the following signs of relationship violence:

- physical injuries, either visible or suspected, such as bruises, cuts, burns, and/or fractures;
- stress-related illnesses, such as headaches, sleeping and eating disorders, difficulty concentrating, memory problems, and/or anxiety;
- depression; low self-esteem; distrust; fear; and/or withdrawal from friends, family, and community;
- employment changes, such as absenteeism, decreased work performance, and recent firing or departure from her job;
- social isolation, such as lack of support; lack of access to transportation; restricted access to money, family, or friends; or to activities such as a job or school; and
- relationship problems, including complaints about her partner's anger or temper, substance abuse, controlling and/or humiliating behaviour, accusations of infidelity, stalking, and/or frequent electronic communication known as "cyber-stalking."

Research suggests nearly 64% of women who have suffered relationship violence do not report it.



Is your client at risk of further harm?

Domestic homicide, the most extreme form of relationship violence, is associated with the presence of certain risk factors. With appropriate safety planning and service provider intervention, domestic homicide is potentially preventable. To help save a life, be alert to the risk factors. Understand critical times when your client may face an increased risk of further violence as well as more severe violence, which could result in serious bodily harm or death. Critical times include separation, the start of litigation, or court attendances and any settlement meetings. Various risk factors include but are not limited to:

Relationship history

- current relationship status, particularly actual or pending separation or relationship breakdown
- obsessive, jealous, and/or controlling behaviours by your client's partner, including threats and stalking
- strangling, choking, biting, or forced sex by her partner
- having children who are or may be the subject of legal proceedings
- client is marginalized and faces discrimination based on race, immigration status, age, income, ability; lives with addiction or mental health issues; is pregnant; between age 15 to 25; socially isolated; or has language or literacy issues
- escalation in frequency or severity of his violence
- prior criminal history
- exposure to violence as a child
- mental health issues, particularly depression and suicidal ideation
- alcohol or drug abuse
- unemployment or financial difficulty

History of your client's partner

- history of violent activity by your client's partner against her or a previous or new intimate partner, children, other family members, or anyone else

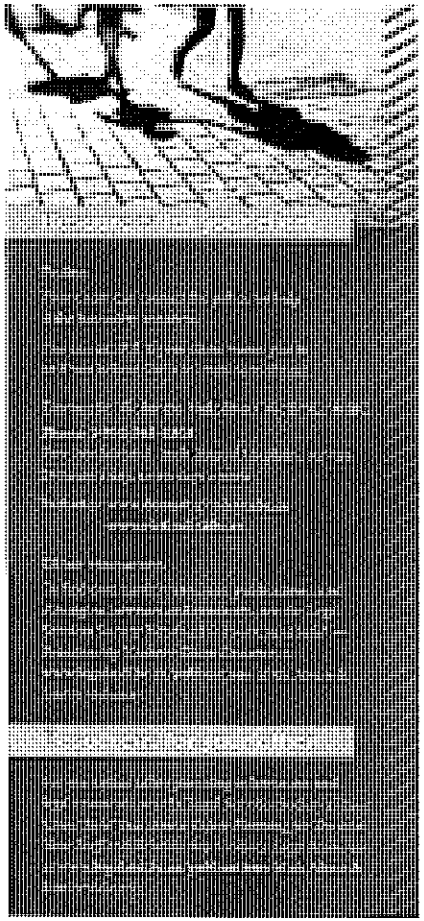
Access to weapons

- client's partner has access to weapons, or has previously used or threatened to use a weapon

Your client's perceptions of risk

- client's perception that her personal safety is at risk, even with a protection order
- fear of future violence by her partner

With thanks to Jocelyn Coupal for the use of content adapted with permission from her Spot the Signs brochure and website.





Your client is more likely to safely leave an abusive relationship if she has support from her community.

Why do you need to know?

Learning whether your client has suffered relationship violence will help inform the legal advice and information you provide. For example, does your client need a protection order or immediate police protection? safe housing? a safety plan?

Statistics show there is a significant increase in the likelihood of violence, including death, when a woman leaves her abusive partner. *Sometimes the violence will be directed at the people involved in assisting her.*

Encourage disclosure

While some clients openly disclose that they have suffered abuse and violence, others might not show or report any obvious signs. You may, however, still suspect that your client has been victimized.

For a list of the steps you can take to encourage disclosure, see the Legal Services Society fact sheet *Is Your Client Safe? — Encouraging Disclosure* at **www.legalaid.bc.ca/publications** (click Abuse & family violence).

If your client has suffered relationship violence

During your initial interview, alert your client to the possible increase in violence and to the idea of making a safety plan when she considers leaving a violent relationship (see Safety planning for your client). If your client discloses that she has been victimized, you can:

- reassure her that this information is confidential, unless there is immediate danger of someone being killed or a child being abused;
- tell her that the abuse is not her fault;
- empathize, encourage, and be supportive;
- provide referrals to victim services, other community services and resources (such as transition houses), and for safety planning;
- develop a safety plan for your workplace, along with your staff; and
- present her with the range of legal options available to her, including any potential risks to her and her children that may be associated with each option.

Safety planning for your client

If your client has safety concerns because of abuse and threats of harm by her partner, she needs to prepare a safety plan. Safety planning involves steps she can take to stay safe and to plan for and get help in an emergency, whether or not she stays in the abusive relationship.

Before leaving an abusive partner, she can get safety planning help from an advocate or victim service worker. Contact VictimLink BC (see Resources for your client).

To start a safety plan, see the Legal Services Society fact sheet *Is Your Client Safe? — Safety Planning for Your Client* at **www.legalaid.bc.ca/publications** (click Abuse & family violence).

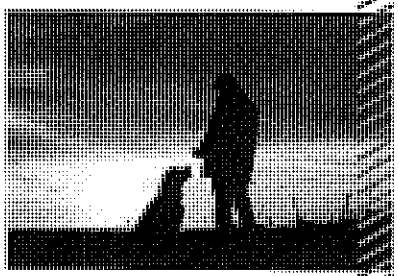
For more information, refer your client to:

- Domestic Violence website at **www.domesticviolencebc.ca** (click Staying Safe)
- Ending Violence Association of BC at **www.endingviolence.org** (under If You Need Help)
- Legal Services Society fact sheet *Live Safe — End Abuse: Safety Planning* at **www.legalaid.bc.ca/publications** (click Abuse & family violence)
- *Safety Planning for Women Who Are Abused* at **www.spotthesigns.ca** (click Spot the Signs)



Separation is the most common risk factor associated with domestic homicide and is present in approximately 4 out of 5 cases.

The new Family Law Act (FLA) defines family violence and creates a new type of protection order that may restrict contact and communication between family members where there is a safety risk. Breaches will be enforceable by police and dealt with as criminal offences. The FLA was passed on November 24, 2011 and most of its provisions will come into force by order-in-council.



[illegible] brochure, including focus group and field test participants, and legal reviewers.

BRITISH COLUMBIA

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WHOSE FILE IS IT ANYWAY?

Who Owns Client File Documents When the Retainer Ends

By Jacqueline Morris, Felicia S. Folk and John Vamplew

I INTRODUCTION

Who owns the paper in client files?

In "Retention and Disposition of Client Files: Guidelines for Lawyers",[1] Professor DeLloyd J. Guth attached as Appendix B a list outlining ownership of client file documents upon termination of the retainer when the account is paid and when a solicitor's lien is claimed because the account is not paid. Since that time, the Law Society of British Columbia has received weekly inquiries about who is entitled to originals or copies of client file documents. The callers have been referred to Appendix B.

The purpose of this article is to expand that Appendix for the benefit of lawyers and their clients. We provide an updated checklist followed by a discussion of authorities in support of the division we have made between documents owned by the lawyer and by the client and what can or cannot be retained by the lawyer when a solicitor's lien is asserted. For some documents, there is little or no authority or, since the authority pre-dates 1900, its relevance may be questionable. We have attempted to indicate the more controversial documents and place them where we believe they would fall under the categories set out in *Cordery on Solicitors*.[2]

Whether documents are delivered to the client following termination of the retainer, or the file is delivered to another party subject to a solicitor's lien, it is important for the lawyer giving up possession to retain a copy, made at his or her expense, a copy of all relevant documents and correspondence. This practice could protect the lawyer in the event a complaint is made to the Law Society or legal action is brought against the lawyer in relation to the file.

II CHECK LISTS

A) File Document Ownership at Termination of Retainer — Accounts Paid

1) The client owns:*

a) originals of all documents coming into existence before the retainer was entered into (unless they belong to a third party);
b) originals of letters sent by the lawyer to the client;
c) originals of letters sent by third parties to the lawyer (including expert opinions and medical reports);
d) copies of letters sent by the client to the lawyer;
e) copies of letters sent by the lawyer to third parties;
f) memoranda of law;

* Jacqueline Morris is a staff lawyer in the Competency Department of the Law Society of British Columbia, Felicia S. Folk is the Practice Standards Advisor for British Columbia, and John Vamplew is a law student at the University of New Brunswick.

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g) notes and tapes of conversations with witnesses (if the trial has not been held);
h) receipts and vouchers for disbursements;
i) transcripts from examinations for discovery and from trial;
j) originals, copies and drafts of all deeds and other legal documents in contentious and non-contentious matters;
k) documents made in preparation for trial, such as chambers briefs, trial briefs, books of documents, and trial books;
l) copies of cases, briefs, and other documents prepared by the lawyer which the client has paid for.

2) The lawyer owns:
a) tape recordings and notes of conversations (other than with witnesses, if the trial has not been held);
b) notes and summaries of evidence and notes of submissions to court;
c) inter-office memos (other than memoranda of law);
d) diary entries;
e) time sheets;
f) computerized records;
g) books of account;
h) originals of letters sent by the client to the lawyer;
i) copies of all other correspondence made by the lawyer at the lawyer's expense;
j) authorizations and instructions, written or oral, given by the client to the lawyer;
k) documents sent to the lawyer during the course of the retainer by the client with the intention that they become the lawyer's property;
l) notes and documents prepared for the lawyer's own benefit or protection and at the lawyer's expense.

B) Solicitor's Lien — Accounts Unpaid

A lawyer asserting a solicitor's lien is entitled to withhold all documents in the client's file except the following:
a) corporate records;
b) the original of a will;
c) a deed in favour of the lawyer but reserving a life interest and power of revocation in the client;
d) documents delivered by a third party to the lawyer acting on behalf of the client, where there is no authority, express or implied, to receive such documents;
e) mortgage documents where the lawyer, acting for both the lender and the borrower, tries to assert a lien against the borrower;
f) original court records;
g) documents delivered to the solicitor for a limited purpose;
h) documents received from a third party who has reserved his or her rights with respect to those documents;
i) documents that prejudice or delay proceedings involving third parties;
j) documents that the client would have no right to retain;
k) documents required by court order to be surrendered.

III FILE DOCUMENT OWNERSHIP AT TERMINATION OF RETAINER — ACCOUNTS PAID

Every document and every piece of paper in a client's file belongs to someone. The question of "Who owns what?" will be answered by reference to legal principles of ownership and possession, not by consideration of legal ethics. The Court in *Aggio*

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v. *Rosenberg* quoted with approval the following from an article in the Law Society of Upper Canada Gazette, "The documents that should be handed over to a client . . . is a matter of law and not of professional conduct."[3] A lawyer must, subject to any solicitor's lien, produce the client's documents when requested to do so. Documents should be delivered as quickly as possible[4] and must be in a reasonable order and condition.[5]

A) Documents Coming into Existence Before the Retainer

Often during the management of a file, lawyers take possession of documents which came into existence prior to commencement of the retainer. They hold these documents solely as agents for the client or third party responsible for their delivery. Following termination of the retainer, the originals of these documents must be returned to their rightful owner.[6]

B) Documents Coming into Existence During the Retainer

Cordery[7] says the lawyer can establish ownership of documents created or received following commencement of the retainer by meeting three criteria:

"(a) He was under no duty to prepare them,
(b) They were not in fact prepared for the benefit of the client, and
(c) The client cannot be regarded as being liable to pay for them . . . "

Cordery further says client ownership is proven by showing:

"(a) The documents were a necessary part of the business transacted . . . and
(b) He has in fact paid (or is liable to pay) in one form or another for their preparation."

1) Cordery's Four Categories

According to *Cordery*, and based on the criteria set out above, all documents coming into existence during the retainer fall into four broad categories[8] (the special status of correspondence will be addressed separately below):

a) Documents prepared by the lawyer for the benefit of the client and paid for by the client

Documents in this category include all original deeds and documents, along with earlier drafts and copies, as well as cases and briefs prepared by the lawyer.[9] They are the property of the client as they meet the twofold test of client ownership and must be provided to the client when requested.

While inter-office memoranda generally are not the client's property, we suggest this is not the case for memoranda of law. Where a lawyer prepares memoranda of law or has them prepared by an agent or employee, he or she does so with the purpose of offering the client the best possible advice and legal service. Such memoranda are clearly for the client's benefit. Where the client ultimately pays for this legal work, either through the lawyer's fee or as disbursements, such memoranda of law become the property of the client.

Documents made in preparation for trial, including chambers briefs, trial briefs, books of documents and trial books, are the property of the client. Where the client cannot receive the original, such as in the case of a chambers brief because the original is submitted to the court, the client is entitled to a copy. These documents clearly meet the two-fold test established in *Cordery* as noted above. The client is charged for preparation of these documents. Their preparation is often a necessary procedure when taking a matter before the courts.

The ownership of notes remains controversial. The traditional view is that all notes,[10] including notes of interviews and preparations for trial, and tape recordings,[11] are the property of the solicitor. However, a September 1993 publication of the Law Society of New Zealand, following Cordery's categories, now places "memoranda of

telephone conversations with third parties" in documents belonging to the client.[12] We agree that ownership of most notes and tape recordings of conversations are the property of the lawyer, as they are made to aid the lawyer's memory. However, we suggest that notes and tape recordings of conversations with witnesses, when the trial has not been held or the matter settled, belong to the client. They provide extremely important information for new counsel in preparing the case.

b) Documents prepared by the lawyer for his or her own benefit or protection at the lawyer's own expense

Documents in this category include notes and summaries of evidence, notes of submissions to court, inter-office memos (but not memoranda of law), diary entries, time sheets, computerized records and books of account. These original documents belong to the lawyer. As well, notes and tape recordings of conversations with the client or others with the exception noted above are for the lawyer's own use or protection and are the property of the lawyer.

c) Documents sent by the client to the lawyer during the course of the retainer, property to which is intended to pass to the lawyer at the date of dispatch

These documents, including originals of letters, authorities and instructions written or given to the lawyer by the client, are the property of the lawyer.[13]

d) Documents prepared by a third party during the course of the retainer and sent to the lawyer otherwise than at the lawyer's expense

Documents of this nature are the property of the client. They include receipts and vouchers for disbursements.[14] The client is entitled to expert opinions, including medical reports, and transcripts from Examinations for Discovery and from trial, as the client is ultimately expected to pay for these documents either as a disbursement or indirectly, having paid an insurance premium. For a discussion of withholding a document, if the information in it may upset the client, please see (d) under Correspondence below.

2) Correspondence

Both the client and the lawyer are entitled to copies of all correspondence in the file provided each bears the cost of the respective copies. As part of the lawyer's ongoing effort to keep the client informed of the progress of the file, the client should have been provided, on a regular basis, with copies of correspondence. If the retainer is terminated before the conclusion of the file and the client obtains new counsel, originals and copies of correspondence as set out below should still be provided so the new lawyer has a complete set of this information. Ownership of the original of a letter will depend on the circumstances.[15]

a) Lawyer to client

The client is entitled to retain the original of all correspondence sent by the lawyer to the client. The file copy belongs to the lawyer,[16] but should be copied for the client at the client's expense, especially if the file is going to new counsel so new counsel can more quickly be brought up to date with the case.

b) Client to lawyer

The original of a letter sent by the client to the lawyer is the property of the lawyer,[17] but should be copied for the client at the client's expense, especially if the file is going to new counsel, for the reason set out in (a) above.

c) Lawyer to third party

A third party may retain the original of any letter sent by the lawyer acting on behalf of the client. The client has a right to the file copies of all such correspondence.[18] The lawyer may make a further copy at his or her expense.

(46)

d) Third party to lawyer

Correspondence sent by a third party to a lawyer acting on behalf of the client is the property of the client. The client is entitled to the originals of these letters,[19] while the lawyer may make copies, at his or her own expense.

What should a lawyer do if the third party specifically requests that the client not see the letter or the lawyer believes the information contained in the letter might in some way endanger, upset or offend the client? This issue was addressed in *McKaskell* v. *Benseman*,[20] where a solicitor received a letter from opposing counsel containing remarks which he believed to be offensive and professionally embarrassing. The solicitor, acting in good faith and his view of the best interests of his client, returned the letter and requested the opposing solicitor to withdraw the offensive remarks and replace the letter. The original letter was never disclosed to the client. The High Court of New Zealand stated that there is a fiduciary duty owed to the client to reveal all material information coming into the solicitor's possession concerning the client's affairs. The solicitor was held to be in breach of this obligation in spite of acting in good faith and in what he believed to be the client's best interests. The client was awarded $1,000 in damages against each of the two lawyers involved, although he had sought $160,000 in general and punitive damages.

IV SOLICITOR'S LIEN — ACCOUNTS UNPAID

To secure payment of fees, a lawyer may assert a solicitor's lien on documents, monies or other property of the client in the lawyer's possession. This article will deal exclusively with the issue of a lien on client file documents. This type of solicitor's lien, sometimes referred to as a retaining lien, creates neither an encumbrance nor an equitable charge. The lawyer has no proprietary interest in the documents withheld. This lien is strictly passive and possessory with no means of active enforcement.

At common law, a solicitor's lien may be applied to all personal property of the client, including documents, papers and funds, with limited exceptions (see below), where the following conditions exist:[21]

1. The personal property belongs to the client;
2. The personal property came into the lawyer's possession while he or she was serving in a professional capacity on behalf of the client (i.e., there is no solicitor's lien on property the lawyer receives when acting in the capacity of a lender or trustee);
3. If the lawyer received the property on behalf of the client from third parties, it was with the express or implied authority of the client;
4. The lien attaches only to taxable costs incurred by the lawyer in respect of work done on the instructions of the client.
5. A lien does not attach to funds held in trust for a particular purpose.

A lawyer asserting a lien should have his or her outstanding accounts reviewed. The lawyer will be under no obligation to permit the client to inspect or copy the documents in preparation for the review.[22] If the client insists on access to the file, he or she may apply to the Court, pursuant to section 77 of the *Legal Profession Act*, for an order requiring the lawyer to surrender the documents. Failing that, the client could possibly apply to the Registrar, pursuant to Rule 32(5) of the B.C. Rules of Court, for a direction that the lawyer produce the documents.

A) Change of Lawyer

The rights of a lawyer to assert a solicitor's lien very largely depend on whether he or she has been discharged by the client or has withdrawn from the relationship.[23]

*Page 92 omitted as advertising only.

Occasionally, a lawyer will assert a valid lien on a client's documents but still must surrender the documents to the client or to his or her new lawyer. The original lawyer can deliver them "subject to the lien." In so doing, the lawyer surrenders the documents while reserving his or her rights to the lien. However, this may be of little solace to the original lawyer because the lien will be of little use once the documents subject to it are no longer wanted.by the client. A better approach for the lawyer is to seek to secure his or her position by obtaining an undertaking from the new lawyer to preserve the lien. Set out below are those occasions when a lawyer must give up possession of the documents without necessarily defeating his or her retaining lien.

1) Withdrawal by Lawyer

Upon a lawyer terminating the solicitor-client relationship, even for just cause, such as non-payment of account, the Courts have traditionally required the departing lawyer to deliver the client's file documents to the new solicitor "subject to the lien".[24] This meant that the new lawyer undertook to return the documents to the original lawyer once the matter was completed, and the original lawyer could then hold the documents until his taxed account was paid. Obviously, the lien at that point has little value.

A 1983 case from the U.K.,[25] however, suggests that if a solicitor has refused to continue to act and the client requests a Court Order for delivery of the file, the traditional practice may not always be followed. The Court will consider the interests of the Court's own officers who should not be left without payment for work properly done. In certain circumstances the Court will uphold the lien.

Reference should also be made to Chapter 10 of the *Professional Conduct Handbook*, entitled "Withdrawal". Ruling 8(e) states:

> **"Procedure for withdrawal**
> 8. Upon severance or withdrawal, the lawyer shall forthwith: . . .
> (e) take all reasonable steps to assist in the transfer of the client's file."

Footnote 2 to that chapter provides further guidance:

> "2. When, upon severance or withdrawal, the question of a right to a lien for unpaid fees and disbursements arises, the lawyer should have due regard to the effect of its enforcement upon the client's position. Generally speaking, the lawyer should not enforce such a lien if the result would be to prejudice materially the client's position in any uncompleted matter.
>
> Before accepting employment, the successor lawyer should be satisfied that the lawyer formerly acting for the client has withdrawn or has been discharged. It is quite proper for the successor lawyer to urge the client to settle or take reasonable steps toward settling or securing any account owed to the lawyer formerly acting, especially if the latter withdrew for good cause or was capriciously discharged. However, if a trial or hearing is in progress or is imminent, or if the client would otherwise be prejudiced, the existence of an outstanding account should not be allowed to interfere with the successor lawyer acting for the client."

2) Discharge by Client

While it may be difficult to maintain a lien if the lawyer terminates the solicitor-client relationship, such is not the case if the client discharges the lawyer (with some notable exceptions). A solicitor's lien is available, subject to the account being reviewed, upon discharge without just cause.[26] Following are exceptions to this general rule resulting in the lawyer having to surrender the documents, subject to the lien.

a) Prejudice to Third Parties

One exception to the rule that a solicitor has a right to exercise a lien upon documents in his possession where he has been discharged is that where third parties

are involved the Court may "interfere with the exercise of the lien without actually nullifying it." In *Re Gladstone*,[27] the Court would not allow the solicitor to prejudice the interests of the children in a divorce proceeding by retaining possession of the documents. It ordered that the former solicitor deliver the documents to the client's new solicitor, upon the new solicitor's undertaking to preserve the documents and return them to the former solicitor after the conclusion of the matter and apply funds from any judgment or settlement firstly to the former solicitor's taxed account.

b) Lawful Demand by aThird Party

A lawyer has no greater right to retain documents than the client would have if he or she still had possession. It has been long established that in circumstances where the client would be required to produce documents to a third party, the lawyer must also produce the documents.[28] This principal has been applied in favour of court appointed receivers[29] and trustees in bankruptcy.[30]

c) Court Order for Delivery of Documents

Upon a change of lawyers, or where the client subsequently chooses to act on his or her own behalf, an application may be made to the Supreme Court of British Columbia, pursuant to s. 77 of the *Legal Profession Act*, for an order that the former lawyer deliver the client's file documents to the client or his or her new lawyers. *Re Neylan*[31] considered the predecessor to s. 77, that being s. 98 of the *Barristers and Solicitors Act*. While the difference in wording between section 77 and section 98 is of some significance, *Re Neylan* remains instructive for interpreting the present legislation.

Section 98 created a discretionary remedy. It provides as follows:

> 98. In case a change of solicitors takes place, the Supreme Court may, on application by summons on behalf of the client, order the solicitor having the custody of deeds, documents or papers of the client to deliver them to the new solicitor nominated by the client, on payment into court of the amount due to the former solicitor, or on proper security being given at the discretion and to the satisfaction of the court.

In *Re Neylan*, Hinds J. considered the effect of the words "proper security"[32] and, upon weighing several factors, applied the common law in *Re Gladstone* to s. 98. He held that the former solicitor should deliver the file to the new solicitors upon an undertaking in writing requiring the new solicitors to:

a) preserve the documents in their present condition;
b) return all documents to the original solicitor at the final disposition of the action; and
c) apply the proceeds of any judgment or settlement firstly to the taxed account of the original solicitor.

In the absence of exceptional circumstances, the case law suggests these three conditions constitute the standard undertaking which new lawyers enter into when the original lawyer delivers a file subject to a lien. In practice, the original lawyer may wish to seek additions or modifications to this undertaking in order to secure payment of fees owing.

Section 77 of the *Legal Profession Act* states:

Change of solicitor

> 77. (1) Where a client changes solicitors or commences acting on his own behalf, without a solicitor, the client or the new solicitor may apply to the Supreme Court for an order directing that the former solicitor deliver the client's records to a new solicitor nominated by the client or to the client himself, as the case may be.

(2) The court may, in an order under subsection (1), make the direction conditional on the client

(a) paying all amounts due to the former solicitor by the client, or

(b) giving security for the payment in an amount and manner satisfactory to the court,

and the court may order a review before the registrar.

This successor to section 98 has brought two significant changes. First, while the granting of the order remains at the Court's discretion, a second discretion may be exercised by the Court in that it may or may not make the order to deliver conditional upon payment of all amounts due or on proper security being given. The previous legislation suggested that once the order to deliver was made, it must be made conditional. *Re Neylan* remains good authority for the interpretation of what constitutes "proper security" for payment.

The second significant difference between the present section 77 and the former section 98 is that the present legislation provides for circumstances where the client discharges a solicitor and chooses to act on his or her own behalf. *Re Neylan* does not apply where the client chooses to proceed without counsel. In *Appleton* v. *Hawes*,[33] the Court refused to impose an undertaking in the terms found in *Re Gladstone* (and, thus, *Re Neylan*) on the client, stating, "the client is not an officer of the Court and to do so would be to defeat the very nature of the lien." Instead the Court allowed the client and any potential new solicitor to inspect the files at the former solicitor's office. In other cases it may be possible for the client to provide other security, presumably of a financial nature

Where the client is moving from lawyer to lawyer with intent to avoid paying fees, it is unlikely a Court will require the lawyer asserting a solicitor's lien to deliver the documents to the client. However, where there is uncertainty as to the reasons for the discharge of the lawyer, the Court may require delivery or some means of access to the file.[34]

Where delivery of certain documents in a former client's file to the client might result in a breach of solicitor/client privilege with other parties to the action, the Court can impose an injunction on the client to restrain the client from revealing confidential information.[35]

3) Dissolution of Law Firm

Where a lawyer is a member of a firm, the client's contract for representation is with the firm, not the individual lawyer. The dissolution of a law firm amounts to a termination of the client's retainer by the firm.[36] The dissolved firm will have a residual accounting and financial interest in all files. A letter, similar in form to Appendix 4 of the *Professional Conduct Handbook*, should be prepared and arrangements made by the current or new lawyer to secure outstanding accounts owed to the dissolved firm.

4) Lawyer Departs from Firm

Where a lawyer leaves a law firm, the lawyer cannot do anything to detrimentally affect a lien asserted by the firm. In *Vertlieb Anderson* v. *Nelford*[37] the B.C. Court of Appeal held that the departing member of a law firm could not remove client file documents, against which the firm claimed a lien, despite the fact that he was acting pursuant to the client's instructions. Southin J.A., for the Court, wrote:[38]

> [He] had an implied obligation to serve the firm, during his relationship with it, faithfully and diligently.
>
> To so act as to deprive the firm of its lien was a breach of that obligation . . .

Reference should be made to the *Professional Conduct Handbook*, Chapter 11, Rulings 16-21, and Appendix 4.

When transferring files on either dissolution of the firm or upon a lawyer departing a firm, it is advisable to request of the lawyer taking the file that he or she provide written assurance that it will be produced if required for the purposes of an audit.

B) Loss of Lien

A solicitor's lien will not come to an end upon the death of a lawyer. Rather the lien passes to the lawyer's personal representative.[39] A lien will, however, be lost under the following conditions:

1) Parting with Documents

A lien will be lost where the lawyer voluntarily parts with the documents without reservation of the lien.[40] The lien will, however, remain intact where the documents are improperly taken from the lawyer[41] or where the lawyer surrenders possession of the documents to his or her agent.[42]

2) Waiver

There is a *prima facie* inference that a solicitor has waived a lien if security or other property is taken inconsistent with the lien. For example, a promissory note was sufficient to discharge the lien in *Re Taylor, Stileman & Underwood*,[43] since the solicitor was under a duty to explain the effect of the security and specifically reserve a right to the lien. The security must be obtained by consensual arrangement with the client. In *A. v. B.*,[43] the arrest of a ship by the solicitors was held to be part of the process of enforcing a lien (which had become a default judgment), and did not constitute a waiver.

C) Documents Not Subject to Lien

The general principles set out above are subject to the following exceptions:

1) Corporate Records

By legislation, certain corporate records must remain in the records office of the company. In the case of B.C. companies, s. 187 of the *B.C. Company Act* lists the applicable documents, while s. 20 of the *Canada Business Corporations Act* governs for federal companies. Often, the records office is designated by the directors to be the office of the corporation's lawyer. When the lawyer's office ceases to be the records office of the company, the lawyer must deliver all applicable documents to the new records office. The lawyer cannot assert a lien on these documents.[45]

However, in a case which appears to be an anomaly, a solicitor's lien on corporate records may be successfully maintained provided that the lawyer's office continues to be the records office of the company and the records are accessible to those entitled by legislation to view them. In *Kingswood Explorations 1985 Ltd. v. Elkind*[46] the Alberta Supreme Court noted that there had never been an express "designation" of a records office, but the fact that the directors had approvingly deposited corporate records at the lawyer's office for 17 years suggested such a "designation" had been implicitly made. Adequate shareholder access had been provided for 17 years, and absent cogent evidence that the existence of a lien would preclude future access, the Court was not willing to disrupt the lien.

2) Original of a Will

A lawyer cannot assert a lien over an original will of a client.[47]

3) Mortgages

A lawyer acting for the borrower as well as acting on behalf of the lender, or being the lender him or herself, cannot claim a lien on mortgage documents as against the client borrower. Upon the execution of the mortgage, the documents become the

sole property of the lender and any lien on the original mortgage documents as against the borrower is ineffective. Upon redemption of the mortgage, the documents must be returned to the borrower and the lien cannot be revived.[48]

4) Documents for a Limited Purpose

A solicitor's lien will not apply to documents delivered to the lawyer for the purposes of raising money or to money held in trust for a special purpose, unless the documents or money are delivered with the express or implied understanding that the lawyer is to retain them for general purposes subsequent to fulfillment or failure of the original purpose for which they were delivered.[49]

5) Third Party Interest

The legal right of a lawyer to hold documents under a solicitor's lien cannot be greater than the interest of the client in the documents.

There can be no lien on a document where it is no longer held on behalf of the client against whom the lien is claimed.[50] As well, a lawyer cannot assert a lien on documents delivered by a third party to the lawyer acting on behalf of the client, without express or implied authority from the client to receive such documents.[51]

Where a lawyer receives documents from a third party who has expressly reserved his or her rights, the lawyer cannot assert a lien against the client with regard to those documents. In *Re Galdan Properties Ltd.*,[52] the solicitors acting on behalf of the vendor in a real estate transaction could not attach a lien to mortgage documents received from the third party lender. The solicitors held the documents solely as trustee for the lender and were required to redeliver them upon demand.

6) Original Court Documents

A solicitor's lien asserted against the client cannot attach to original court records.[53] Thus, a discharged lawyer cannot refuse to produce a Court Order obtained while he or she was acting for the client.[54]

V WHO PAYS FOR COPIES?

In *Ex parte Horsfall*, Lord Tenterden C.J. wrote, "He who pays for the drafts . . . by law has a right to the possession of them."[54] This statement still holds true today but technology and billing practices have altered the effect. Gone are the days of *Re Thompson*[55] where letters were copied by hand into a solicitor's letter-book and the client had to pay for them to be recopied. Gone also are the days of *Marshall* v. *McAllister*[56] where a single carbon copy was made at the time the original was typed. With the proliferation of computers and photocopiers, copies are made with relative ease.

Changes in technology have been accompanied by changes in billing practices. Photocopying charges are not now encompassed in the category of general office overhead which was included in the lawyer's hourly rate. Rather, photocopying charges are billed as a disbursement. Provided the client pays these bills, the copies will already be paid for. For those copied documents generated since the last billing, provided the client wishes the copies, the lawyer is entitled to submit a bill for the outstanding copying charges.

A lawyer can claim ownership of some documents in a file and is thus entitled to the originals of those documents. All documents listed under "The client owns" in the Checklists at the beginning of this article, with one possible exception, should be provided to the client without any further copying charges. (That one exception is (d), copies of letters sent by the client to the lawyer.) The lawyer is entitled to make copies of these client documents to retain for his or her own benefit or protection. The expense of producing these copies is to be borne by the lawyer.

At the end of the retainer, where an original document "owned" by the client is still in the possession of the lawyer, it should be turned over to the client. Many original documents, however, will not be found in the file. For example, the original of a letter written by the lawyer and sent to a third party will be in the possession of the third party. The original of a chambers brief will be in the possession of the court. Documents such as these will be represented in the file by a copy of the original. At termination of the retainer, the client will be entitled to these copies, just as he or she would be entitled to originals, as the client will have been billed for the expense of producing the original and the copy.

Thus, the principle espoused by Lord Tenterden in 1827 survives. The client will be entitled to copies of documents only upon bearing the burden of the expense of copying. The lawyer should retain copies of all correspondence and important documents in the file for his or her own benefit or protection when the client or new lawyer is given the file, but the lawyer cannot charge the client for these photocopies.

ENDNOTES

1. (1988) 46 *Advocate* 229.
2. F.T. Horne, *Cordery's Law Relating to Solicitors*, 8th ed. (London: Butterworths, 1988) [hereinafter *Cordery*].
3. (1981), 24 C.P.C. 7 at 12 (Ont. S.C.), quoting with approval from *Cordery* and from "A Lawyer's Authority Over Documents on Termination of Retainer" (1981) 15 L. Soc. of Upper Can. Gaz. 103.
4. *Aggio v. Rosenberg*, *supra*, note 3.
5. *North Western Railway Co. v. Sharp* (1854), 10 Exch. 451, 156 E.R. 514.
6. *Cordery*, *supra*, note 2, at 89.
7. *Supra*, note 2, at 90.
8. *Ibid*, at 89.
9. *Cordery*, *supra*, note 2, at 90.
10. *Records Retention Law and Practice*, Anson — Cartwright et al, Carswell, 1992, at p. 5-12.
11. *Cordery*, *supra*, note 2 at p. 90; "A Lawyer's Authority over Documents on Termination of Retainer", *supra*, note 3 at 104.
12. "Ownership and Retention of Legal Records and Files — Guidelines", Law Society of New Zealand Law Talk, Sept. 6, 1993.
13. See the references at notes 10, 11 and 12.
14. Re *Ellis & Ellis*, [1908] W.N. 215.
15. The author of a letter is prima facie the first owner of the copyright in the letter.The recipient owns the material upon which the letter is written, subject only to the proprietary right retained by the author to restrain publication in breach of confidence and to restrain reproduction in infringement of copyright. *Copinger and Skone James on Copyright*, W.A. Copinger & F.E. Skone James, 1991 13th ed. (London, Sweet and Maxwell, 1991); *Canadian Law of Copyright*, Harold G. Fox, 2nd ed. (Toronto, Carswell, 1967).
16. Re *Wheatcroft* (1877), 6 Ch. D. 97.
17. *Ibid.*
18. *Marshall v. MacAllister*, [1952] N.Z.L.R. 257 at 260 (S.C).
19. Re *Thomson* (1855), 20 Beav. 545, 52, E.R. 714 (C.A.).
20. [1989] 2 N.Z.L.R. 75 (H.C.).
21. *Cordery*, *supra*, note 2, at 237-239; "Solicitor's Liens" (1985) 19 L. Soc. of Upper Can. Gaz. 91.
22. *Cordery*, *supra*, note 2 at 239.
23. In *re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1.
24. *Collison v. Hurst*, [1946] O.W.N. 668, [1946] 4 D.L.R. 27 (C.A.); "Solicitor's Liens", *supra*, note 21 at 94.
25. *A. v. B.* [1984] 1 All E.R. 265 (Q.B.).
26. *Cordery*, *supra*, note 2, Chapter 8, pp 236-250.
27. *Re Gladstone*, [1972] 2 O.R. 127 (C.A.).
28. *Re Hawkes*, *supra*, note 23.
29. *Re Imperial Developments Ltd. v. Field & Field* (1988), 28 C.P.C. (2d) 257 (Alta. C.A.); *Northland Bank v. L.G. Lands Ltd.*, [1983] 4 W.W.R. 86,44 B.C.L.R. 237 (S.C.).
30. *Lapointe v. Racine* (1979), 33 C.B.R. (N.S.) 19 (C.S. Que.); *Re Fundy Forest Industries* (1972), 7. N.B.R. (2d) 344 (Q.B.).
31. (1986), 8. B.C.L.R. (2d) 314 (S.C).

32. *Ibid*, at 317.
33. (1990), 46 C.P.C. (2d) 107 at 112.
34. *Ibid.*
35. *Chin v. Wong* (1991), 53 B.C.L.R. (2d) 288 (S.C.).
36. *Cordery, supra*, note 2 at 248.
37. [1992] 5 W.W.R. 97 (B.C.C.A.).
38. *Ibid*, at 12.
39. *Cordery, supra*, note 2, at 248.
40. *Dicas v. Stockley* (1836), 7 Car. & P. 587, 173 E.R. 258; *Caldwell v. Sumpters* [1972] 1 Ch 478 at 497 (C.A.).
41. *Dicas v. Stockley, ibid*, at 497.
42. *Caldwell v. Sumpters, supra*, note 40.
43. [1891] 1 Ch. 590 (C.A.), at 597.
44. *Supra*, note 25.
45. *Re Alpha Mortgage and Investments Co.* (1916), 10 W.W.R. 652 (B.C.S.C.); *Re Pioneer Tractor* [1918] 1 W.W.R. 329 (Alta S.C.).
46. (July 5, 1988) Toronto 27134/88 (Alta S.C.).
47. *Balch v. Symes*, (1823) Turn & R. 87, 37E.R. 1028; *Georges v. Georges* (1811), 18 Ves. Jun. 294, 34 E.R. 328.
48. *Barratt v. Gough-Thomas*, [1951] 1 Ch 242 (C.A.).
49. *Ex parte Pemberton* (1810), 18 Ves 282; *Re Mid Kent Fruit Factory*, [1896] 1 Ch. 567 at 570; *Cordery, supra*, note 2, at 238.
50. *Supra*, note 48.
51. *Gibson & May* (1853), 4 De G.M. & G. 512.
52. [1988] I.R. 213 (S.C.).
53. *Bird v. Heath* (1848) 6 Hare 236.
54. *Clifford v. Turrill* (1848) 2 De G. & Sm. 1.
55. (1827), 7 B. & C. 528, 108 E.R. 820.
56. *Supra*, note 19.
57. *Supra*, note 18.

Understandable financial facts, provable in Court...

If you are faced with

* **unorganized or incomplete financial and business information**
* **important facts buried amongst a mass of extraneous material**
* **a need to "pull together" facts and make them more easily understandable for Court purposes**

consider calling W.D. (Bill) Kinsey, ***a Chartered Accountant with over 30 years experience finding and explaining financial and business facts for lawyers, their clients, and the Courts.***

Kinsey & Company ***Forensic Accounting*** ***925-1464***

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Date: _____

NAME OF ORGANIZATION

FILE CLOSING FORM

Client: _____

Primary legal issue:

- ☐ Income Security (includes CPP, WCB, Welfare, Disability, EI)
- ☐ Housing (includes Residential Tenancy)
- ☐ Debt
- ☐ Family
- ☐ Child Protection
- ☐ Other (includes Criminal, Mental Health, Immigration/Refugee, Wills/Estates, Human Rights, Consumer, Employment, etc.)

1. Briefly describe the client's problem: _____

2. What did the client want to have happen? _____

3. What did the client actually get? _____

4. For better or for worse, has the client's problem finished or reached a conclusion? Please explain. _____

Draft template by Amber Prince, Atira, November 7, 2012

[Advocate contact info]

May 31, 2012

To: Jane Doe
3104 –ABC Street
Vancouver, BC.
Delivered by hand & by regular mail

Dear Jane,

RE: Your Court of Appeal Matter

This letter is to confirm that I will be unable to continue to assist you with pursuing your Court of Appeal matter, including assisting you with preparing to represent yourself.

On May 28, 2012 I attended with you at the office of lawyer John Singh, Q.C. for the purpose of obtaining *pro bono* advice on your Court of Appeal matter.

Unfortunately, Mr. Singh advised that it is not in your best interest to pursue your appeal. Mr. Singh stated quite unequivocally that you will not win, and that costs will be awarded against you.

Mr. Singh advised you to abandon this appeal as soon as possible, and that if you choose to abandon the appeal he may be able to assist you ensuring you would not have to pay additional legal costs for initiating this appeal.

Based on Mr. Singh's advice I believe it is in your best interests to abandon this appeal.

I have sought out the opinion of my supervising lawyer, who has reviewed your case and come to the same conclusion as Mr. Singh. Per the advice of Mr. Singh and my own supervising lawyer, it is no longer appropriate or useful for me to continue to support your application, even if only in the role of a support person assisting you. In fact, supporting your Court of Appeal is likely counterproductive, given the advice received from Mr. Singh and my supervising lawyer.

You are welcome to seek a second opinion, but unfortunately I am not longer able to help you with this matter.

Should you have other legal issues separate from this appeal, I'd be more than happy to meet with you and see if I can assist with it.

If you have any questions/concerns regarding this letter please do not hesitate to contact me Jane.

Take care,

[Advocate Name]

OTHER RESOURCES

Compiled by Robyn Gifford & Amber Prince (November, 2012)

BC Society of Transition Houses, *Reducing Barriers to Support: Discussion Paper on Violence Against Women, Mental Wellness and Substance Use*, online: http://www.bcsth.ca/sites/default/files/ReducingBarriersDiscussionPaper_Final.pdf

Canadian Bar Association, *Conflicts of Interest*, online: http://www.cba.org/CBA/groups/conflicts/toolkit2.aspx

Canadian Bar Association *Pro Bono Resources*, online: http://www.cba.org/CBA/groups/probono/resources.aspx

Law Foundation of BC, *Legal advocates conference materials*, online: http://www.lss.bc.ca/community_workers/conferenceMaterials.php

Law Society of BC, *Annotated Code of Professional Conduct* (will replace the current Code of Conduct in January 2013), online: http://www.lawsociety.bc.ca/page.cfm?cid=383&t=Professional-Conduct-Manual

Law Society of BC, *Practice Support and Resources*, online: http://www.lawsociety.bc.ca/page.cfm?cid=17&t=Practice-Support-and-Resources

Law Society of BC, *Confidentiality/privacy / conflict of interest*, online: http://www.lawsociety.bc.ca/page.cfm?cid=944&t=Confidentiality-/-privacy-/-conflict-of-interest

Law Society of Upper Canada, *FAQs – Knowledge Tree, online:* http://rc.lsuc.on.ca/jsp/kt/loadKnowledgeTreePage.do

Penticton Advocacy Network, *The Advokit*, online http://www.pawc.ca/pawcAdvokit.html

Povnet, *Witnessing An MHR/Client Interview*, online: http://www.povnet.org/sites/povnet.org/files/Witnessing.pdf

Practicepro, *Topical List of articles and resources*, online: http://www.practicepro.ca/information/default.asp?ename=CF#CF

Diana Romano, *The Legal Advocate and the Questionably Competent Client in the Context of a Poverty Law Clinic*, online: http://ohlj.ca/archive/articles/35_34_romano.pdf

8. Welfare and Disability Benefits

- **Welfare Update: Current Issues**
  - Contacts at MSD
  - Your Welfare Rights Updates sheet
  - Overdue: The Case for Increasing the Persons with Disabilities Benefit in BC
  - Welfare for People without Legal Status in Canada
- **Loss Prevention Management**
  - Welfare Overpayments Sheet, BCPIAC
  - PLMS FAQS
- **Welfare and Assets**
  - Welfare and Assets Materials
  - Lists of Apendices
  - Appendices A through G
- **Child Tax Benefit (CCTB): Eligibility, Overpayment Allegations and Appeals**
  - Child Tax Benefit Materials
  - List of Appendices
  - Appendices
- ***Mothers without Legal Status (materials under Immigration)***

THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

8. Welfare and Disability Benefits

- **Welfare Update: Current Issues**
  - Contacts at MSD
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  - Overdue: The Case for Increasing the Persons with Disabilities Benefit in BC
  - Welfare for People without Legal Status in Canada

THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

Consultation Process: Ministry of Social Development/ Community Advocates

Contact Information

1. Moving Forward Steering Committee ("MFSC"):

The Steering Committee is the overall umbrella group for the consultation process, discussing policy issues, raising systemic issues, etc at the provincial level. Advocates are represented from all 5 provincial regions.

Advocates' co-chair: Tish Lakes, Advocate and Executive Director
Okanagan Advocacy and Resource Society (OARS)
Tel (250) 979 0201, oars@telus.net

Ministry co-chair: Judy D'Gal, Director, Policy Interpretation &Stakeholder Relations, MSD
Tel: (250) 387-9271; judy.dgal@gov.bc.ca

2. Working Groups

The MFSC has 3 working groups that focus on specific issues. Membership in working groups is open to advocates whether or not they attend MFSC meetings.

a) Reconsideration and Appeal Rights:

Advocates' co-chair: Gillian Andrew, Poverty law advocate
Powell River Community Services Association
Tel (604) 485 0950; povertylaw@onelink.ca

Ministry co-chair: Cary Chiu, Manager, Appeals Section, MSD
tel (250) 356 1926; Cary.Chiu@gov.bc.ca

b) Health Benefits

Advocates' co-chair: Stacey Tyers, Advocate
Terrace & District Community Services Society
Tel (250) 635-3178; staceytyers@tdcss.ca

Ministry co-chair: Paul Beardmore, Director, Health Assistance Branch, MSD
Tel (250) 356 1746;
Paul.Beardmore@gov.bc.ca

c) Communications & Immigrant/Refugee, Racialized groups working group

Advocates' co-chairs: (a) Ros Salvador, Barrister and Solicitor, BCPIAC
Tel (604) 687 3063, rsalvador@bcpiac.com

AND:	(b) Gurpreet Pabla, Advocate Progressive Intercultural Community Services (PICS) Tel 604 596 7222, ext 123 gurpreet.pabla@pics.bc.ca
Ministry co-chair:	Judy D'Gal, Director, Policy Interpretation &Stakeholder Relations, MSD Tel: (250) 387-9271; judy.dgal@gov.bc.ca

3. Regional quarterly consultation calls

The Community Relations Service Quality manager for each MHS region organizes a consultation call with advocates in their area every 4 months, together with an advocate co-chair in each region. If you don't get notices of the consultation calls in your region, contact your local advocate co-chair:

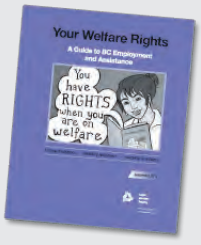
Region 1 (Vancouver Island):	Gillian Andrew, Poverty law advocate Powell River Community Services Association Tel (604) 485 0950; povertylaw@onelink.ca
Region 2 (Vancouver Coastal):	Stephanie Smith, Advocate MOSAIC, Vancouver Tel 604 254 9626; ssmith@mosaicbc.com
Region 3 (Fraser)	Soraya Van Buskirk, Advocacy programs manager Newton Advocacy Group Society (NAGS) tel 604 547 0107; soraya@newtonadvocacygroup.ca
Region 4 (Interior)	Ashly Van Steele, Advocate Kamloops and District Elizabeth Fry Society (250) 314-1900; advocate@kamloopsefry.com
Region 5 (North).	Stacey Tyers, Advocate Terrace & District Community Services Society Tel (250) 635-3178; staceytyers@tdcss.ca

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

Updates to Your Welfare Rights

Updates

October 1, 2012



Some of the information in *Your Welfare Rights* has changed since it was printed in April 2012. Those changes are detailed below. However, welfare laws and policies change often. Even this update may not be completely up to date. An advocate can help you find the most recent information. (To find an advocate, see the chapter on Resources, starting on page 142 of the booklet.) You can also check the ministry's online resource guide at www.gov.bc.ca/meia/online_resource; look halfway down on the first page you come to, under the heading "What's New." All changes went into effect in 2012 unless otherwise noted.

DRAFT

New additions

More assistance for teenage parents living at home

This change is a new addition; it affects pages 8–10 of the booklet.

If you are under 19, have a dependent child, but live with your own parent who is also on welfare or Persons with Disabilities (PWD) benefits, the ministry might consider you and your parent separate family units. This change would mean that you might both be able to get a shelter allowance in addition to your own support allowance. The ministry's decision will depend on your age. This change started October 1.

If you are a parent under 19 and you live alone with your child, see page 10.

Income from government boards exempt

This change is a new addition and adds to the information on pages 38–40.

As of October 1, if you receive welfare or PWD benefits and you sit on a government board, commission, or council, any income you make for doing this work counts toward your earnings exemption. However, any expense allowance that you receive to cover travel is exempt income.

Filing income taxes now required for all clients

This change is a new requirement, and it affects page 101.

Starting in Spring 2013, you will have to file an income tax return with the Canada Revenue Agency in order to get welfare and PWD benefits. Everyone has to file a return — both those already on benefits and those applying for them. The ministry said it will help people on PWD who are first-time tax filers to prepare their returns.

Trusted third-party witness required for forms

There is a new rule about who can witness your signature on a ministry form. Someone called a *trusted third party* must sign on the witness line. This can be a welfare worker (EAW) or other ministry staff. If you have a good reason why you cannot get to a ministry office to get your form signed, the ministry might accept a signature from another government worker or a prescribed professional (doctor, nurse, nurse practitioner, social worker, psychologist, chiropractor, or physical or occupational therapist).

Chapter 1: Who is Eligible

Citizenship requirements

Parents without status who have been abused

This change affects pages 8, 10, and 110–115 (as well as the work requirements described in Chapter 4).

If you are a single parent who does not meet the requirements for citizenship, permanent residency, refugee status, or temporary residence (as described on page 8 of the booklet), you might be eligible for welfare on a temporary basis if ALL of the following are true:

- You have a dependent child who is a Canadian citizen.
- You have left an abusive spouse.
- You have applied for status as a permanent resident.
- You cannot leave BC with your children because of ONE of the following:
    - another person who lives in BC has parenting rights (also called custody and access) or contact (visitation) rights with at least ONE of your children through a court order, agreement, or other arrangement, AND leaving BC with your children would go against the court order or agreement; OR
    - another person who lives in BC is claiming parenting or contact rights regarding one of your children; OR
    - you or one of your children is being treated for a medical condition and leaving BC would be dangerous to that person's physical health.

If you left an abusive spouse, you should also be excused from the work search and the past financial independence requirements. You also might not have employment-related obligations (see page 113 for more information).

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Family member who does not meet citizenship requirements

This information affects pages 8 and 10 of the booklet.

It is still true that if an adult in your family unit does not meet the citizenship requirements for any kind of assistance, the ministry will not count him or her when they decide how much to pay your family in benefits. The ministry will also still deduct that adult's income from your benefits. However, as of October 1, the ministry will also count that adult's *assets* and income when they decide whether your family is eligible for assistance. (See page 8 of the booklet for more information on citizenship requirements.)

Hardship assistance

Spouse awaiting Employment Insurance must sign form

This change affects page 11 of the booklet.

As of December 14, 2011, if you are on hardship benefits and your *spouse* is waiting for Employment Insurance (EI) benefits, your spouse will need to sign an EI Assignment of Benefits form with the ministry. This form gives the ministry the right to receive your spouse's EI payments, once they start. You can face penalties if you do not tell the ministry beforehand about any income your family is waiting to receive.

If more than one of your family members is waiting for EI, then *only* the family member who is most likely to receive EI benefits should complete the form. Only one family member must fill out the form.

Three-month time limit for work search when on hardship

This change affects pages 11–12 of the booklet.

If you are on hardship assistance and the ministry says that someone in your family unit needs to do a work search, then you have a maximum of three months to finish the work search. (This is true whether you have to do a three-week work search or the new five-week search.) You do not have to repay this type of hardship assistance.

If you do not finish the work search or stop trying to finish it within those three months, the ministry will close your file and stop paying your family benefits. You can reapply. However, you must begin the application process all over again. That means that you will also have to start the work search again.

Time limits extended for those awaiting documents

This change replaces information on page 12.

If you are getting hardship assistance because you do not yet have a Social Insurance Number (SIN) or other identification documents, you can now get hardship assistance for up to six months. You must be trying to get the documents during those six months to qualify. You will not have to pay the benefits back.

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Students and eligibility

Full-time students of funded programs usually not eligible

This change affects pages 15–16 and 106. Please read those pages for more information about which students are eligible and which are not.

On April 2, the ministry added to its policy on which students can and cannot receive welfare. It is still true that if you are a *full-time* student enrolled in programs where financial assistance (such as loans or grants) is available, you are *not* eligible for income assistance. The ministry added that, if your program is eligible for financial assistance but you have used up your loans, grants, and bursaries, you cannot get welfare to finish *full-time* studies (although you might be able to get welfare during summer break if you cannot find a job). However, there are exceptions. One exception is described below.

Some people can claim exemptions for education and daycare costs

There are some exceptions to the policy above. You might qualify for an exemption if ANY of the following applies to you:

- Your dependent child (or children) under 19 is a student, OR
- You or your dependants receive PWD benefits, OR
- The ministry temporarily excuses you from the work requirement, OR
- You are a student in a program that is not eligible for student loans. The ministry must approve this before you become a full-time student.

If you qualify, the ministry might allow you to claim money, including grants, scholarships, and Registered Education Savings Plan (RESP) withdrawals as exempt up to the amount of your education and daycare costs.

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Chapter 2: How to Apply

Please also see pages 9–11 of this update for information about changes that apply *only* to Persons with Disabilities (PWD) benefits, under its own heading. The rest of the information in this section *sometimes* applies to PWD as well. We note when this is the case.

Work search requirements

Longer work search required for first-time applicants

This change affects pages 21–25, 27–28, and 34.

As of October 1, if you apply for welfare for the first time, you will be required to complete a *five*-week work search (up from three weeks).

If you return to welfare, you will be required to do a *three*-week work week search before you will be eligible for benefits.

If you can show that you have an immediate need for food, shelter, or urgent medical attention, the ministry will give you hardship assistance while you do the required work search. You will have up to three months to complete the work search.

Work search exemptions—special circumstances

This change affects pages 22–23 of the booklet.

As of October 1, the ministry changed its policies about work searches and waiting periods for some applicants:

Marital/spousal breakdown: When a spouse is deleted from a case because of marital or spousal breakdown and the former spouse reapplies for assistance on his or her own, neither spouse must repeat the work search.

Adding a spouse: When a spouse is added to a case, that person does not have to do a work search before getting income assistance. However, the ministry might say the spouse must sign an employment plan for the couple to stay eligible.

Prisoner about to be released: If you are about to be released from prison and apply for welfare, the ministry considers you as having an immediate need for food, shelter or urgent medical attention. This means that they will give you help when released without needing to do an immediate needs assessment. If you are eligible for hardship assistance, you will get it right away without waiting to finish your work search. However, if the ministry says that you must do a work search, you will have to finish it within three months or be cut off of benefits.

17-year-old applying for PWD: If you are applying for PWD benefits in advance so that you will qualify as soon as you turn 18, it is important to know that you can do the work search ahead of time as well. This way, you can start to receive benefits as soon as you turn 18. (Not everyone will have to do a work search. Check with an advocate and with the ministry to see whether your condition is serious enough to exempt you.)

Proof of your identify—Social Insurance Number

This information affects page 33 of the booklet.

As of October 1, you can use ANY of the following documents if the ministry asks you to prove what your Social Insurance Number (SIN) is:

- your SIN card,
- a receipt issued by Service Canada in place of your SIN card, until your card arrives, if the receipt shows your Social Insurance Number,
- an original Notice of Assessment from Canada Revenue Agency containing your SIN and your name,

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- other original formal documentation from the Government of Canada that has both your SIN and name, OR
- a copy of ANY of the four documents listed above, as long as it is already in your ministry file.

New income and asset exemptions

Income tax refunds now exempt

This change affects pages 38–40 and 101.

If you are on welfare or PWD benefits, as of October 1, you can keep any money you receive from an income tax refund. It will not be deducted from your cheque, and the ministry will consider it exempt income. You must report it, just as you would other exempt income.

Some Workers' Compensation Board payments exempt

This information affects pages 37 and 45.

On May 1, the ministry clarified that not all Workers' Compensation Board (WCB) unearned income is treated the same.

- Some of your WCB Temporary Wage Loss Replacement Payments (issued under Sections 29 and 30 of the Workers Compensation Act) are now exempt from your income if:
    - at least one person in your family unit is on PWD benefits, AND
    - your family unit has received PWD benefits for at least one month, OR
    - your family unit has received PWD benefits in the past.
- WCB lump-sum or monthly payments awarded as compensation for a criminal injury which occurred on the job are exempt up to the asset level for your family unit.
- Other payments from WCB are not eligible for exemptions from your unearned income.

Universal Child Care Benefit exempt for hardship and CIHR

This changes information on page 38.

As of October 1, if you get hardship assistance or Child in the Home of a Relative (CIHR) benefits, the Universal Child Care Benefit is now fully exempt for you, too.

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How the ministry treats structured settlements

This information affects pages 38–40 and 42–43.

A structured settlement is something you might have if you win damages in a lawsuit. It pays you the money the court has awarded over time, instead of all at once. To be considered a structured settlement under this policy, the settlement agreement:

- must have been for damages for personal injury or death, and
- must come from a single annuity (and the annuity cannot be assignable, commutable, or transferable).

See an advocate if you need help understanding whether you have a structured settlement.

The ministry will not count the *annuity* that your payments come from as an asset no matter what kind of benefits you get. This might help you qualify for welfare or PWD benefits. The *payments* you get from the annuity will be treated differently, depending on what kind of benefits you get.

If you are on PWD benefits, the ministry sees the structured settlement as a kind of *trust.* That means you can spend the payments you get from the settlement on disability-related costs. They will not be taken off of your cheque. (See the next page for more information on trusts and disability-related costs.)

However, if you are not on PWD benefits, the ministry will see the payments from your structured settlement as unearned income. But if you are living in a private hospital or special care facility, even if you are not on PWD benefits, the ministry will see the structured settlement payments as exempt.

One-time award allowed as exempt asset

This change affects pages 42–43.

On May 1, 2012, the ministry clarified its policy to say that you when you apply for welfare, you can claim a one-time award that is not on the ministry's list of allowed income or asset exemptions. However, in this special case, you can only claim an amount up to your family's asset level limit (see page 41 of *Your Welfare Rights* for more information). For example, you can claim one-time awards from the CPP Class Action Settlement Agreement, back pay awarded to you by the Employment Standards Branch, compensation from a landlord for an eviction, land claim settlements, and WCB payments awarded for a criminal injury that you suffered on the job, etc.

If you receive more than one payment like those just listed, see the section before this one to see if it might be a structured settlement. The ministry has special rules that might let you keep those payments.

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Chapter 2: How to Apply & Chapter 4: Once Your Are on Welfare

Increase to vehicle asset limits

This change affects pages 40–41 and 107–109.

As of October 1, if you are on welfare and the ministry expects you to work, you can keep a car valued at up to $10,000 (up from $5,000) that you use for daily transportation. However, the ministry will count any other vehicles you own towards your family unit's asset limits. (This does not apply to people on PWD benefits, whose primary vehicles are exempt with no limit; see page 42 of the booklet.)

Increases to general asset limits

This change affects pages 40–41 and 107–109.

As of October 1, people getting welfare as well as those applying for it can keep the following general asset amounts and still be eligible for benefits:

Category & family size	*New asset limit*
PWD: single person	$5,000 (up from $3,000)
PWD: 2 or more people	$10,000 (up from $5,000)
Other welfare: single	$2,000 (up from $1,500)
Other welfare: 2 or more people	$4,000 (up from $2,500)

PWD: changes to asset and income exemptions

Money and other property managed by a committee is exempt

This change affects pages 38–44 of the booklet.

As of October 1, if a committee is managing your affairs and controls your money and other property, this money and other property does not have to be held in a trust to qualify for an exemption like those given to a non-discretionary trust (generally $200,000).

Return on investment in a trust exempt while in trust

As of October 1, there are new rules for how the ministry treats return on investment in a trust. If your trust earns income, as long as the income stays in the trust, it stays exempt. (This includes rental income earned by a property that is part of the trust.) Your trust can also go over the $200,000 limit if it does so because it earned income. The income is only counted as *your* income once the trust pays it to you.

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Transferring money into a trust: time & dollar limits extended

This information affects pages 38–44.

As of October 1, if you are on PWD benefits, applying for PWD, or on welfare but living in a special care facility or private hospital, the amount of money that you can invest in a non-discretionary trust account increased from $100,000 to $200,000.

If you are on PWD benefits and want to transfer income or assets to a trust or RDSP, you have up to three months to set it up. (The same is true for people on welfare who live in a special care facility or private hospital.) You must still report to the ministry that you received the income or assets. You must also tell them you want to put the income or assets in a trust or RDSP. During the three months, the ministry will exempt assets intended for the trust or RDSP that exceed your asset limit. You can ask the ministry to extend the three-month period if you are making reasonable efforts to establish your trust or RDSP. They will also exempt payments from money intended for a trust that you use for disability-related costs (see below).

Disability-related costs exemption allowed

Trust payments are exempt if you use them for the following disability-related costs:

Disability-related cost	*Annual calendar year limit*
Devices or medical aids related to improving your health or well-being	No limit
Caregiver services or other services related to your disability	No limit
Any other item or service that promotes your independence	$8,000 (up from $5,484)
Education or training	No limit
Renovations or changes to your residence necessary to accommodate the needs resulting from your disability (clients who already have PWD designation only)	No limit
Necessary maintenance on your residence (clients who already have PWD designation only)	No limit

(The first four items apply to people who already get PWD, those who are applying for it, and to people who are in special care facilities or private hospitals. The final two items apply only to those who already have PWD status.)

The ministry will also exempt payments from a trust that you put toward buying your primary residence, or opening or adding to an RDSP or RESP.

Trust payments are separate from RDSP payments. RDSPs are not subject to trust payment guidelines.

For more detailed information about how you can use trust payments, see the ministry's policy at www.gov.bc.ca/meia/online_resource/verification_and_eligibility/trusts/policy.html#6

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Trusts can be amended to re-qualify for PWD

If the ministry stops your benefits after reviewing your trust, you might be able to change the terms of your trust so that you can qualify for benefits again. Or you can appeal the ministry's decision. (See an advocate for help. Page 142 of the booklet lets you know how to find an advocate.) If you do not appeal, you will not be able to get benefits again until the ministry finds your trust to be an exempt asset.

If you are on PWD benefits and you expect to receive a large sum of money, see an advocate as soon as possible. It is usually best if you set up a trust or RDSP before you get the money.

Chapter 3: Available Benefits

Child tax benefits exempt for hardship assistance

This change is an addition to pages 38, 59–60, 89, and 97–100.

As of October 1, families who get hardship assistance will be able to keep child tax benefits without having their monthly hardship benefits reduced. These benefits include the Universal Child Care Benefit, the BC Earned Income Benefit, and the Child Tax Benefit.

Coverage restored for some medical needs

These changes affect pages 66–75.

On October 1, the ministry restored coverage for supplies and equipment for people on welfare and PWD benefits. The restored benefit and the replacement period (when noted) are as follows:

Apnea monitors: if medically essential to monitor your breathing (five-year replacement).

Bariatric scooters: up to a cost limit of $4,500, when you weigh more than a conventional scooter can hold, AND if the scooter is medically essential for you to achieve or maintain basic mobility (five-year replacement).

Floor-to-ceiling pole (second pole allowed if necessary): if medically essential to facilitate transfers (five-year replacement).

Foot abduction orthoses: if medically essential to achieve or maintain basic functionality. For example, Dennis Brown boots and bars. Frequent replacement allowed as a result of growth (no waiting period for replacement).

Inhaler accessory devices ("spacers" or valved holding chambers): if medically essential to deliver medication (one-year replacement).

Nebulizers: if necessary to avoid an imminent and substantial danger to your health (five-year replacement period and one-year period for accessories and supplies).

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Needles/syringes for medication delivery and feeding: if necessary in order to avoid an imminent and substantial danger to your health (two-year supply policy).

Non-conventional glucose meters: if medically essential to test your blood glucose levels (five-year replacement) — for example, a talking glucose meter for those with a visual impairment.

Positioning items on a bed: if medically essential to achieve or maintain your positioning — for example: Symmetrikit, Sidelyers, and bed wedges.

Positioning chairs and standing frames: if medically essential to achieve or maintain your positioning (five-year replacement). (Note: "lift" chairs are not positioning chairs.

Toe orthoses: if medically essential to achieve or maintain basic functionality (one-year replacement).

Tracheostomy humidifier: if medically essential to moisturize air in order to allow you to breathe (five-year replacement).

Tracheostomy supplies: if necessary to avoid an imminent and substantial danger to your health (two-year supply policy).

Transfer aids: if medically essential to facilitate transfers — for example: belts, boards, and slider sheets (five-year replacement).

Underliners for orthoses: if medically essential for you to use an orthosis — for example, sleeves and specialized socks for braces.

Ventilator supplies: if there is an imminent and substantial danger to your health (for up to 2 years) — for example, the ministry may provide you with sterilization items and distilled water to run your ventilator.

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Dental benefits for children—hardship assistance

This change is an addition to the information contained on pages 76–78.

As of October 1, dependent children of families on hardship assistance will have access to $1,400 in every two-year period for basic dental treatment. (Before this change, these children could only get emergency dental coverage).

Other benefits changes

Rates increased for special care facility user charges

This change affects pages 84–85 of the booklet.

On February 1, the Ministry of Health introduced new rates for residential care and assisted living services in BC. If you are going to a special care facility, check with an advocate to make sure that you get the right amount of assistance from the welfare ministry (MSD) during and after your stay at the facility. The welfare ministry is supposed to pay a user charge to the facility and a comforts allowance to you.

Community volunteer supplement deadline extended slightly

This change affects page 88 of the booklet. Please see that page for more information about who is eligible.

The ministry has already begun to phase out the community volunteer supplement program. However, it extended the deadline for who is eligible by a few months. On November 1, 2011, the ministry said that it would continue payments or allow applications to continue for anyone who:

- had already started getting the community volunteer supplement as of October 31, 2011, OR
- has been on the wait list for this supplement as of August 8, 2011, and submitted an application for it between August 8 and October 31, 2011.

Confirmed job supplement eligibility adjusted

This information affects pages 88–89 and 111.

As of April 2, 2012, you may be eligible for a confirmed job supplement if ALL of the following are true:

- someone counted as part of your family unit gets a confirmed job that will make it possible for your family to leave income assistance, hardship assistance, or PWD assistance, AND
- the person with the job needs a specific item related to the job in order to start work, AND
- your family unit has no other funds available to pay for the item.

You can use this supplement to buy:

- transportation to the job (such as a bus pass)
- supplies you must have for occupational health and safety (such as work gloves, goggles, and safety work boots)
- work clothing and other things you must have to start your job (such as uniforms, rain gear, rubber boots, tools not normally provided by the employer, and haircuts)

You cannot use this supplement for relocation costs, training, tools, or other things normally provided by an employer. You also cannot use the supplement for disability-related technical aids or workplace accommodations. Those costs might be paid for by the Employment Program of BC (EPBC).

If your case is being managed by someone with EPBC, you cannot get this supplement. This is because that program offers you similar job start supports.

If you do not start the job that the confirmed job supplement was issued for, the ministry might impose employment-related sanctions on your family.

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Moving, transportation, and living costs

This information clarifies pages 85, 86 and 90 of the booklet.

You may be able to get a moving, transportation, and living costs supplement if you are on welfare or PWD benefits and ANY of the conditions listed on pages 85 and 86 (under "Court-related costs") and 90 (under "Moving costs") apply to you.

Family maintenance court action

This addition affects page 86. The ministry may also pay you some money towards your transportation, childcare, and living costs if:

- you must travel to the office of a notary public, OR
- you need to pay to notarize an *Interjurisdictional Support Orders Act* application package.

The ministry will only pay for the least expensive option available for these costs.

This supplement is only available if:

- you have no other way to pay for these costs, AND
- you get approval from the ministry *before* you pay the costs.

You cannot get this supplement if the ministry considers you to be "transient" (homeless, with no dependent children).

The ministry will only pay for your storage costs as part of this supplement if your family's possessions must be stored for a limited period of time.

School start-up supplement increased

This change affects the information contained on page 91. See that page for information on who is eligible.

As of July 3, the school start-up supplement is available to families on hardship assistance as well as to those on all other forms of welfare. The amount paid will increase to $100 for every child aged 5–11 (up from $84), and to $175 for every child 12 and over (up from $116).

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Chapter 4: Once You Are on Welfare

Earnings exemption increases

Please also see pages 7–11 of this update for changes to what you can own while on welfare (exempt assets).

Employable clients' earnings exemption increased

This change replaces some information on pages 50 and 102–104.

As of October 1, if the ministry says you have employment-related obligations, you and your family can earn up to $200 per month without affecting your welfare benefits. This is called an earnings exemption. (If you are a single parent with a disabled child in your family, you can still earn up to $300 per month.) This exemption applies to earned income, such as wages or rent you receive from a boarder. It does not apply to unearned income (see page 104 to learn more about unearned income.)

The waiting period to claim any earnings exemption is one month instead of three. This includes the earning exemptions for PPMB benefits and single parents of disable children. This change means that your family can start to claim the exemption any time after the first month you receive welfare.

However, if the ministry considers you homeless and you have no dependent children, you are not eligible for earnings exemptions.

PWD earnings exemption raised, changing to yearly basis

As of October 1, if you are on PWD, you can earn more money without affecting your benefits:

- $800 per month for family units with one person on PWD (up from $500)
- $1,600 per month for family units with two people on PWD (up from $750)

There is a one-month waiting period to claim an earnings exemption while on PWD, unless:

- you or someone in your family unit received PWD benefits in the past, OR
- you or someone in your family unit received welfare or PPMB benefits the month before your family unit became eligible for PWD benefits.

Also, as of January 2013, the ministry will add up your earnings exemptions per *year* rather than per month (again, only for those on PWD). This change means that you can earn more when you feel healthy and able to work without affecting your benefits. The total you can earn per year will be:

- $9,600 per year for family units with one person on PWD
- $19,200 per year for family units with two people on PWD

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However, if the ministry considers you homeless and you have no dependent children, you are not eligible for earnings exemptions.

Earnings by children

This change affects page 102 of the booklet.

If your child is under 19 and in school full-time, your family can still keep all of their income without having it affect your benefits. If your child under 19 is *not* in school full-time, his or her income can be claimed against any earnings exemption your family unit has.

BC Family Bonus top-up supplement rates increased

This change affects pages 97–100.

The ministry may give you a top-up supplement when you do not get the maximum amount of BC Family Bonus from the federal government. The ministry is increasing its rates for the top-up to match the federal rates from now on.

As of October 1, the maximum per month for the top-up supplement is:

- $181.41 for one child
- $341.91 for two children
- $494.58 for three children
- $152.67 for each additional child beyond three (fourth, fifth, etc.)

BC Family Bonus lump-sum payment penalty eliminated

This change affects pages 89 and 97–100. The section "If your BC Family Bonus does not come or is low" on pages 97–98 is now out of date.

As of October 1, the ministry will let you keep BC Family Bonus payments you get, even if they come in one big payment covering several months (a "retroactive lump sum"). They no longer see these payments as income.

If the ministry paid you a top-up to replace the Family Bonus money while you waited for the Family Bonus to come, you will have to repay the ministry for the top-ups. The ministry will choose the amount below that is *smallest*:

- the total amount of top-ups you got while you waited for your federal Family Bonus payments to start, OR
- the total federal Family Bonus payment — *if* it is smaller than the amount of your top-ups, OR
- one month's welfare benefits (this is the most you would have to pay).

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This money will be taken out of your next cheque. That means that you now come out even, or might have more money to live on, when you get a lump sum Family Bonus payment. This is because the big cheque you get for the lump sum should more than replace any amount the ministry takes back for past top-ups. See an advocate for help if you think the ministry took out too much money to repay a top-up.

Employment programs renamed and reorganized

This information affects pages 110–115.

Last April 2, the ministry created the Employment Program of British Columbia (EPBC). When they did so, they folded the following programs into the EPBC: Community Assistance Program, Bridging Employment programs, British Columbia Employment Program, and the Employment Program for Persons with Disabilities. The EPBC will be the place you must go if:

- you have employment obligations with the ministry
- you are on PWD or PPMB benefits and the ministry decides to refer you for employment services that are supposed to be tailored to your abilities
- you want self-serve job search services
- you want other employment services

The Self-Employment Program will continue for eligible people on PWD and PPMB benefits. The ministry also started something called the Employment Strategy for Persons with Disabilities, which they are still developing. This program is supposed to provide supports and training to help you enter the job market. More changes are coming. Check with an advocate to stay up to date.

Employment plans and obligations

EPBC might communicate with the ministry

This information affects pages 110–115 and 121–123.

On April 2, the ministry changed its policies on employment obligations:

- If you use the services of the Employment Program of BC (EPBC), they must tell the ministry when:
    - you have gotten a job,
    - you have started your own business, or
    - you are on employment insurance (EI).
- If you get help to find a job from the Employment Program while you are on EI, the program will give information about these supports to the ministry.
- You must notify the ministry when you find a job if you are on benefits.

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- If the ministry finds out that you might have been paid more in wages than your family gets in welfare, they will do an eligibility assessment before you can get your next welfare cheque. (This change does not apply to people on PWD benefits starting in January 2013 because of the change to calculating income on a yearly basis — see page 16 of this update for more information.)
- However, the ministry must only assess your *current* eligibility. They cannot use information from EPBC or EI to calculate an overpayment.

Employment plans, exemptions, & PPMB screening changes

This information affects pages 110–115.

On April 2, the ministry created the Employment Planning and Exemptions Category to assess your employability, make employment plans, decide whether you are exempt from employment obligations, and decide whether you qualify for PPMB status.

To do these things, the ministry will use the following documents:

- the new Employment Readiness Information Questionnaire (ERIQ)
- the Employability Screen
- the Client Employability Profile
- Employment Plan
- Voluntary Participation Plan

The ministry said they will rely on ERIQ most heavily to make decisions about employment obligations, although they might still use the other forms.

They also said that they are primarily using the Employability Screen, along with the Client Employability Profile, to decide whether you are eligible for PPMB benefits. Also, they will require you to do an Employability Profile if you score 15 or more ("employable with longer-term intervention") on the Employability Screen. However, ministry staff may use the Profile whenever necessary, regardless of your Employability Screen scores.

As of April 2, if you have no employment-related obligations with the ministry and are not required to have an employment plan, the ministry *might* require you to have a voluntary participation plan.

Also, in rare cases, if you do have employment-related obligations but are *not* required to have an employment plan, the ministry *might* require you to sign a voluntary participation plan. However, the ministry cannot apply sanctions against you if you do not do the activities listed in a voluntary participation plan.

No more 24-month time limit for being on welfare

This change replaces the information on pages 116–118 (and affects some of the information on page 114).

As of October 1, 2012, there is no longer a time limit for being on welfare. After 24 months, your benefits will not be reduced.

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Eligibility review by mail might be an option

This change affects pages 118–119.

On April 2, the ministry amended its policy on eligibility reviews. As before, they might review your welfare benefits once per year. The ministry decides whether you have to come in to the office for an interview, speak to a worker over the phone, or fill out a form and send it to them for this review. They might ask you about all aspects of your case, including your employment status and efforts to find work (if you have employment-related obligations). And if you are participating in programs through the EPBC, the ministry can ask you to give them a signed copy of your EPBC Action Plan at any time.

Chapter 5: How to Appeal

Reconsiderations

Requests allowed when case closed

This information affects pages 128–134.

On June 13, the ministry amended its policy on requests for reconsideration. Anyone, including applicants, recipients, advocates, and trustees, may request a reconsideration, even if the case is closed. The Reconsideration Branch will determine whether reconsideration is available.

Reconsideration supplement added

This information affects pages 120, 128, and 136.

On February 24, the ministry added a reconsideration supplement in addition to the appeal supplement. You might be able to get a reconsideration supplement if the ministry has cut off or reduced your benefits or denied you a supplement and you have made a request for reconsideration. This supplement is similar to the appeal supplement and will keep your welfare benefits at the same level as before while you are going through the reconsideration process.

If your reconsideration request is denied, you can apply for an appeal supplement.

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Chapter 6: Resources

Where to find an advocate

This change affects page 143. The Island J.A.D.E. Society of Campbell River has closed. Advocacy services in Campbell River are now available from:

Advocacy Services Centre
250-914-0272

Bus Pass Program — additional contact information

This information affects pages 155–156 of the booklet.

The ministry's Bus Pass Program has not changed its contact information, but here are all of the ways to contact the program:

Phone: 1-866-866-0800 (call no charge): A recording will tell you that you have reached the Ministry of Social Development. Press 4 when the recording picks up, then press 3 for the Bus Pass Program.

TTY (for hearing- and speech-impaired): 1-800-855-0511 (call no charge)

E-mail: HSDBUSPA@gov.bc.ca

Mail: Ministry of Social Development
BC Bus Pass Program
PO Box 9985 StnProvGovt
Victoria BC V8W 9R6

Fax: 250-414-4888

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Disability Without Poverty Network



overdue

The Case for Increasing the Persons with Disabilities Benefit in BC

July 2012

British Columbia Association for Community Living

BCCPD

Canadian Mental Health Association
Association canadienne pour la santé mentale
BC Division

CLAS

sparc bc
people. planning. positive change.



As of May 2012, there were 134,361 cases and 177,683 individuals receiving income assistance in British Columbia. Of these, 82,452 cases or 98,150 individuals were in the Persons with Disabilities designation. This represents approximately 61% of the active cases in May 2012.

Among those falling into the PWD designation, 72,330 were single individuals while the remaining 10,122 cases were couples (3,200), single parent families (5,220) and two parent households.

This brief is dedicated to all of those who are living with a disability and who are struggling every day to try to make ends meet. We hope that by working together, we can make a difference.

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BACKGROUND

Starting the Dialogue on Fairness

Over the last decade, the cost of living in BC has steadily increased. At the same time, BC's Persons with Disabilities (PWD) benefit has remained relatively flat. Since 2001, the PWD rate has increased by only $120 per month, while the cost of basic essentials such as food, clothing, transportation, health, personal care and shelter have increased by 17.2%. During this period, the cost of food alone increased by nearly 25%.



It is about working for positive change.

This increase in the cost of living, without a similar increase to the PWD rate, means there is an ever-increasing gap between the cost of basic living expenses and what PWD recipients can afford. Concern about this growing gap led to the formation of the Disability Without Poverty Network in April 2011. The network is a working partnership between five organizations: the BC Coalition of People with Disabilities (BCCPD); the BC Association for Community Living (BCACL); the Canadian Mental Health Association, BC Division (CMHA-BC); the Social Planning and Research Council of BC (SPARC BC); and, the Community Legal Assistance Society (CLAS). The goal of this partnership is to develop positive recommendations for change so British Columbians with disabilities who receive PWD are not living in poverty.

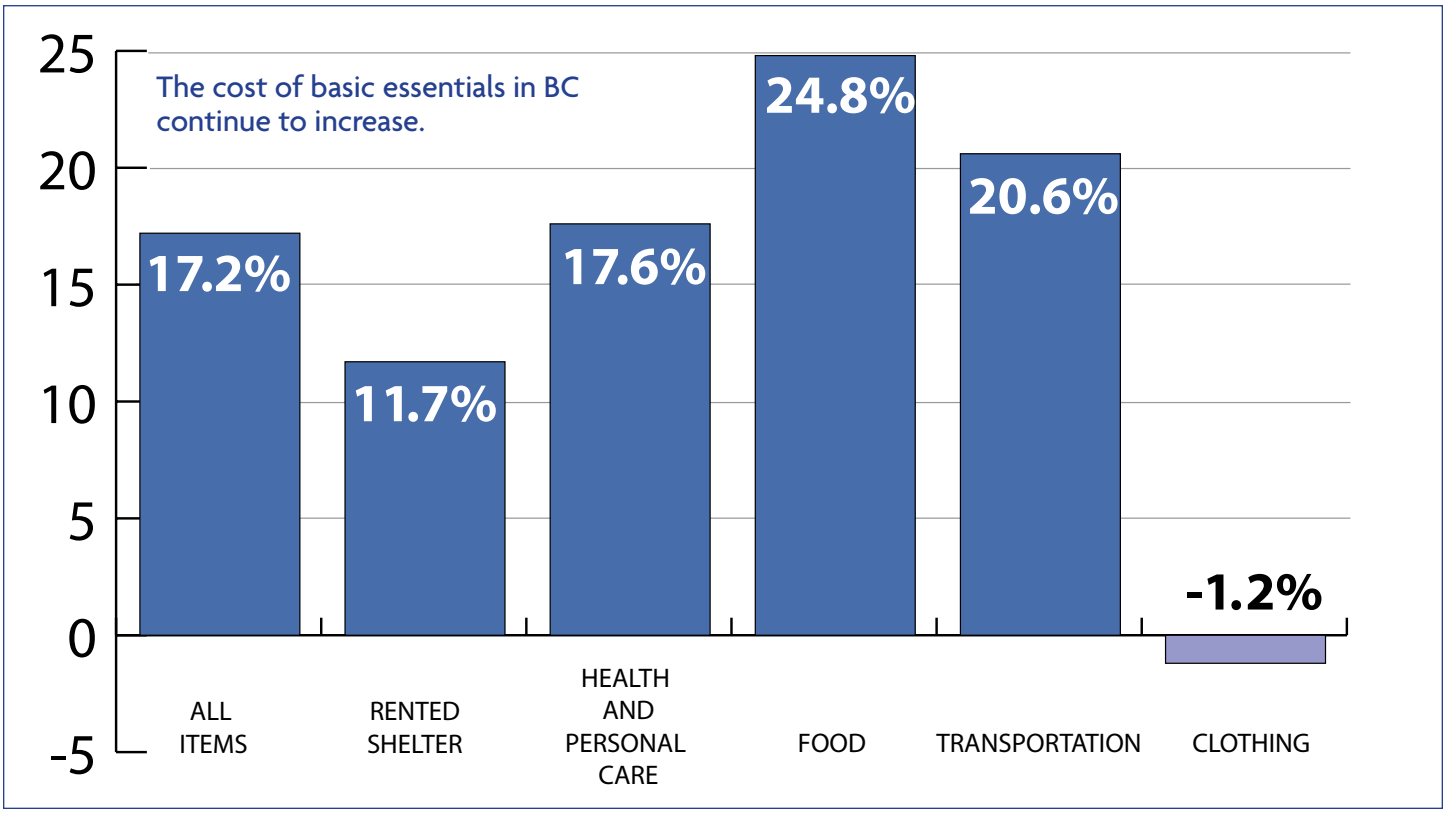
This brief reviews the cost of basic essentials in BC and proposes an increase to the PWD rate to a minimum of $1,200 per month to better reflect the actual cost of living in BC. Our goal is to begin a dialogue with government to ensure that individuals and families relying on BC's PWD benefit live with dignity, and with the supports they need to engage and be part of their communities.

The Rising Cost of Living in British Columbia

This section outlines the cost of basic living expenses in British Columbia such as food, clothing, shelter and basic communications (phone). It also looks at the specific implications of the high housing costs across BC and the pressures these create for people with disabilities who are relying on disability assistance. As shown in Graph 1, the costs of basic essentials in British Columbia have increased significantly over the past ten years, resulting in greater challenges and a diminished capacity for people relying on BC's PWD benefit to meet their basic needs.

The Survey of Household Spending (December 2010) shows that the average household needs about $1,400 per month to meet the cost of basic necessities. This includes an estimated cost of $768 per month for rent [1], $478 per month for food [2], $76 per month for clothing and $48 per month for basic communication. With the PWD benefit, a single person receives only $906.42 per month to live on – almost $500 below the amount needed to cover the estimated cost of basic essentials. In addition, people with disabilities have ongoing disability-related costs, such as non-prescription health or medical goods and user fees

Graph 1 BC Consumer Price Index — Average Increases Selected Items (2001 to 2010)



SOURCE BC Stats, British Columbia Consumer Price Index, Annual Averages (2001-2010). Statistics Canada, CANSIM Table 326-0021

[1] A conservative estimate when compared to the rental market data available. See Table 2 and Table 3.

[2] Approximately $16 per day.

for various health care services. Often these costs are not covered by PWD.

We have focused our analysis on four (4) basic essentials – food, shelter, clothing and basic communication. This approach results in a conservative estimate of the level of need. This approach was adopted to not over-state the need and to recognize that there are different types of supplemental supports that are provided by the Ministry. At the same time, our research shows that the assistance that is available is not keeping up with basic living expenses[3].

The Impact of High Housing Costs

High housing costs represent a particular challenge for British Columbians. The SHS (December 2010) reported average annual housing expenditures of $9,211 or $768 per month with median expenditures of $8,430 or $703 per month. The cost of housing in Metro Vancouver was even higher. Based on the SHS, a household in Metro Vancouver reported average annual expenditures of $9,720 on housing or $810 per month with median expenditures of $9,000 or $750 per month.

To comfortably afford shelter costs of $768 per month, without spending more than 30 per cent of income on housing, a household would need an annual

Table 1 Average Monthly and Annual Expenditures, Shelter, Food, Clothing, Telephone compared to the current assistance for a single receiving BC's PWD benefit.

Type of Expenditure	Average Annual Expenditure	Average Monthly Expenditure	Maximum Monthly Assistance (PWD designation)
Shelter	$9,211	$768 [4]	$375
Food	$5,731	$478	$531
Clothing	$917 [5]	$76	
Telephone	$582	$48	
Total	**$16,441 annually**	**$1,370 monthly**	**$906 monthly**

SOURCE BC Stats, 2009 Survey of Household Spending (SHS), Canada, British Columbia, and Vancouver Published by Statistics Canada, December 2010

[3] This would apply to individuals who fall within the PWD designation as well as other individuals relying on income assistance. Those who fall within the PWD designation are the focus of our brief and account for approximately 61% of all of the Ministry's current income assistance cases (May 2012).

[4] This estimate is based on data in the Survey of Household Spending 2009. Data published by Canada Mortgage and Housing Corporation shows that the average market rent for a bachelor unit in BC was $776 per month while the average rent for a 1-bedroom unit was $891 per month.

[5] The estimate for clothing represents an average of the annual expenditure reported by women ($1,085) and men ($748).

Table 2 (below) shows the average monthly rent for a bachelor unit in both Metro Vancouver and BC increased by almost $100 in the past five years.

income of at least $30,000. This is almost three times more than the annual payments to a single person receiving PWD.

Recent rental market data published by CMHC (December 2011) shows that average rents across BC continue to increase well beyond a rate that is affordable to a person receiving PWD. As shown in Table 2, the average rent for a bachelor unit in Metro Vancouver in December 2011 was $839 per month, while the average rent for a 1-bedroom unit was $964. Across the province, the average rent for a bachelor unit was $776 per month while the average rent for a 1-bedroom unit was $891.

Table 2 also shows that average monthly rents for a bachelor unit and 1-bedroom unit increased by more than $100 in the past five years. During this same period, the monthly shelter portion of BC's income assistance increased by only $50 per month. The increasing cost pressures associated with rising rents are passed on directly to those who are relying on income assistance.

Table 2 Average Market Rents – BC and Metro Vancouver (2007 to 2011)

BRITISH COLUMBIA	2007	2008	2009	2010	2011	Change 2007-2011	Rate of Increase
Bachelor	$681	$703	$744	$753	$776	$95	14.0%
One bedroom	$784	$821	$853	$871	$891	$107	13.6%
Two bedroom	$922	$969	$1,001	$1,019	$1,050	$128	13.9%
Three + Bedroom	$1,048	$1,144	$1,145	$1,170	$1,210	$162	15.5%

METRO VANCOUVER	2007	2008	2009	2010	2011	Change 2007-2011	Rate of Increase
Bachelor	$735	$754	$804	$811	$839	$104	14.1%
One bedroom	$846	$880	$919	$940	$964	$118	10.4%
Two bedroom	$1.084	$1,124	$1,169	$1,195	$1,237	$153	14.1%
Three + Bedroom	$1,234	$1,356	$1,367	$1,420	$1,463	$229	18.6%

SOURCE Canada Mortgage and Housing Corporation, Canadian Housing Observer, Data Tables
Canada Mortgage and Housing Corporation, Rental Market Report, December 2011

Those living on PWD are forced to make difficult choices

As housing costs continue to increase, and in the absence of a corresponding increase in shelter assistance, those living on PWD are forced to make difficult choices in order to make ends meet. This includes choices like cutting back on their already limited budgets for food, clothing, and other basic necessities. These are choices that are unjust and unsustainable.

The Growing Gap Between Shelter Assistance and Actual Housing Costs

Under BC's disability benefits system, a single person with a PWD designation receives $375 per month for housing and $531 per month for other basic living expenses. Any shelter costs over $375 per month must be covered through the support portion of the monthly benefit. As shelter costs increase, PWD recipients are forced to use an ever greater proportion of their support to pay for the cost of their housing.

Using the most recent rental market data, the average rent for a bachelor unit in Metro Vancouver was equal to 93% of the total assistance available to a single person receiving the PWD benefit. Similarly at the provincial level the average rent for a bachelor unit was equal to 86% of the total.

Graphs 2 and 3 on the following page show the growing gap between average rental costs for a bachelor unit and the shelter portion of BC's income assistance program.

As rents increase, the amount of the gap between the actual cost of housing and the assistance that is available continues to grow. In BC the monthly shortfall between the shelter portion of BC's income assistance program and the average rent for a bachelor unit was $401. In Metro Vancouver where rents are higher the gap is even larger.

The Need for Action

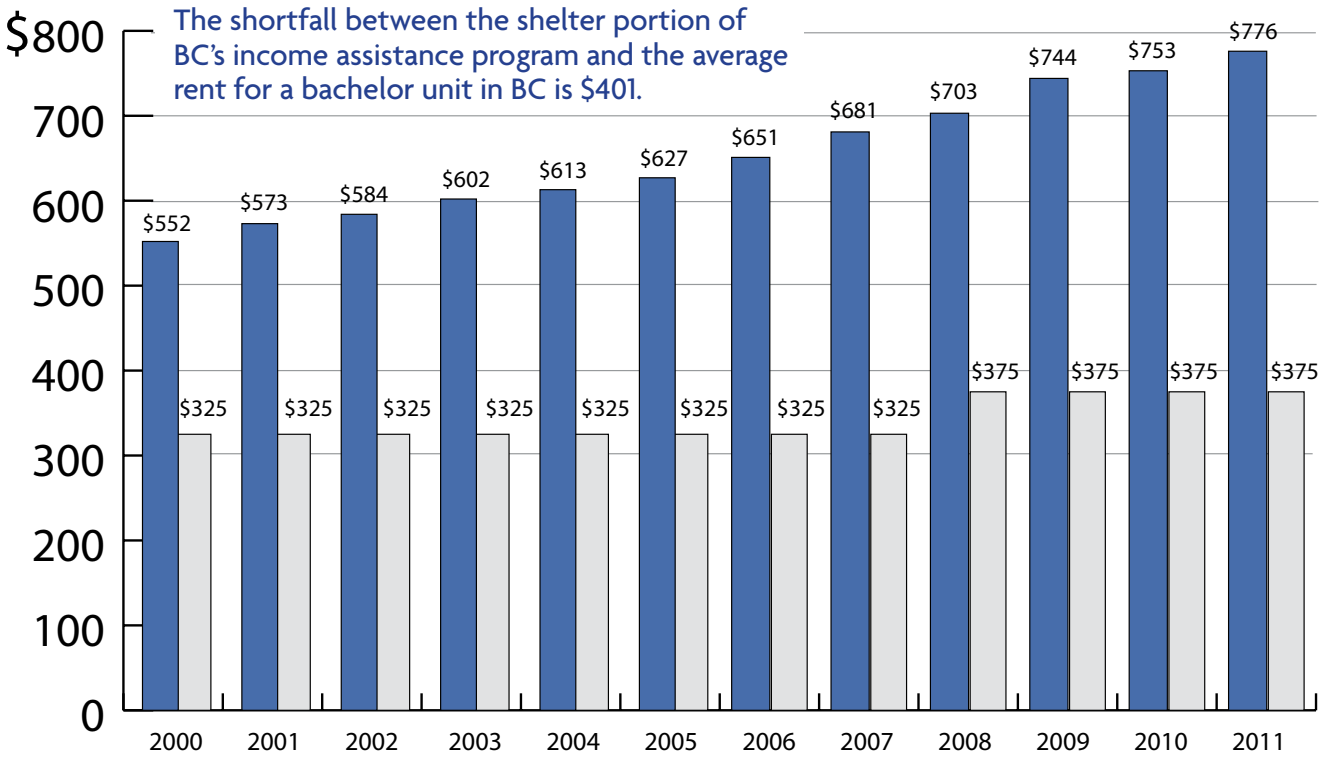
The 2006 Census shows a higher incidence of poverty and low income among people with disabilities. Approximately one in five individuals across British Columbia who reported a health and activity limitation were living in poverty in 2006. This represents 193,530 individuals across BC. Of these, almost 49% were single person households (94,065) whose dependence on a single income makes them particularly vulnerable.

For individuals relying on the Persons with Disability benefit and receiving only $906 per month ($10,872 annually), it is extremely difficult to make ends meet. An annual income of $10,872 is also significantly below the Low Income Cut Offs (LICO) established by Statistics Canada.[6]

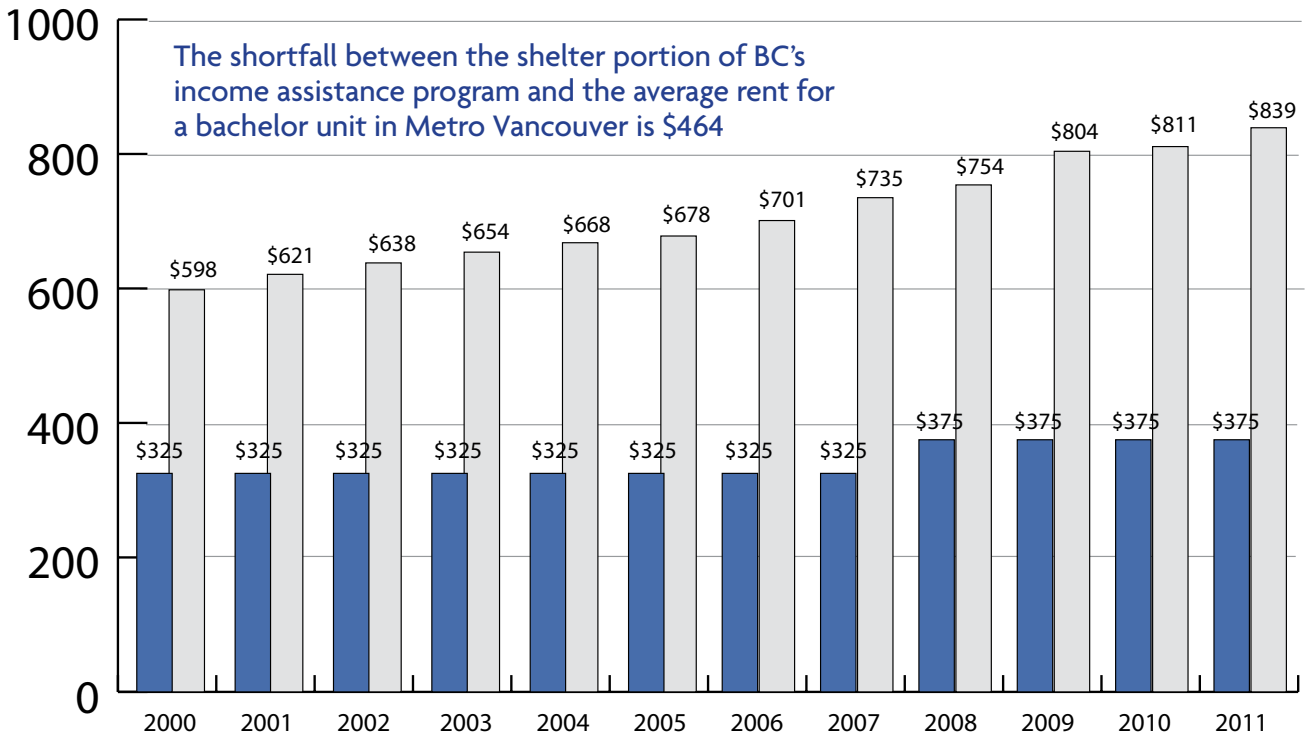
Research produced by the School of Public Policy at the University of Calgary observed that the level of assistance available to a single person with disabilities in BC is approximately $300 per month below the income deemed acceptable for low income seniors based on the standards established under the Federal OAS/GIS programs.

[6] In 2006, Statistics Canada estimated the low income cut-off for a single person to be between $15,000 and $21,200 depending on the size of the community.

Graph 2 Average Rent (Bachelor Unit): British Columbia Compared to the Shelter Assistance Rate for a Single Person



Graph 3 Average Rent (Bachelor Unit): Metro Vancouver Compared to Single Shelter Assistance Rate



SOURCE FOR GRAPH 2 AND 3 Rental market data CMHC Rental Market Reports and Canadian Housing Observer. Press releases and income assistance rate tables – Ministry of Housing and Social Development September 2008.

Inaction is unjust and unfair and costs us all



Recognizing the real human and social consequences of this growing disparity, we are calling on the province to increase the level of assistance provided to persons with disabilities to more accurately reflect the cost of living. An increase to $1,200 per month would not only help to improve the quality of life for PWD recipients, but it would also help to bring the benefit in line with the Federal government's established minimum for low income seniors.

The Cost of Inaction

We know that, apart from the personal and individual consequences of living in poverty, there are significant costs to society. This is reflected in both lost productivity and a diminished capacity for people with disabilities to meaningfully contribute to their communities and to realize their full potential. Without an increase in assistance levels, we are likely to see on-going reliance on food banks and other emergency services, and continued high levels of homelessness.

Data from the 2011 homeless count for Metro Vancouver showed that a high proportion of the homeless population reported some type of health condition or disability. The report notes that since the 2008 count the incidence of multiple health challenges among the homeless increased significantly. As noted in the 2011 homeless count report nearly two out of three homeless people surveyed (62%) reported multiple health conditions, including one in three (31%) who reported three or four health challenges.[7]

The report also noted that approximately one in five people interviewed at the time of the count were receiving disability benefits. This was true of 24% of the sheltered homeless and 15% of the unsheltered homeless.[8]

Housing Affordability and the Risk of Homelessness

There were 31,290 renter households across Metro Vancouver in 2006 who were spending at least half of their income on their housing costs. Of these, approximately one in four also reported a specific health or activity limitation. These households face extreme affordability challenges and are considered to be at increased risk of becoming homeless. As the cost of their housing increases, these risks grow.

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[7] Regional Steering Committee on Homelessness Report. ***One Step Forward: Results of the 2011 Metro Vancouver Homeless Count.*** February 2012: pg. 26.

[8] Ibid., pg. 21.

British Columbians support an increase to the PWD benefit



Increasing the assistance available to persons with disabilities would help reduce homelessness.

BC Housing estimates that it costs approximately $2,250 per month ($75 per day) for a temporary emergency shelter bed.[9]

An increase of $300 per month (or $10 per day) in income assistance would help PWD recipients better meet their basic needs including housing. Even this small increase can help prevent homelessness by reducing the number of people with disabilities who are precariously housed. It would also allow persons with disabilities to live their lives with greater dignity and with the support that they need.

There Must Be a Better Way

British Columbians are caring people. We asked British Columbians about their perceptions regarding the adequacy of the level of assistance available to PWD recipients and the extent to which they believed that the assistance available would be enough to cover basic living expenses[10]. The following provides a summary of the results:

• **Basic living expenses** When asked about the minimum monthly income needed to cover basic living expenses:

• Approximately 1 in 3 British Columbians surveyed reported that they felt that a minimum income of $1,750 per month would be required to cover the cost of basic living expenses in B.C.;

• Almost half of all British Columbians surveyed reported that they felt that a minimum of $1,500 per month would be required to cover the cost of basic living expenses in B.C.; and,

• Three quarters of all British Columbians surveyed reported that they felt that a minimum of $1,250 per month would be required to cover the cost of basic living expenses in B.C.

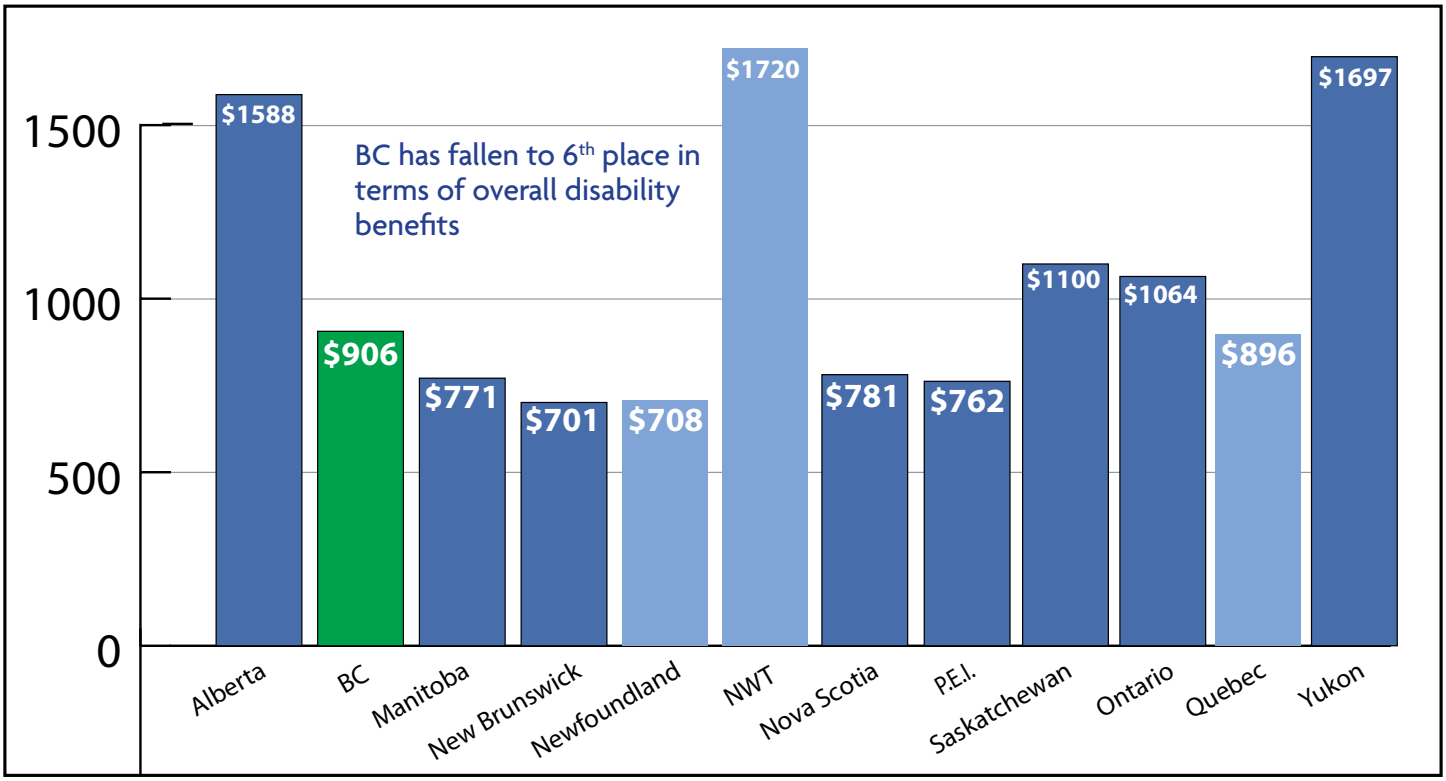
For a person relying on the PWD benefit, their total monthly income of $906 per month is $350 per month below the level that most British Columbians felt was necessary to cover the cost of basic living expenses.

• **The adequacy of the current PWD benefit** We also asked British Columbians if they felt that the current rate of $906 per month was enough for people to live on. Of those surveyed 88% indicated that they did not feel that $906 per month would be enough. In addition, 90% of those surveyed indicated that they would support an increase in the assistance provided to people with disabilities.

[9] The Province, April 5, 2011

[10] Feedback from questions included on an Omnibus Survey completed by the Mustel Group (September 2011).

Graph 4 Disability Assistance Levels by Province and Territories



Source: Updated to reflect 2012 rates where available along with Planned Lifetime Advocacy Network (2010). Securing the Future Financially: Income, Assets and Contributions.

We believe that there is a high level of support from the public. We also believe that this support comes from the fact that as a society we recognize the challenges the many people with disabilities face and support measures which will build and strengthen our social safety net. We also know that it is a question of fairness and dignity.

British Columbia Is Falling Behind Other Provinces

In 2005, when the provincial government announced a $70 per month increase in support for people with disabilities, the government noted BC was second highest among the provinces in terms of the level of assistance available.

While BC's program may still be recognized as one of the better programs in Canada, we have fallen to sixth place in terms of overall disability benefits. Our program has also become less responsive to the needs of people with disabilities, with other provinces like Alberta increasing their disability assistance rates to $1,588 per month. Both Saskatchewan and the Yukon have also made improvements to their disability assistance programs in the past year with the Yukon announcing that they will be indexing assistance rates.

Given the high cost of rent and other necessities in British Columbia when

Action is needed to close the gap

compared to other parts of Canada, the pressures faced by people living with disabilities in BC can be greater. Therefore, we are asking the province to increase the PWD benefit in BC to bring it more in line with other provinces and to reflect the true cost of living in BC.

Recommendations

BC's PWD benefit is not keeping up with the cost of living. The gap between what PWD recipients need and what they receive is growing, and will continue to grow, unless BC changes the way it assists individuals and families with disabilities. We know from our front-line work and our research that people with disabilities are living in poverty. The Disability Without Poverty Network proposes the following three changes as a first step towards making a real difference for British Columbians with disabilities.

1. Increase the PWD benefit to $1,200 per month This will reduce the gap between what people with disabilities need for basic essentials and what they receive. It will help ensure that British Columbians with disabilities who need provincial support can live in dignity, not poverty. It will also result in greater equity between vulnerable groups by bringing the assistance levels in line with those provided to low income seniors through the Federal OAS/GIS support.

2. Index the PWD benefit This will ensure that the PWD benefit keeps pace with the rising cost of living and that inflation does not erode the ability of PWD recipients to meet their basic needs. The Yukon government has recently adopted this approach and we respectfully urge BC to take this positive step forward. The 2011 review recently completed by public policy experts from the University of Calgary



It is about fairness and about dignity.

also proposed indexing as a way to reduce the growing gap between the cost of living and the PWD benefit.

3. Establish a shelter assistance program for people with disabilities

The high cost of housing in B.C. is a significant challenge for many low income people with disabilities. We propose the introduction of a rental assistance program for people with disabilities similar to the SAFER (Shelter Aid for Elderly Renters) and RAP (Rental Assistance Program). Access to rental assistance would help to close the gap between the cost of housing and the amount of rent that people with disabilities can afford to pay.

We also know that the majority of people receiving the PWD benefit are living in housing in the private market. If a person with disabilities was able to access rental assistance under a program similar to the SAFER program, then a single person receiving the PWD benefit would be eligible for an additional $385 per month to help them with their rent if they were living in Metro Vancouver and $300 per month if they were living outside of Metro Vancouver.

Access to this type of assistance would help to close the affordability gap that people with disabilities face and allow more people with disabilities to find safe, secure and suitable housing while at the same time ensure that their other basic needs could be met. Even with an income of $1,200 per month (the guaranteed minimum income under OAS/GIS) a low income senior living in Metro Vancouver is eligible for $300 per month in rental assistance under SAFER ($225 per month in other parts of the Province). We believe that a person with disabilities should be able to count on similar support.

Concluding Comments

There is a significant gap between the income needed to cover the cost of basic essentials and the assistance available under BC's PWD benefit.

Without action that gap will continue to grow. Our proposal to increase the PWD benefit would play a significant role in helping close the gap and improving the quality of life for people with disabilities in BC.

We believe our recommendations will better enable people with disabilities to live with dignity and participate in their communities. We know this is the kind of society we all want and the kind of province we know BC can be.

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Appendix A

Comparative Summary of Disability Assistance Levels, Asset and Income Exemption Rules [1]

Province	Support (Income)	Housing	Support & Shelter Max.	Non-exempt Assets	Earned Income Exemption
Alberta	$1,588	Included	$1,588	$100,000 trust limit	$800
British Columbia	$531	$375	$906	$3,000 [2]	$800 - effective October 1, 2012
Manitoba [3]	$771		$771	$4,000	$200 + 30% of additional amounts
New Brunswick	$701	Included	$701	$3,000	$250
Newfoundland & Labrador [4]	$708 [5]		$708	$3,000	$150 plus 20% of additional amounts
Northwest Territories	$402 – $820	$900	$1,720	No information	$200 + 15% of additional amounts
Nova Scotia	$229	$535	$764	$1,000	$300 plus 30% of any additional amounts
Saskatchewan [6]			$1,100	$1,500	$200 + 25% of additional $500 to a maximum of $325
Ontario	$590	$474	$1,064	$5,000	50% exempt
PEI			$762	$900	$75 + 10% of additional amounts
Quebec [7]	$896		$896	$2,500	$100
Yukon	$973 – $1,205	$492	$1,697	$1,500	$100 + $3,900 per year + 25% – 50% of monthly income

[1] Rates are for single individuals with no dependants. All rates are based on March 2012 research except Quebec and Northwest Territories which are from 2010: Planned Lifetime Advocacy Network, (2010). Securing the Future Financially: Income, Assets and Contributors.

[2] BC's trust limit of $100,000 was increased in June 2012 to $200,000. This is in addition to the $3,000 asset limit and is comparable to or above most other Provinces.

[3] Recipients can also receive an extra "automatic allowance" of $150 if living in the community and an allowance for basic telephone rental costs.

[4] Applies to all income assistance recipients (non disabled and disabled).

[5] Based on whether recipient lives with relatives (lower amount), with non relatives or maintains own home (higher amount).

[6] Amounts are for support provided through the Saskatchewan Assistance Program (SAP) only. Income supports are also provided through the Saskatchewan Assured Income for Disability Program (SAID) for people with disabilities living in residential care.

[7] Quebec also has a shelter allowance program for eligible households.

Appendix B

The Earnings Exemption

In June 2012, the Province announced changes to the earnings exemption for PWD recipients. The changes that were announced are welcome in that they will help to contribute to improvements in the economic circumstances for some households. The changes that were introduced included:

• An increase in the earnings exemption for PWD recipients from $500 per month to $800 per month. This change will take effect October 2012.

• Increased flexibility in the way that the earnings exemption will be calculated to allow PWD recipients to retain a larger portion of their monthly earnings while still retaining their benefits. This change will take effect January 2013.

• The elimination of the waiting period for a PWD recipient who finds that they have to reapply for assistance.

The changes that were announced will no doubt help some PWD recipients. However, many people who receive the PWD benefit are limited in their ability to work or are unable to find suitable employment. Therefore, the changes while important are likely to have only a limited impact for many PWD recipients.



Not everyone can benefit from the PWD earnings exemption. It is only part of the solution.

Other Changes Announced June 2012

The provincial government also announced some very positive changes to the asset limits for PWD recipients. The changes include increasing the limit from $100,000 to $200,000 for money held in a non-discretionary trust and allowing trust-holders to access up to $8,000 per year from a trust for any cost related to promoting independence, with the decision on the use of these funds being left to the individual. These amendments provide individuals with a greater ability to access their money to support their independence.

Appendix C

Average Market Rents for Single Person Households By Regional District

The CMHC Rental Market Report only provides information on average market rents for the purpose-built rental housing stock. CMHC's Housing in Canada On-Line (HICO) is another potential source of rental market data. Housing In Canada On-Line provides information on average housing costs across different household groups and includes information on the number of households in core housing need. These are households that are unable to find housing in their community with the resources that they have available without spending 30% of more of their income on their housing costs. As shown in the table below, in 2006, the average single, non-senior living in B.C. spent approximately $742 per month on their housing (up from $677 the previous Census period). This amount is reasonably aligned with the average bachelor rent reported by CMHC during the same period.

SEE TABLE NEXT PAGE.

Appendix C - continued

Average Market Rents for Single Person Households By Regional District

Location	All Single Households			Households in Core Need			% Change Over Time		
	2006	2001	1996	2006	2001	1996	2001 - 2006 (5 yr)	1996 - 2001 (5 yr)	1996 - 2006 (10 yr)
BRITISH COLUMBIA	742	677	644	635	570	556	9%	5%	15%
REGIONAL DISTRICTS									
Squamish - Lillooet	1016	907	815	847	863	826	11%	11%	25%
Greater Vancouver	802	733	688	681	600	577	9%	7%	17%
Central Okanagan	764	648	616	677	579	601	15%	5%	24%
Northern Rockies	754	602	611	652	624	591	20%	-1%	23%
Capital	723	648	632	630	563	567	10%	3%	14%
Peace River	678	584	509	569	496	479	14%	15%	33%
Sunshine Coast	664	613	511	618	558	515	8%	20%	30%
Fraser Valley	660	588	575	577	535	515	11%	2%	15%
Nanaimo	621	541	586	544	494	535	13%	-8%	6%
Thompson - Nicola	615	539	551	523	469	498	12%	-2%	12%
Comox - Strathcona	591	534	548	530	467	495	10%	-3%	8%
Columbia - Shuswap	590	506	493	560	491	464	14%	3%	20%
Fraser - Fort George	579	586	574	513	523	493	-1%	2%	1%
Okanagan-Similkameen	579	522	486	503	488	447	10%	7%	19%
North Okanagan	574	537	518	502	477	474	6%	4%	11%
Cowichan Valley	567	554	533	530	535	492	2%	4%	6%
Central Kootenay	561	530	487	506	520	466	6%	9%	15%
East Kootenay	552	534	463	483	503	428	3%	15%	19%
Powell River	549	462	475	502	427	426	16%	-3%	16%
Kitimat - Stikine	536	533	516	471	474	475	1%	3%	4%
Mount Waddington	532	527	506	414	477	483	1%	4%	5%
Bulkley - Nechako	528	546	481	512	537	403	-3%	14%	10%
Alberni - Clayoquot	526	494	503	482	463	450	6%	-2%	5%
Cariboo	511	493	501	462	468	442	4%	-2%	2%
Kootenay Boundary	511	475	458	477	456	408	7%	4%	12%
Central Coast	508	592	476	0	603	450	-17%	24%	7%
Skeena - Queen Charlotte	492	512	518	483	498	492	-4%	-1%	-5%
Stikine	337	479	433	0	0	0	-42%	11%	-22%
Central Fraser Valley	-	-	-	-	-	-			
Dewdney - Alouette	-	-	-	-	-	-			

Source: CMHC Housing In Canada On-Line (HICO), 2006

BC Association for Community Living (BCACL)

BCACL is a provincial association dedicated to promoting the participation of people with developmental disabilities in all aspects of community life.

BC Coalition of People with Disabilities (BCCPD)

BCCPD is a provincial organization working to support people with all disabilities to live with dignity, independence and as equal and full participants in the community.

Canadian Mental Health Association - (BC Division)

CMHA's (BC Division) mandate is to promote the mental health of British Columbians and support the recovery and resilience of people experiencing mental illness.

Community Legal Assistance Society (CLAS)

CLAS is a non-profit law office that provides legal assistance to disadvantaged people throughout BC. CLAS's focus includes poverty, disability, and equality law.

Social Planning and Research Council of BC (SPARC)

SPARC BC operates the Parking Permit Program for People with Disabilities and works with communities across BC in building a just and healthy society for all.

Disability Without Poverty Network

Concern about a growing gap between the cost of basic living expenses and what PWD recipients can afford led to the formation of the Disability Without Poverty Network in April 2011. The network is a working partnership between five organizations: the BC Coalition of People with Disabilities (BCCPD); the BC Association for Community Living (BCACL); the Canadian Mental Health Association, BC Division (CMHA-BC); the Social Planning and Research Council of BC (SPARC BC); and, the Community Legal Assistance Society (CLAS). The goal of this partnership is to develop positive recommendations for change so British Columbians with disabilities who receive BC's PWD benefit are not living in poverty.

Changes to Income Assistance Policies for People Without Legal Status in Canada

YWCA VANCOUVER

People who do not have Canadian Citizenship or Permanent Resident Status, but otherwise qualify for income assistance, are now eligible under circumstances outlined in Section 7.1 of the Employment and Assistance Regulations.

YWCA VANCOUVER

a) They must be a sole applicant/recipient.

- They cannot apply with, or add, another adult to their file to be eligible for this exemption. Other than the applicant/recipient, only their dependent children can be on their file.

YWCA VANCOUVER

b) The applicant/recipient must have one or more dependent children who are Canadian citizens.

- The child/ren must live with the applicant/recipient.

YWCA VANCOUVER

c) The applicant / recipient must identify as having separated from an abusive partner.

- MSD will ask for details about the abuse.
- MSD may ask for proof of the abuse (for example whether or not they disclosed the abuse to police, doctor, transition house or counsellor etc.)

d) The applicant / recipient has applied for status as a permanent resident under the Immigration and Refugee Protection Act.

- The applicant/recipient was sponsored by the abusive partner, and the sponsorship was not complete at the time that the relationship ended **OR**
- The applicant has applied for Refugee status **OR**
- The applicant has applied for permanent resident status on Humanitarian and Compassionate grounds.
- The applicant will have to prove that they have *already* submitted their application for status as a permanent resident. If their application has not yet been processed by Citizenship and Immigration Canada, they can provide a letter from their lawyer that it has been submitted.

e) The applicant/recipient cannot leave British Columbia with their dependent children because:

- A court order, agreement or other arrangement provides custody, guardianship or access rights to the child/ren to another person who resides in BC that legally prevents the applicant/recipient from removing the child from BC **OR**
- Another person who resides in BC is claiming custody, guardianship or access rights to the child/ren and the person's claims have not yet been resolved **OR**
- The applicant/recipient, or their dependent child is being treated for a medical condition and leaving BC would result in imminent danger to the physical health of the applicant/recipient or to the child.

Note: Applicants/recipients and their lawyers may be concerned that receiving income assistance will negatively impact their application for permanent resident status in Canada. The provincial government has informally reached an agreement with the federal government that it will not impact cases of people who meet the criteria of Section 7.1.

Changing lives
since 1897.

YWCA
VANCOUVER

8. Welfare and Disability Benefits

- **Loss Prevention Management**
  - Welfare Overpayments Sheet, BCPIAC
  - PLMS FAQS

THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

8. Welfare and Disability Benefits

- **Loss Prevention Management**
  - Welfare Overpayments Sheet, BCPIAC
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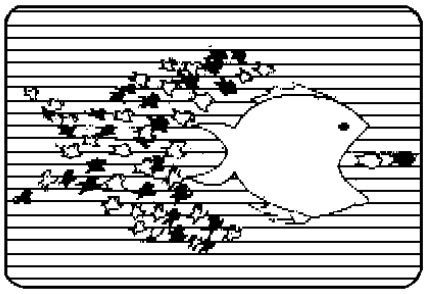
THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

The
British Columbia
Public Interest
Advocacy Centre

208 - 1090 West Pender Street
Vancouver, B.C. V6E 2N7
Tel: (604) 687-3063 Fax: (604) 682-7896
email: support@bcpiac.com
http://www.bcpiac.com



Welfare Overpayments

Tips for Advocates dealing with alleged overpayments
to the BC Ministry of Social Development

November, 2012

Eugene Kung & Robin Loxton
Adapted from an earlier version by Sarah Khan

Resources and Assistance

The Ministry of Social Development (MSD) legislation, policies and procedures are available through the MSD Online Resource. The section of the Online Resource that covers a range of topics related to overpayments is found at: http://www.gov.bc.ca/meia/online_resource/verification_and_eligibility/rec/policy.html

Some overpayment cases can be complicated. If you are assisting a client to deal with an alleged welfare overpayment and are not sure what to do, you can post your question to the Povnet Welfare-BC list. You can also call the Community Advocate Support Line at: (604) 681 CASL (2275) or Toll-free in BC at 1 888 781 CASL (2275); or lawyers with the BC Public Interest Advocacy Centre at 604-687-3063 and the Community Legal Assistance Society at 604-685-3425.

Legal Services Society also publishes “Your Welfare Rights – A Guide to BC Employment and Assistance, which includes a section called “When the Ministry says you owe them money”, available at http://www.lss.bc.ca/publications/pub.php?pub=167

Overpayments and MSD investigations

If MSD overpays your client or gives her a benefit that she was not entitled to, this is called an **overpayment**. Overpayments can arise in several situations, for example where MSD says that a client has not declared income or assets, or knowingly gave MSD false or misleading information to get benefits that she was not entitled to.

If MSD believes that a client may have an overpayment, staff record allegations on the Fraud Allegation Reporting System (FARS). The FARS is an interactive web based application used to record, track and monitor all allegations reported to the ministry.

MSD staff are to send a **letter to the client** requesting an interview to discuss the findings of the review. The letter *must* advise the client of the following:

- the role of the staff member
- the purpose of the review
- what is being reviewed
- a summary of the evidence
- the purpose of the interview
- the preliminary findings
- the amount of overpayment and how it was calculated
- possible consequences
- an appropriate timeframe for written response or personal interview
- that the client may be accompanied at the interview by an advocate or other person of their choice

If your client decides to attend the meeting, let her know that if she does not feel comfortable at the meeting, she has the right to leave.

The approach you take, or the consequences MSD may want to impose on your client, could be quite different depending on whether your client agrees with MSD or disputes their claims. In either situation, it is best to review the information carefully before deciding what to do.

MSD may give your client an **Overpayment Notification Form** and ask your client to sign it. This form is used by MSD to:

- notify clients that they have been determined to have received assistance for which they were not eligible

- advise them that they are liable to repay the overpayment and that a minimum of $10 per calendar month will be deducted from future assistance until the debt is paid

- inform them of their right to reconsideration of the ministry decision

Your client does not have to sign the Overpayment Notification Form if she disagrees with MSD about the overpayment.

If your client does not agree that there is an overpayment or with the amount of the overpayment, she must be given an **Overpayment Chart**, and supporting documents and advised of her right to request a reconsideration. The Overpayment Chart shows clients how the overpayment was calculated.

Overpayments involving amounts greater than the rate of three months' assistance for the client's family unit must not be dealt with by EAWs and should be referred to **Prevention and Loss Management Services** (PLMS). PLMS investigation policies can

be found at:
http://www.gov.bc.ca/meia/online_resource/verification_and_eligibility/lossman/policy.html

Protect your client when MSD is investigating an overpayment. Keep copies of all letters or other documents that are given to MSD, keep a written record of any conversations with MSD, and keep copies of letters and documents that MSD provides.

Overpayments and living arrangements

For the purpose of determining eligibility for income assistance, disability assistance or hardship assistance, a **family unit** is defined by MSD as either of the following:

- married persons
- persons living in a marriage-like relationship with or without dependent children
- sole persons with or without dependent children

When two people (over 19 and excluding dependent children) live together and there is no acknowledgement that a dependency, spousal, or marriage-like relationship exists, MSD will assess the nature of the relationship to determine if a **marriage-like relationship** exists, using the following factors:

1. Two people who reside together are spouses of each other for welfare purposes if they have resided together for at least
   - the previous 3 consecutive months, or
   - 9 of the previous 12 months, AND
2. MSD is satisfied that the relationship demonstrates
   - financial dependence or interdependence, and
   - social and familial interdependence,

   that is consistent with a marriage-like relationship.

If your client believes that she is not in a marriage-like relationship, put together documents that explain why your client and her housemate do not meet the requirements for a marriage-like relationship that are set out above.

Getting all of the information about the alleged overpayment

If a client approaches you about a welfare overpayment, ask her to bring in all documents that she has related to the overpayment, and ask her to explain what has happened.

If MSD has not provided your client with a letter explaining why they think there is an overpayment, ask them for one, and for an Overpayment Chart and all other documents supporting MSD's view that there is an overpayment.

If you think that there might be information in your client's MSD file that has not been disclosed to your client, make a **request under the Freedom of Information and Protection of Privacy Act** for your client's MSD file. You can do this by filling out the Request for Records form found at: http://www.gov.bc.ca/citz/iao/foi/submit/personal/form/Request_to_Access_Personal_Information.pdf and asking for all records related to the alleged welfare overpayment.

Send the completed form to:

Ministry of Social Development
Information, Privacy and Records Services
Records and Forms Services
PO Box 9972 Stn Prov Govt
Victoria, BC V8W 9R5

Ph: 250-387-3128

Fax: 250 387-3311

Repayment Agreements

If your client agrees there was a mistake and that she owes MSD money, she may be asked to sign a **Repayment Agreement**. In a Repayment Agreement, your client acknowledges that she owes some money to MSD. By signing a Repayment Agreement, your client is giving MSD permission to deduct an amount from her welfare cheque each month to repay the debt.

Your client can arrange to have as little as $10 per month taken out of her income assistance cheque in order to repay the overpayment.

Advise your client not to sign a Repayment Agreement if:

- she does not agree that she owes MSD money.
- she is not sure whether or not she owes MSD money.
- she is uncertain about what the agreement means, or what effect it will have.

Appealing the Ministry's decision

In some circumstances, your client can ask MSD to change the decision they have made about a welfare overpayment.

The first step in any appeal about a welfare benefit is called a **reconsideration request.** . If your client disagrees with the reconsideration decision, she may **appeal** that decision to the **Employment and Assistance Appeal Tribunal**. In some cases, she may also ask a court to **judicially review** an overpayment-related decision that MSD has made about her.

It is very important to act quickly if your client disagrees with any decision MSD has made about her benefits. The **time limits** for reconsiderations and appeals are very strict. If she misses the time limits, she will not be able to make her appeal.

Disputes with MSD about overpayments – civil court

If MSD believes that your client has received an overpayment but your client disagrees, MSD may sue your client in either **Small Claims Court** or **BC Supreme Court**. If the case goes to one of these courts, MSD will have to prove the existence of the overpayment to a judge. If MSD succeeds in proving the overpayment, the judge may order your client to pay the money back.

If MSD gets a judgment against your client in civil court, MSD can choose whether or not to apply **sanctions** (see heading below). If MSD applies any of the sanctions listed, your client can make a reconsideration request to MSD. If your client disagrees with the reconsideration decision, she can appeal that decision to the Employment and Assistance Appeal Tribunal.

Offences and criminal fraud

In addition to the actions MSD can take to get recover an overpayment, if your client knowingly gives false or misleading information to MSD to get benefits that she is not entitled to, she may be charged with an **offence** under the Employment and Assistance Act. In serious cases, she may be charged with **fraud** under the Criminal Code of Canada.

If MSD says they want to have your client charged with an offence or criminal fraud, get legal help right away. In some circumstances, your client may be able to get a legal aid lawyer.

Remember that there are a lot of steps between MSD saying they suspect fraud and proving their allegations.

If your client is convicted of criminal fraud or under the Employment and Assistance Act, she could face some of the sanctions described below.

Sanctions

In certain circumstances, MSD can apply **sanctions** to your client because of an overpayment. Sanctions mean that your client will either be ineligible for benefits, or will face a benefits reduction, for a certain period of time.

When applying sanctions, MSD must use discretion in situations where there are legitimate mitigating circumstances or the non-compliance is a one-time occurrence. Sanctions are **not** to be applied in situations where non-compliance is beyond the client's control.

The type of sanctions imposed on your client will depend on a variety of factors, including whether there is a judgment against your client, and what type of family unit she lives in. Sanctions will last for different periods of time, depending on your client's situation.

MSD's policy about sanctions can be found at: http://www.gov.bc.ca/meia/online_resource/verification_and_eligibility/sanctions/policy.html

Below are two tables that outline sanctions that can be imposed based on issues involving overpayments:

Table: Sanctions for inaccurate or incomplete reporting

Types of Sanctions	Consequence	Period of Time
Failure to accurately or completely report (on the Monthly Report EIA0081) any income, assets or circumstances that affect the eligibility of the family unit that result in an overpayment.	The amount of assistance the family unit is eligible to receive is reduced by $25. Note: The overpayment recovery amount is deducted from the reduced (sanctioned) amount.	1st occurrence – 3 months 2nd occurrence – 6 months 3rd occurrence – 12 months Each subsequent occurrence – 12 months

Table: PLMS Imposed Sanctions

Types of Sanctions	Consequence	Period of Time
Conviction under Criminal Code for Fraud in respect of the BCEA legislation	Single persons or couples without dependants where both are subject to a sanction for any reason under this section of the Act are ineligible. Families with a *dependent child* are subject to a reduction as follows:	Lifetime of person (nb. Think about hardship and family status, dependents, etc. s.42.1 of EAPWD

	$100 per month for a single parent $100 per month for a couple with dependant children if only one parent is sanctioned. $200 a month for a couple with dependent children if both parents are sanctioned. Couples without dependent children are subject to a $300 reduction per month if only one person is subject to a sanction.	Regs; 47.1 EA Reg)
Conviction under BCEA legislation	Same as above	1st occurrence – 1 year 2nd occurrence – 2 years 3rd occurrence – Lifetime
Civil Court judgment under the BCEA legislation	Same as above, except that the decision to impose the sanction is discretionary.	1st occurrence – 3 months 2nd occurrence – 6 months 3rd and subsequent occurrence – 12 months
Conviction under former legislation or Criminal Code for fraud in respect an offence charged wholly under former legislation	Family unit is ineligible	3 months
Civil Court judgment under former legislation	Family unit is ineligible. The decision to impose the sanction is discretionary	3 months

PLMS FAQs

Who are Prevention Loss Management Services (PLMS)?
PLMS is the branch of the Ministry of Social Development that investigates clients whose eligibility for assistance has been called into question. In the words of the Ministry, *To ensure that assistance is paid only to those truly in need, the Branch develops and implements prevention, compliance and enforcement initiatives, strategies and programs aimed at reducing overpayments and deterring fraud*

What are the issues that are typically handled by PLMS?

- Dependency allegations
- Unreported income
- Undisclosed assets or disposing of assets
- Fraud allegations

How do PLMS get involved?

- Client financial reviews
- Data matching
- EAW referrals
- Third party reports

What challenges do clients face when dealing with Investigative Officers and PLMS?

- Easily intimidated by PLMS staff attitudes and correspondence
- Inability to communicate effectively
- Have had their income assistance suspended
- Fear of having their income assistance cut off
- Fear of being charged with fraud
- Lack of understanding of the EA and EAPWD Acts and Regulations
- Failure or inability to obtain information and verification requested
- Lack of co-operation from third parties
- Made a “mistake” in the past which has compromised their case
- Filed a Request for Reconsideration without fully understanding the eligibility issues
- Lack of advocacy resources
- By the time they speak to an advocate, their options are significantly reduced

What can advocates do to help clients?

- Reducing the level of intimidation and demystifying the process
- Liaising with Investigative Officer
- Advising clients of legislative and regulatory requirements
- Addressing current eligibility issues so income assistance can be re-instated
- Ensuring that PLMS has disclosed all relevant information
- Assisting client in obtaining requested documentation
- Advising clients of their appeal rights and providing necessary assistance
- Understanding that Reconsideration Section is not part of PLMS
- Where possible, negotiating with PLMS about the application of sanctions
- Being aware of the limitations of a lay advocate

8. Welfare and Disability Benefits

- **Welfare and Assets**
  - Welfare and Assets Materials
  - Lists of Apendices
  - Appendices A through G





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Welfare and Assets

Alison Ward, Barrister and Solicitor, Community Legal Assistance Society, prepared November 22, 2011 (and revised November 19, 2012)

Welfare eligibility issues commonly arise in relation to assets. While each case is slightly different, in general there are three kinds of problems:

1. The Ministry of Social Development ("MSD") refuses someone welfare, or cuts their benefits off, because MSD says they have too many assets.

   Specific legal issues arise where:

   a. The person owns property that they don't live in, but which the property is very hard or impossible to sell (e.g. bare land that is in a flood plain);

   b. The person owns property jointly and the co-owner will not cooperate with a sale (e.g. a matrimonial home, or other); or

   c. The person is on the legal title (either sole or joint) to property but feels that they don't "really own it" (lack of beneficial interest in the property).

2. A client on welfare receives a lump sum of money. How will this affect their benefits? What options do they have?

3. MSD says that a client is not eligible for benefits for a period of time because they have "disposed of assets."

This presentation reviews the *Employment and Assistance* (EA) and *Employment and Assistance for Persons with Disabilities (*EAPD) legislation, and policy, in relation to these three categories of problems, and offers suggestions for dealing with each.

Section 1

MSD refuses someone benefits, or cuts off their benefits, saying they have too many assets

Introduction

This section of the paper examines the definition of "asset" in the welfare legislation. It offers suggestions for how advocates may approach three categories of cases where MSD finds someone ineligible for welfare due to excess assets.

a. A person owns property but is not able to sell it in the short term and needs time to be able to sell it, (either because they own it jointly and the co-owner will not cooperate with a sale, or for some other reason);

b. a person owns property that they don't live in, but the person is not able to sell the property (e.g. bare land that is in a flood plain and there is no market for it; a jointly owned matrimonial property that the person is cannot sell because they cannot get legal aid, cannot hire a lawyer, and cannot represent themselves in court);

c. A person is on the legal title to property (either sole or joint) but feels that they don't "really own it." In other words, they do not have a "beneficial interest" in the property.

What unites all three of these issues is that they raise questions as to whether something is, in fact, someone's "asset" for the purposes of welfare eligibility.

Legal definition of "asset" in the welfare legislation

"Asset" is defined in section 1 of the EA and EAPD Regulations as follows:

> "*asset" means*
>
> *(a) equity in any real or personal property that can be converted to cash,*
>
> *(b) a beneficial interest in real or personal property held in trust, or*
>
> *(c) cash assets.*

The rest of this section examines what subsections (a) and (b) of this definition mean.

(a): "*equity in any real or personal property that can be converted to cash"*

- ***What is equity?***

Equity refers to the net value of an asset (the market value of a thing, minus any debt that the person owes on the thing). Let's say someone owns a house that they do not live in. The evidence shows the house would sell for $200, 000, but the person owes a mortgage of $230,000 on the house. Because the house is worth less than the debt owed on the house, the person does not have any equity in the house. In this case, because there is no equity in the house, the house is simply not an "asset" for MSD's purposes (based on subsection a of the definition of asset).

To take another example, let's say someone buys a boat for $7 000. They pay $500 down, and take out a secured loan for $6500 for the rest of the purchase price. They then have equity of $500 in the boat. If the amount of equity in the property is below the client's general asset exemption level, you can argue the asset is therefore exempt. If there is no equity in a property, it is simply not an "asset" for MSD's purposes.

- ***What is "equity <u>that can be converted to cash</u>"***

What is meant by equity that "can be converted to cash?" Another way to phrase this is basically whether the thing in question can be sold.

It is sometimes possible to argue that a thing cannot be sold and is therefore not a person's "asset" for welfare purposes (even though they own the thing, legally).

MSD's policy on this issue is at http://www.gov.bc.ca/meia/online_resource/verification_and_eligibility/assets/policy.html (in the assets topic, under "eligibility"). The Online Resource says:

> *Assets are only assets if they can be converted to cash. All assets have an intrinsic monetary value; therefore, <u>the term convert refers to the "ability" to sell the asset</u>. 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.*

<u>Examples of situations in which property cannot be sold (or at least, not sold quickly)</u>

A. Jointly owned property: The person owns property jointly and the co-owner will not cooperate with a sale (e.g. a matrimonial home, or other)

Ministry policy on jointly owned assets is at http://www.gov.bc.ca/meia/online_resource/verification_and_eligibility/assets/policy.html #6 It provides:

> ***Jointly Owned Assets***
>
> *When it is determined that an asset that is jointly owned cannot be disposed of because the other owner will not co-operate, the Supervisor may deem the asset not available. This decision is valid for a six-month period and may be extended for a maximum of two years.*

This policy on jointly owned assets is an interpretation of the definition of "asset" and whether there is "*equity in any real or personal property that <u>can be</u> converted to cash."* (that is, there is no section in the welfare legislation that specifically allows MSD to deem an asset to be "not available, other than section 11(3)(b) of the *Employment and Assistance Regulation,* and section 10(3)(b) of the *EAPD Regulation,* regarding exemption of saleable acreage and buildings. For more on that issue, see page 11 below. It is not clear how these sections interact with the definition of asset as something that can be converted to cash).

MSD's policy recognizes that it can take time to sell jointly owned property (i.e. to "convert it to cash") because sale requires either the cooperation of the other joint

owner, or an order from the Supreme Court of BC (if the property is in BC) that the property be sold.

The policy provides that a jointly owned property can be exempted for a maximum of two years. That time frame is policy only (not law). If after two years your client has not been able to sell a jointly owned property despite reasonable efforts to do so, you can take the position that the property is still not an "asset" and should continue to be exempted, by presenting documentation that shows that your client is (still) not able to sell that property and that, as the property cannot be converted to cash, it is not her "asset."

If there is no equity in a jointly owned property, you will want to argue that the property is simply not the person's asset at all (due to the absence of equity) rather than arguing that the person should be simply given time to sell the jointly owned property.

B. *Other examples where a property cannot be sold quickly (despite the person's reasonable efforts)*

MSD's policy on jointly owned assets is just one example of how the phrase "equity…. that can be converted to cash" can be interpreted.

If your client presents with another fact pattern in which the property cannot be sold quickly, because the evidence shows that it will take time for the property to sell (for whatever reason), you can argue by analogy to the policy on jointly-held assets that MSD should likewise deem this property not to be an asset (as it is not available) for a period of time, to give the person time to sell it.

C. *Examples where a property cannot be sold*, at all

There may be other situations where you can argue that something is not an "asset" for MSD's purposes because it cannot be sold at all (i.e. cannot be converted to cash).

Think of a situation, for example, where someone owns bare land in a remote location, but the land has had serious environmental damage or is experiencing climate change and has now become, basically, a swamp. Can that property be sold? How do you show that it can, or can't?

What if your client owns real property in another country where they know no one, cannot afford to hire a real estate agent, and cannot afford to travel there to sell it themselves. Practically speaking, can that property be converted to cash? The answer to that will depend on the strength of the evidence you can assemble.

Trying to establish that a given thing cannot be sold will involve assembling a lot of evidence. In all cases, first, your client needs to show that they have *tried* to sell the land. To take the case of the remote swampland, copies of listing agreements with real estate agents the person has had list the property, will be helpful evidence. A letter from a real estate agent setting out the condition of the land and giving an appraisal value, and commenting on the strength or slowness of the market in that area would be helpful too. Are other neighbouring properties in the same state? Have their owners tried to sell them? If so, gather evidence of those listings, how long they have been on the market, and the fact they have not sold. Are there governmental or engineering reports available

anywhere commenting on the condition of the land in the area in which the client's property is located?

It may also be possible to argue that a jointly owned asset cannot be sold, because it is a practical impossibility.

For example, let's say a client owns a matrimonial home jointly with their ex-partner in another province (say, New Brunswick). The person is receiving welfare as MSD has exempted the jointly owned asset for two years to give the client time to sell it. There is equity of $40 000 in the house in New Brunswick.

Is it possible to argue that in some cases, a jointly-owned matrimonial home like this is not an "asset" as it cannot be sold? Yes. To make such an argument, you would want to look for *evidence* of three main points:

1. *the person is not eligible for legal aid to help them pursue property division*

   In our example, the client applied for legal aid and obtained a letter from legal aid in New Brunswick confirming she is not eligible for legal aid to help with property division.

2. *the person cannot hire a lawyer to help them pursue property division*

   It is not enough to simply assume the person cannot afford to hire a lawyer. You need <u>evidence</u> that they cannot do so.

   In our example, the client contacted a lawyer in New Brunswick and tried to hire them on a contingency fee, but the lawyer said the client's likely share of the equity in the property was not enough to support the lawyer's contingency fee. The client obtained a letter from the lawyer, confirming the lawyer's opinion, and also confirming that to take the case without a contingency fee, the lawyer would need a retainer (down payment) of at least $2000.00.

3. *the client is not able to pursue property division through self-representation*

   Whether it is reasonable to expect a client to pursue property division by representing themselves in court is a question of fact that will differ from case to case.

   In our example, as the property was located in New Brunswick, the client would have had to leave BC and travel to New Brunswick in order to represent herself in court (which would in turn make her ineligible for welfare in BC). She gave MSD evidence that she could not afford to travel to New Brunswick.

   In other cases, if the property is located in BC, and the person is not able to pursue property division (for example, due to a history of abuse, power imbalance, language, literacy or other barriers), consider whether you can get a letter from a lawyer confirming what self-representation in court would entail (this will vary depending on the complexity of each case), setting out the steps the client would need to take, and setting out the lawyer's view as to whether it

would be reasonable to expect the client to self-represent in this case given the barriers this particular client has to doing so.

If you are able to assemble supportive evidence on all those points the client would have a good legal argument that a jointly-owned matrimonial home is not an asset for MSD's purposes, because the person is <u>not able</u> to convert the equity in it to cash.

The question of whether equity in a given property can be converted to cash (i.e. whether it is an asset) can be taken to both reconsideration and appeal.

(b): *a beneficial interest in real or personal property held in trust"*

A thing is only a person's asset if the person has a beneficial interest in it. To repeat, the EA and EAPD Regulations define "asset" to include:

(b) a beneficial interest in real or personal property held in trust

If a person does not have a beneficial interest in property, then that property is not their "asset" for MSD's purposes.

What is meant by "beneficial interest" in property?

Legally speaking, "ownership" may be more complicated than you might at first suspect.

Think about the following situation: your sister really wants to buy a car. You know she can afford to make car payments, but she can't get a car loan because she has bad credit. You have good credit, and you trust her, so you agree to buy a car, with the car loan in your name. You don't pay a penny toward the car. You both agree that your sister will make all of the payments, and be the only one who ever drives it. Your sister does both, and it all works out as you'd hoped.

In this situation, who owns the car?

The law's answer to this question is that, in a sense, you and your sister both own the car. But you have different kinds of ownership of it. You are the <u>legal owner</u> of the car (because the car is legally registered in your name). And your sister is the <u>beneficial owner</u> of the car (because she paid for the car and because you both intended she would be the one to have the benefit of the car).

The law recognizes at least two kinds of ownership:

a) **legal ownership**: legal ownership is determined purely by who is named as the owner on the registered legal title to a property (i.e. at the Land Title Office if dealing with real estate, at the Motor Vehicle Registry if dealing with a vehicle, etc); **and**

b) beneficial ownership: beneficial ownership is about who owns a property in the sense of having all the benefits of ownership, regardless of who may be named as the "legal owner" of a property on paper. A lay person might say that a beneficial owner is the person who “really owns” something, regardless of who might have legal title to it.

To take another example, if I buy a house for my own use, then I will be both the legal owner of the house (my name will be registered on title to the house at the Land Title Office), and I will also be the beneficial owner of the house.

As the beneficial owner of the house, I can do whatever I want with the house (subject to noise and other bylaws). For example, I have the right to move into the house, live in it however I like, rent it out if I want, get 10 roommates if I want, paint the house a hideous colour, plant strange things in the garden if I feel like it, tear up the front lawn, replace all the carpets, and even tear the house down if I like. My neighbours might not be happy about any of this, but they would have not have the right to stop me from doing any of this. Beneficial ownership of a property includes the right to use the property as the beneficial owner wants.

Such a situation where I purchase a house for my own use is clear, but in other cases legal ownership and beneficial ownership can be entirely separate.

For example, sometimes a parent who owns a house adds an adult child to the title of their house as joint tenant (i.e. co-owner) purely for estate planning purposes. That is, the parent puts the adult child on joint title to the house so that, when the parent dies, legal title to the house will pass directly to the adult child (as joint tenant). However, the parent *does not intend* that the adult child would actually have the right to act as the owner while the parent is still alive. For example, the parent does not intend that the adult child have the right to move into the house while the parent is still alive (even if the parent does not want them to), or be entitled to rent the house out, or paint it their favourite colour, or replace the parent’s favourite plants, or do any of the other things that a person who is the “real owner” (beneficial owner) of a house has the right to do.

In other words, the adult parent may transfer joint legal title (i.e. legal ownership) to the adult child, without intending that the adult child have beneficial ownership of the house while the parent is still alive. In such a case, until the parent died, the adult child would have legal ownership of the property, but would not have beneficial ownership of the property while their parent was alive. The parent would remain the beneficial owner of the property until their death (even though the adult child was also a legal owner). After the parent’s death, the adult child would become the beneficial owner of the house (as well as the legal owner).

How do you determine whether or not someone has beneficial ownership of property?

“Beneficial ownership" is not legally required to be registered anywhere in writing. Therefore, it can sometimes be hard to determine (or prove) who the beneficial owner of a property is.

In welfare advocacy, questions about whether a client is a beneficial owner of a property usually arise in cases where, for whatever reason, the client’s name has been put on the legal title of a house (although it could be another kind of property too, like a car, or a

boat, etc). However, the client does not feel that they "really own" the property (they do not think they are the beneficial owner of it). Legally speaking, MSD may say the person is not eligible for welfare because they own a house that they do not live in.

The issue for the advocate then becomes, is the house the client's asset? That is, do they have "beneficial ownership" of the house, or do they merely have legal title to the house (without having a beneficial interest in it).

In every case where this issue arises, what will determine who the beneficial owner of a property is, are:

a) **the intention of the parties at the time that the property was put into the name of the client** (or other legal owner**);** AND

b) what the law has to say about something called **a "presumption of advancement."**

Let's return to the example above, wherein a parent put an adult child's name on joint title to the parent's house, for estate planning purposes, without intending the child to have the house until the parent died.

Pretend that that adult child now comes to see you. They explain that MSD has cut off their welfare benefits because they own a house they do not live in, and therefore have assets in excess.

As the advocate in a case like this, how can you show what the parent intended when they put the adult child on title to the house? How, if need be, would you prove that intention to MSD or the Employment and Assistance Appeal Tribunal ("EAAT") in an appeal?

Whether you are working with a reconsideration request or appeal, the key will be for the advocate to:

a) **know what legal presumptions apply to the situation**; and

b) **obtain evidence of the intention of the parties** (here, the parent and the adult child) **at the time that the transaction occurred** (here, when the parent put the property into the name of the adult child).

a) Legal concept: does a presumption of advancement apply in the case?

Legal presumptions are non-negotiable assumptions that the law makes about certain situations, in a factual void. The presumption of innocence is an example of a legal presumption. Without knowing any of the facts about a criminal case, the law always presumes that someone is innocent.

However, like any assumption, a legal presumption can be changed by actual evidence. So, in criminal law, a person is presumed to be innocent, but of course can be proven to be guilty, by the evidence that is presented in a criminal trial. Once there is evidence of the person's guilt, the presumption of innocence no longer applies.

The “presumption of advancement” is deals with situations in which the law does (and does not) presume someone to have a beneficial interest in property when they are on legal title to that property as sole or joint owner.
To give an example, if I own a house (or other thing) and I put another person’s name on legal title to my property – for free (that is, they do not pay me for it) - then in *some* situations the law will presume that I intend to give that other person a gift of the beneficial interest in that property and in others, it will not. A presumption that someone has gifted someone the beneficial interest in property is called a “presumption of advancement.” Of course, that presumption (like the presumption of innocence) can be disproven by evidence to the contrary.

Where there is no legal presumption of advancement of the beneficial interest in property, the law will instead presume that the other person is just holding the property for me as a trustee (i.e. as a legal owner without beneficial interest in the property) and that I retain the whole beneficial interest in the property. Again, that presumption (like the presumption of innocence) can be disproven by evidence to the contrary.

In 2007, the Supreme Court of Canada decided an important case called *Pecore* v *Pecore.* In that case, a parent had added his adult daughter’s name to his bank accounts while he was alive. The issue the court had to decide was whether or not there is a legal “presumption of advancement” when a parent puts an adult child on title to something. Extracts from the Supreme Court of Canada’s decision in Pecore v Pecore are attached to this handout and marked **Appendix A.**

Historically, the law presumed that when a parent put their child (of any age) on joint title to anything, the parent intended to give that child both legal and beneficial interest in the property.

But the Supreme Court of Canada changed that law in the *Pecore* case in 2007. The Court decided that, in modern society, there is no good legal reason to presume that a parent who puts an *adult* child on joint legal title to something necessarily intends to make them a gift of the beneficial ownership in the property***. Pecore* determined that in such a case, the law does not *presume* that the adult child is the beneficial owner of that property, but rather presumes that the parent only intended to give bare legal title to the adult child, and that the parent retains beneficial ownership**. However where a parent puts a minor child on title to a property, there is still a legal presumption that the parent intends to give the minor child beneficial interest in the property (as well as legal title to it).

Where the presumption of advancement applies (i.e. where the law *presumes* that a person intended to give someone else beneficial ownership of a thing), that presumption can be displaced by showing actual evidence about what the parent or other person *actually intended* (despite the law’s presumptions) when they put another person on joint title to a property.

So, for example, if Mr. Smith puts his adult son Joe on joint title to his house, the law *presumes* Mr. Smith did not intend to make Joe the beneficial owner of the house before Mr. Smith died. However, by gathering evidence like statutory declarations of what Mr. Smith in fact intended in his own mind it may be possible to prove that Mr. Smith actually *did* want to give Joe beneficial ownership of the house while Mr. Smith was still alive.

In other words, evidence of what people actually intended can displace a legal presumption.

It is very important to know if a presumption a presumption applies in a case you are working on, because it will affect how much evidence you will need to gather about the intention of the parties, in order to do a good job of presenting your client's case.

b) Gathering Evidence of the intention of the parties

The Supreme Court of BC has said that when someone is arguing that they don't have a beneficial interest in a property that they are on legal title to, that person **must supply sworn evidence (by affidavit or statutory declaration) to support their position.**

Therefore, when you are working with a client who is on legal title to a property but says they do not really own it, the advocate must have the parties swear statutory declarations about what they intended when the client's name was put on the property. A sample template for a statutory declaration is attached to this handout as **Appendix B.**

In preparing a client's case for an initial application to MSD, a request for reconsideration or an appeal to the EAAT, you should therefore have the client and anyone who put property into the client's name swear statutory declarations setting out how it came to be that the client was put on title to a given property, and what both the client and the other person (e.g. parent) intended to happen when this was done.

Seek help drafting the statutory declaration if you need guidance in what it should include. It should, however, canvass the following issues:

- When did the other person put the client on legal title to the property?
- Why did the other person put the client on legal title to the property?
- When the other person put the client on legal title to the property, did the parent or other person intend for the client to really own the property and have the use of it now? Or was title transferred for some other reason? If so, what was that reason?
- For example, did the other person intend the client to have the right to move into (or otherwise use) all or part of the property now, even against the other person's wishes? Did the other person intend the client to have the right to rent out all or part of the property now, even against the other person's wishes? (these are both rights that a beneficial owner would have).
- What did the client understand about the other person's intentions? Did the client know they had been put on legal title or was it done without their knowledge?

Also consider whether there may be other people who can provide evidence about what the parties intended when they entered into the transaction. For example, a parent may

have put an adult child onto the title to their house after consulting with a lawyer for advice about their Will or estate planning. If a lawyer or other person can speak to the reasons behind why a client was put on legal title to something, and what was intended by that, get that person to provide a letter setting that out or (ideally) a statutory declaration setting out that information.

See attached **Appendices C to E** for sample submissions to MSD in cases involving adult children on joint title to property.

Saleable Acreage and Buildings can be exempted

If your client is not successful in establishing that a given property cannot be sold (i.e. if MSD decides there is equity in it, and that the equity can be converted to cash), or that your client does not have a beneficial interest in the asset, your client may still be able to have the property in question exempted as an asset if you can argue that it consists of "saleable acreage and buildings."

Section 11(3)(b) of the *EA Regulation* (and section 10(3)(b) of the *EAPD Regulation*) provide:

11 (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.*

MSD does not have a policy in the Online Resource which discusses what constitutes a "saleable acreage" or "building."

This section may be used to try and establish that MSD should reasonably exempt certain properties as assets. Attached as **Appendix F** are two decisions of the Employment and Assistance Appeal Tribunal where the Tribunal decided exactly that. Note in one case, the property in question was a house in a small village, and was not an acreage, however the Tribunal found that MSD was unreasonable not to exempt it as an asset under section 11(3) of the EA Regulation, as the appellant had made reasonable efforts to sell the property but it was not immediately saleable or convertible to cash.

Hardship benefits and assets in excess

If your client is not successful in establishing that a given property cannot be sold (i.e. if MSD decides there is equity in it, and that the equity can be converted to cash), or that your client does not have a beneficial interest in the asset, your client may still be eligible for hardship benefits from MSD if they have dependent children, and assets in excess.

This form of hardship benefits is repayable. Still, it may tide a client over a difficult period of time. Hardship benefits for assets in excess are usually limited to three consecutive months, to give the client time to sell the asset. However, MSD policy

provides that a district supervisor may approve hardship assistance beyond the three months in exceptional circumstances.

Section 46 of the *Employment and Assistance Regulation* (and section 41 of the EAPD Regulation) provide:

> ***Family units that have excess assets***
>
> ***46*** *The minister may provide hardship assistance to a family unit that is not eligible for income assistance because the assets of the family unit exceed the applicable limit under section 11 (2) and (2.1) [asset limits] if:*
>
> *(a) the minister considers that undue hardship will otherwise occur,*
>
> *(b) the applicant provides the type of security specified by the minister for the repayment of the hardship assistance,*
>
> *(c) the applicant satisfies the minister that*
>
> *(i) the assets that caused the family unit to be ineligible are not immediately available to meet the family unit's basic needs, and*
>
> *(ii) every effort has been made and continues to be made to sell the assets, and*
>
> *(d) the family unit*
>
> *(i) includes one or more dependent children, or*
>
> *(ii) includes only persons who have reached 65 years of age or persons who have persistent multiple barriers to employment (or includes only person who are 65 and over if the family unit receives PWD benefits – Alison).*

If your client is still not able to sell the property in question after making diligent efforts to sell it (and after receiving hardship benefits for several months), your client may want to consider reapply for regular benefits if they can now show MSD (via evidence of all their attempts to sell the property, and the amount of time that has passed without a sale) that the asset in question really can't be sold quickly, and that MSD should exempt it as an asset for a period of time, to allow them to receive regular benefits while they continue to try and sell the property.

Section 2

A client receives a lump sum of money. How will this affect their welfare benefits? What options do they have?

Clients may receive lump sums of money from several sources. Some examples include:

- An ICBC settlement;
- An inheritance;
- Life insurance proceeds from a deceased loved one;
- A gift from a friend or family member;
- A residential schools settlement;
- Retroactive CPP benefits;
- A family law settlement or court order for property division;

All clients of MSD must report their receipt of all such funds to MSD as soon as possible. If they do not, they risk being assessed overpayments, and the possibility of prosecution for fraud. They also risk losing the opportunity to try to structure their situation so that their ongoing benefits from MSD are affected as little as possible.

There are many rules in the welfare legislation that affect clients who receive lump sums of money. Whenever a client tells you that they have received, or will be receiving, a lump sum of money, there are three questions that you must ask yourself:

1. Will MSD see this money as income in the month in which the client receives it, or is there an argument that it is exempt income?

2. Will MSD see this money as an asset in the month(s) following your client's receipt of it, or is there an argument that it is an exempt asset?

3. If the answer to question 2 is that MSD will see the money as a non-exempt asset, what options does the client have for structuring their affairs so that their particular goals are best met (which may include the goal of trying to limit the impact on their ongoing benefits as little as possible).

Question 1: Will MSD see this money as income in the month in which the client receives it, or is there an argument that it is exempt income?

The answer to this question will vary in each case, depending on the source that your client received (or will receive) the money from. You need to check the welfare legislation carefully each time to determine if the particular type of funds is considered exempt income:

- A full listing of income exemptions is found in Schedule B to the *EA Regulation* and *EAPD Regulations;*

- The income exemptions for hardship benefits (either regular or PWD hardship) are slightly different than the income exemptions for income assistance and disability assistance. For a full list of the income exemptions for hardship benefits, see section 6 of Schedule D to the EA and EAPD Regulations.

Example:

Your client Martha receives a residential schools settlement. Residential schools settlements are considered exempt income, except money paid as income replacement in the settlement, under EA Regulation section 11(1)(v) and EAPD Regulation section 10(1)(v). So, if Martha's residential school settlement does *not* include an amount for income replacement, then it will not be considered income in the month in which it is received. So Martha will not lose her benefits for one month due to excess income. Nonetheless, Martha must still report to MSD that she has received these funds.

There are two rules about income exemptions that are sometimes overlooked:

- a "one time," or isolated, gift is not considered to be income, but an asset at the time it is received. A one-time gift that is below your client's asset exemption level will not affect their ongoing benefits, although the client must still report their receipt of these funds to MSD.

  This is not found in the EA and EAPD legislation, but is based on a 1996 decision of the BC Supreme Court case called *Morris v Income Assistance Tribunal.* MSD's policy on one-time gifts is found in the Online Resource at http://www.gov.bc.ca/meia/online_resource/verification_and_eligibility/assets/policy.html#6 under "loans, credit and gifts."

- "A criminal injury compensation award or other award" is exempted as unearned income up to a family unit's asset exemption level, by section 7(c) of Schedule B to the EA and EAPD Regulations. This section provides room to argue that an award, such as an ICBC settlement or monetary award from the RTB or eviction compensation, should be considered exempt income.

If the legislation classifies your client's funds as non-exempt income, your client will be off benefits for one month, due to receiving income in excess.

What will happen after that one month will depend on the welfare rules about assets.

Question 2: In the months after your client receives the money, is it considered non-exempt asset? Or is there an argument that it is an exempt asset?

MSD considers money to be "income" in the month that it is received. In months after that, MSD considers the funds to be an "asset." Assets are classified either as being "exempt," or "non-exempt."

Some types of payments are specifically exempted as assets by legislation. If exempt funds are used to purchase other things (assets), those assets in turn become exempt; the exemption passes from the funds to the assets.

Payments that are not specifically exempted as assets, can become exempt if the person intends to put them into a disability trust or RDSP, and advises MSD of their intention.

To determine if the funds your client has received are exempt assets, as with question 1, you will have to carefully check the welfare legislation to see how your client's situation fits within it.

- A full listing of asset exemptions is found in sections 11, 12 and 13 of the EA Regulation (for income assistance and PPMB benefits); and in section 10, 11 and 12 of the EAPD Regulation (for PWD benefits);

- The asset exemptions for hardship benefits (either regular or PWD hardship) are slightly different than the asset exemptions for income assistance and disability assistance. For a full list of the asset exemptions for hardship benefits, see section 6 of Schedule D to the EA and EAPD Regulations.

If the funds your client received are <u>not</u> considered an exempt asset, remember that your client is allowed to have non-exempt assets up to their asset exemption level, and still receive monthly benefits. The asset exemption level varies depending on the size of their family unit and whether the client receives income assistance/PPMB or PWD benefits. Also remember that asset exemption levels increased on October 1, 2012; make sure you are familiar with the new asset exemption levels.

Example:

To continue with Martha's case as an example, a residential schools settlement is also considered to be an exempt asset, except money paid as income replacement in the settlement; (see EA Regulation section 11(1)(v) and EAPD Regulation section 10(1)(v)). So, if Martha receives a residential school settlement that does not include an amount for income replacement, then it will not be considered income *or* an asset, and she will not be cut off benefits for any length of time.

Spending Exempt Funds: assets bought with exempt funds become exempt assets

If your client receives funds that are exempt as assets (like a residential schools settlement), if your client wants, s/he can use those exempt funds to buy *other* things, including assets that would not normally be considered an exempt asset for someone

receiving welfare benefits. **The exemption that was attached to the funds passes to the asset**. For example, if someone uses exempt residential schools funds to purchase a $10 000 boat, the boat becomes an exempt asset.

Client's who choose to do this must be very careful to **keep detailed written records and receipts of what they bought, and where the funds to buy it came from.** This is done so that the client can prove to MSD that any assets that are normally considered non-exempt, were purchased directly with the exempt funds.

For example, let's say Martha uses some of her exempt residential schools settlement funds to buy a second vehicle worth $8 000 (which is normally considered a non-exempt asset). Unless Martha can show MSD that she purchased the second vehicle using exempt funds from her residential schools settlement, MSD will likely view the second vehicle as an excess asset, and tell Martha they are no longer eligible for benefits because of it.

Therefore, it may be a very good idea for a client to **keep exempt funds in a separate bank account**, so they can more easily show what the exempt funds were used to purchase.

For relevant policy, see the Online Resource at http://www.gov.bc.ca/meia/online_resource/verification_and_eligibility/assets/policy.html under "compensation payments."

Question 3: **If the funds are not exempted as an asset, what options does the client have for structuring their affairs so that their particular goals are best met (which may include the goal of trying to limit the impact on their ongoing benefits as little as possible)?**

If a client reports to an Employment and Assistance Worker ("EAW") that they have received a lump sum of money, it seems to be quite common for an EAW to tell the person that they will be off welfare now, and that they must live off the money at a rate of no more than $2 000 per month. Sometimes the EAW will even give a time frame saying, for example, "you received $10,000 so don't come back to this office for at least 5 months."

The information from the EAW in this example is **not correct**.

A. Options not involving Trusts and RDSPs

Any welfare recipient who receives a sum of money that is not exempt as an asset and that is over their asset exemption limit, has **at least three options** in addition to simply living off the funds. **Any combination of these options can be used.** They can:

- **Use some or all of the funds to pay just debts.**

"Just debts" means debts that a person can prove (in writing) that they owe. For example, credit card debts, student loans, etc. A debt to a family member that was never properly documented in writing should NOT be paid in most cases; **and/or**

- **Use some or all of the funds to buy <u>exempt</u> assets**.

A full list of exempt assets is found in section 11 of the EA Regulation (for income assistance and PPMB); section 10 of the EAPD Regulation (for PWD benefits) and section 6 of Schedule D to the EA and EA Regulations (for regular hardship or PWD hardship benefits).

You should review the complete list of exempt assets with each client who is deciding how they should manage a lump sum that they have received.

Exempt assets include a home that you live in and a vehicle (subject to the equity limits in a vehicle if they apply to your client). But buying a car, or putting down payment on a home, or buying necessary household items are not the only options for exempt assets. <u>Some exempt assets, such as a Registered Educations Savings Plan, or pre-paid funeral costs, may be of great interest to your client, so you should review the full range of exempt assets with them so they can make an informed decision about what they want to do with the money they have received</u>; **and/or**

- Keep non-exempt assets up to their asset exemption level (e.g. a single person on income assistance is eligible for benefits again once they have non-exempt assets of up to $2000 left; a single person with the PWD designation has an asset exemption level of $5 000).

Example:

Ray is a single person on income assistance who receives a $12 000 inheritance. He could use $4 000 of it to pay just debts, spend $4 000 on an exempt asset such as an RESP, live off the funds for one month (spending $2 000), and then receive income assistance again once his remaining non-exempt assets are $2000 or less. If he buys the RESP and pays the debts *in the same month that he received the funds as income, he* should be off benefits for only one month due to income in excess (since in the following month they would not have assets in excess of the allowable levels). If he buys the RESP and pays his debts in the month *after* he received the funds as income, he should be off benefits for only two months (i.e. one month for income in excess, and one month for assets in excess).

Record Keeping

If a person chooses to pay just debts or purchase exempt assets, it is <u>essential</u> that they keep clear and thorough records, and copies of all receipts and proofs of payment. This is so that they can show MSD how they spent the funds they received. If they pay debts, they must also be able to show MSD documents that prove to MSD that they in fact owed the money they paid.

If a client does not keep careful records and cannot prove to MSD how they spent the funds, MSD is likely to say that the client is not eligible for benefits because they disposed of assets, either without adequate consideration, or in order to make

themselves eligible for benefits (refer to section 14 of the *EA Act* and section 13 of the *EAPD Act).*

For more information on allegations about disposing of assets, see section 3 below.

B. Disability Trusts and Registered Disability Savings Plans (RDSPs)

In addition to any or all three options above, certain clients also have the option of putting some or all of the funds they have received into a disability trust or RDSP.

Who can have an RDSP as an exempt asset?

To qualify to open an RDSP, a person must first qualify for the Disability Tax Credit through the Canada Revenue Agency. In addition, the person must be under age 60 (contributions to an RDSP can only be made until the end of the calendar year in which the person turns 59). For more information about RDSPs and the disability tax credit, see http://www.rdsp.com/

Money in an RDSP is considered an exempt asset for people on income assistance, PPMB and PWD (including all forms of hardship benefits).

Who can have a disability trust as an exempt asset?

A disability trust is considered an exempt asset (and certain withdrawals exempt as income) for the following groups of people:

- a person with the PWD designation *(refer to EAPD Reg s 12);*

- an applicant or a recipient who has applied for the PWD designation and is waiting for a decision on their application; OR a person who satisfies the minister that they "have a genuine intention" to apply for PWD designation.

  In these cases, a disability trust - or funds that the person intends to put into a disability trust or RDSP - are an exempt asset for the person while they apply for and/or receive income assistance, hardship or assistance or PPMB benefits. *(Refer to EA Reg s 13.1).*

- a person receiving accommodation or care in a private hospital (i.e. a private hospital licensed under the *Hospital Act), other* than a drug or alcohol treatment centre. This is the case whether the person is eligible for income assistance, PPMB or PWD benefits) *(refer to EA Reg s 13 and EAPD Reg s 12)* and;

- a person receiving accommodation or care in a special care facility, other than a drug or alcohol treatment centre. This is the case whether the person is eligible for income assistance, PPMB or PWD benefits. (Note: a "special care facility" is a facility that is a licensed community care facility under the Community Care and Assisted Living Act or a specialized adult residential care setting approved by the

minister (if no such license is required by the Community Care and Assisted Living Act) *(refer to EA Reg s 13 and EAPD Reg s 12)*.

Funds intended for a Trust or RDSP are exempt assets

If a person receives a lump sum and wants to put all or part of it into a trust or RDSP, they must advise MSD of this. Under section 12.1 of the EAPD Regulation, MSD will still treat that lump sum as income in the month received (unless it is otherwise exempt), so the person will be off benefits for one month because of income in excess.

However, under section 12.1 of the EAPD Regulation, MSD will exempt the funds as an asset for three months from the date the asset is received, if the person reports their receipt to MSD and also advises that they intend to put them into an RDSP or disability trust. The purpose of this exemption is to give the person time to get a trust set up, or qualify for the disability tax credit so they can start an RDSP. At the end of the three month exemption, MSD will review the client's situation. If the RDSP or trust has not been finalized by then, MSD has the discretion to continue exempting the funds to enable the person to finish setting that us. Under section 12.1(4) of the EAPD Regulation, MSD may extend the period that the asset is exempt if MSD is satisfied that the person is making reasonable efforts to establish a trust or RDSP.

MSD policy on transferring money into a trust or RDSP is at http://www.gov.bc.ca/meia/online_resource/verification_and_eligibility/trusts/policy.html#5

More on Trusts

How and when is a disability trust created?

A disability trust is a contract that is usually drafted by a lawyer. The contract creates the disability trust. A disability trust can be created at any time, either

- before the person receives funds that they are expecting;
- when the person receives funds; or
- any time after the person has received funds.

A disability trust can also be created in a Will (this is called a "testamentary trust"). If you have a client on PWD benefits who tells you they think their parents will leave them money, you should tell your client that her parents should see a lawyer who knows something about welfare law, so that they can get legal advice about whether it is a good idea for them to create a testamentary trust for their disabled daughter in their Will. If a person inherits property through a testamentary trust, the property goes directly into the trust and does not pass through their hands. Therefore they remain eligible for welfare throughout the inheritance.

Further, if a client has been declared incompetent by the Supreme Court of British Columbia and a "committee" has been appointed to handle their financial affairs, MSD considers any money that the committee to hold for the client, to be exempt as an asset under section 12(5) of the EAPD Regulation, and section 13(5) of the EA Regulation (for people in special care who are not on PWD benefits).

How much money can be in a disability trust?

There are two types of disability trusts: discretionary trusts, and non-discretionary trusts. In a discretionary trust, the trustees have complete discretion about how the trust funds are spent. In a non-discretionary trust, the beneficiary (client) of the trust funds retains some control over how the trust funds are spent.

The welfare legislation (section 13 of the EA Regulation, and section 12 of the EAPD Regulation) states that usually a maximum of $200 000 can be in a non-discretionary disability trust. However, the minister can authorize a non-discretionary trust for more than $200 000, if it is expected that the person's disability related costs will be over $200 000 in their lifetime.

There is no limit on the amount of money than can be in a discretionary trust. A person is allowed to have both a discretionary trust, and a non-discretionary trust.

What can money in a disability trust be used for?

Money can be withdrawn from a disability trust to pay for certain categories of disability-related costs, without the person's monthly benefits being affected. The person must report all income received from a disability trust to MSD. It is a good idea to have any planned withdrawals from a disability trust, pre-approved by MSD.

The types of disability- related costs that can be paid for by a trust are found in section 12 of the EAPD Regulation, and section 13 of the EA Regulation. Note that under the EA Regulation, the categories are a bit more restricted than is the case for a person with disabilities. Under both the EA and EAPD Regulation, there is a limit on the amount that the trust can spend each calendar year on items or services promote the person's independence. As of October 1, 2012 this limit was increased from $5 484 per calendar year, to $8 000 per calendar year (see section 7(2.1) of Schedule B to the *EAPD Regulation*, and the *EA Regulation*). Further, as of October 1, 2012, it is now up to the client and/or their trustee (not MSD) to determine whether an expenditure serves to promote the client's independence.

On October 1, 2012 other amendments to the EA and EAPD regulations now specify that, in addition to paying for disability-related costs, money withdrawn from a trust will *not* be treated as income by MSD if the money is withdrawn to:

1) purchase a family unit's place of residence,

2) open or make an additional deposit to a registered education savings plan, or

3) open or make an additional deposit to a registered disability savings plan.

- See section 7(1)(d) of Schedule C to the *EAPD Regulation* and *EA Regulation.*

More on RDSPs

How much money can be in an RDSP?

The overall lifetime limit for an RDSP is $200 000. There is no annual limit on amounts that can be contributed to an RDSP in a given year.

What can money in an RDSP be used for?

Money withdrawn from an RDSP is considered exempt income for people on income assistance, PPMB and PWD (including all forms of hardship benefits). There are no welfare rules limiting how money withdrawn from an RDSP can be used. RDSP withdrawals do not affect welfare eligibility.

Other resources for disability trusts and RDSPs

For more information about disability trusts, see:

- "How to Create a Trust," a useful booklet by the Voice of the Cerebral Palsied of Greater Vancouver at http://www.vcpgv.org/home/publications
- The BC Coalition of People with Disabilities Helpsheet 8 about trusts and PWD benefits: http://www.bccpd.bc.ca/helpsheet8.htm
- The Planned Lifetime Advocacy Network (PLAN) can also provide information about trusts and a referral service to lawyers who know about setting up disability trusts. See http://plan.ca/
- The Coast Foundation in Vancouver can assist with setting up disability trusts for people who have mental health disabilities. See http://coastmentalhealth.com/trust.html

For more information about RDSPs, see:

- The RDSP Resource Centre website, affiliated with PLAN, at http://rdsp.com ;
- the BC Coalition of People with Disabilities's website, with several RDSP related resources at http://www.bccpd.bc.ca/rdsp.htm
- Canada Revenue Agency website at http://www.cra-arc.gc.ca/tx/ndvdls/tpcs/rdsp-reei/menu-eng.html

Section 3

MSD says that a client is not eligible for benefits for a period of time because they have "disposed of assets."

Section 14 of the *Employment and Assistance Act* (and section 13 of the *Employment and Assistance for Persons with Disabilities Act)* provide:

> ***14*** *(1) The minister may take action under subsection (3) if, within 2 years before the date of application for income assistance or hardship assistance or at any time while income assistance or hardship assistance is being provided, an applicant or a recipient has done either of the following:……*
>
> > *(b) disposed of real or personal property for consideration that, in the minister's opinion, is inadequate.*
>
> *(2) A family unit is not eligible for income assistance for the prescribed period if, within 2 years before the date of application for income assistance or hardship assistance or at any time while income assistance or hardship assistance is being provided, an applicant or a recipient has done either of the following:*
>
> > *(a) disposed of real or personal property to reduce assets;*
>
> *(3) In the circumstances described in subsection (1), the minister may*
>
> > *(a) reduce the amount of income assistance or hardship assistance provided to or for the family unit by the prescribed amount for the prescribed period, or*
> >
> > *(b) declare the family unit of the person ineligible for income assistance or hardship assistance for the prescribed period.*

If MSD finds that a client disposed of assets either for "inadequate consideration", or to reduce assets, MSD may either declare the client ineligible for benefits, or reduce their benefits, for various period of time determined in the EA and EAPD Regulations.

What does this section mean?

"Consideration" is a concept from contract law. It refers to what two parties involved in a contract exchange. If I buy a bag of rice for $5.00, the $5.00 is the "consideration" I give the store in that transaction, and the rice is the consideration the store gives me in exchange. **Disposing of an asset for "inadequate consideration" means giving something away for free, or selling it for less than it is worth.**

Similarly, section 14(2) says a person can be sanctioned by MSD if they "dispose of "property "to reduce assets." The sanction that applies under this section is double the sanction that applies to the sanction that applies to disposing of an asset for inadequate consideration. This indicates it is a serious allegation. In order for MSD to properly find that someone has "disposed of property to reduce assets," MSD must be able to show that the person got rid of assets by *intentionally* giving

them away or selling them for less than they were worth, and that they did this *intentionally, specifically in order to* qualify for benefits from MSD.

MSD often makes mistakes in interpreting these sections of the legislation. If a client reports to an Employment and Assistance Worker ("EAW") that they have received a lump sum of money, it seems to be quite common for an EAW to tell the person that they will be off welfare now, and that they must live off the money at a rate of no more than $2 000 per month, "or else they will be considered to have disposed of assets." Sometimes the EAW will even give a client a time frame saying, for example, "you received $10,000 so don't come back to this office for at least 5 months."

Such advice is seriously flawed. A client receiving a lump sum of money has all of the options outlined in section 2 of this paper.

But where do the EAW's misunderstanding and $2 000 per month "rule" come from? Under section 31 of the EA Regulation, and section 27 of the EAPD Regulation, MSD may declare a client ineligible for benefits for one month for each $2 000 in assets that MSD thinks the client disposed of for inadequate consideration, or to reduce their assets. See Appendix G (extract from LSS's *Your Welfare Rights)* for a chart of consequences (penalties) that MSD may apply for disposing of assets for inadequate consideration or to reduce assets.

EAWs who misunderstand the meaning of "disposing of assets for inadequate consideration" and "to reduce assets" often think that those sections somehow mean that a client can only use assets to live off at the rate of $2 000 or less per month. Such EAWs are just wrong.

However, the possibility that MSD could claim that a client has disposed of assets for inadequate consideration, or reduced their assets to make themselves eligible for benefits, highlight the importance of keeping careful records when a client has received a lump sum and is exercising options outlined in section 2 for using that sum of money. **A client who can show that they used their non-exempt funds to buy exempt assets and/or to pay justly owing debts (and who can provide proof they in fact paid those debts) cannot be said to have disposed of assets for inadequate consideration, or to reduce their assets.**

Clients with **addiction and/or mental health issues** may raise particular issues with regard to MSD allegations that they have disposed of assets for inadequate consideration. For example, a person who is addicted to street drugs and receives a lump sum inheritance may spend thousands of dollars on street drugs. Or, a person with a gambling addiction who receives an ICBC settlement may lose thousands of dollars in a casino. Have such clients disposed of assets for inadequate consideration? I think the answer is "no."

In such situations is it important that you develop enough trust for the client to disclose to you what they did, roughly, with the money they received. The most difficult situation to deal with is one where a client will not tell you what they spent some or all of a lump sum of money on. If MSD does not know what money was spent on, they may assume it was disposed of improperly. If you have no information from the client about what they did with the money, you will not be able to

help the client deal with MSD's allegation. *Any information from the client is better than none when it comes to allegations that a person has disposed of assets for inadequate consideration or to make themselves eligible for benefits.*

On the other hand, let's say a client with a drug addiction tells you they spent a $10 000 inheritance on cocaine. That is information you can work with and should not lead MSD to allege that the client disposed of assets for inadequate consideration or to make themself eligible for welfare. *Spending $10 000 on $10 000 worth of cocaine is not disposing of an asset for inadequate consideration – it is a fair market value exchange.* Nor should it be considered to be intentionally disposing of property to reduce assets to qualify for welfare. It would be difficult for MSD to allege that a person embroiled in addiction spent money on drugs not because they were addicted, but because they wanted to make themselves eligible for welfare benefits. Further, under the Human Rights Code, MSD has a duty to accommodate a person's disability up to the point of undue hardship. If a disability (including addiction) quite clearly caused certain behaviour, MSD should not sanction the client for the behavior.

Other situations where disposal of assets may be alleged

Sometimes a client, in frustration and lacking good advice about their welfare issue, may have their name removed from title to a property that they did not have a beneficial interest in. This may happen, for example, where MSD insists that an adult child who is on title to their parent's house for estate planning purposes, is not eligible for welfare due to assets in excess. If that client does not get property advice and is not able to persuade MSD that the house is not their asset as they do not have a beneficial interest in it, the client may in desperation, try and "fix" the situation by having the parent remove the adult child from legal title to the house.

Rather than fixing the situation, this complicates the welfare issue. That is, MSD may now say that the client is not eligible for benefits as they have disposed of assets to make themselves eligible for benefits. However, an advocate should be able to help. If the client can gather evidence (as described in section 1c above) to show that the house never was her asset, as she never had a beneficial interest in it, then she cannot be said to have disposed of that supposed "asset" for inadequate consideration.

Welfare and Assets

Alison Ward, Barrister and Solicitor, Community Legal Assistance Society, prepared for November 22, 2011 (and revised November 19, 2012)

List of Appendices

a) Extracts from Supreme Court of Canada decision in *Pecore v Pecore* *(is a parent who puts an adult child on title to property presumed to have given them beneficial interest? Can that presumption be rebutted? How?)*

b) Sample template for statutory declaration

c) Sample submission to MSD – adult child put on title to property by parent for estate planning purposes. Does the adult child have excess assets if they don't live in the house?

d) Sample submission to MSD – adult child put on joint title to property by parent for estate planning purposes. If the adult child lives in the house, can they receive shelter benefits from MSD for rent that they pay to their parent?

e) "Types of trusts," extract from textbook *Waters' Law of Trusts in Canada* (3rd ed) 2005, Thomson Carswell

f) Two Employment and Assistance Appeal Tribunal decisions regarding exemption of saleable acreage and buildings as if they were a person's residence

g) Extract from LSS's *Your Welfare Rights* (pp 89 to 90): "Getting rid of assets" section, and "Penalties for getting rid of assets (chart)

Appendix A.

Pecore v Pecore, 2007 SCC 17, [2007] 1 S.C.R. 795 SCC

(at http://www.canlii.org/en/ca/scc/doc/2007/2007scc17/2007scc17.html)

Pecore v Pecore is a 2007 decision of the Supreme Court of Canada. It the leading Canadian case about situations where parents give legal title to something to an adult child; and what presumptions are made about who has a beneficial interest in the thing in that situation, and how resulting trusts arise.

Below are some highlights of the case which may help you in understanding the case, and which it may be useful to cite in some submissions.

Extracts from the Supreme Court of Canada's judgment in Pecore v Pecore:

Paragraph 4

Equity.... recognizes a distinction between legal and beneficial ownership. The beneficial owner of property has been described as "the real owner of property even though it is in someone else's name": *Csak v. Aumon* (1990), 69 D.L.R. (4th) 567 (Ont. H.C.J.), at p. 570.

Paragraph 20

A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner: see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 362. While the trustee almost always has the legal title, in exceptional circumstances it is also possible that the trustee has equitable title: see *Waters' Law of Trusts*, at p. 365, noting the case of *Carter v. Carter* (1969), 70 W.W.R. 237 (B.C.S.C.).

Paragraph 21

Advancement is a gift during the transferor's lifetime to a transferee who, by marriage or parent-child relationship, is financially dependent on the transferor: see *Waters' Law of Trusts*, at p. 378. In the context of the parent-child relationship, the term has also been used because "the father was under a moral duty to advance his children in the world": A. H. Oosterhoff et al., *Oosterhoff on Trusts: Text, Commentary and Materials* (6th ed. 2004), at p. 575 (emphasis added).

Paragraph 22

In certain circumstances which are discussed below, there will be a presumption of resulting trust or presumption of advancement. Each are rebuttable presumptions of law: see e.g. *Re Mailman Estate*, [1941] S.C.R. 368, at p. 374; *Niles v. Lake*, 1947 CanLII 5 (S.C.C.), [1947] S.C.R. 291; *Rathwell v. Rathwell*, 1978 CanLII 3 (S.C.C.), [1978] 2 S.C.R. 436, at p. 451; J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 115. A rebuttable presumption of law is a legal assumption that a court will make if insufficient evidence is adduced to displace the

presumption. The presumption shifts the burden of persuasion to the opposing party who must rebut the presumption: see Sopinka et al., at pp. 105-6.

Paragraph 23

For the reasons discussed below, I think the long-standing common law presumptions continue to have a role to play in disputes over gratuitous transfers. The presumptions provide a guide for courts in resolving disputes over transfers where evidence as to the transferor's intent in making the transfer is unavailable or unpersuasive. This may be especially true when the transferor is deceased and thus is unable to tell the court his or her intention in effecting the transfer. In addition, as noted by Feldman J.A. in the Ontario Court of Appeal in *Saylor v. Madsen Estate* 2005 CanLII 39857 (ON C.A.), (2005), 261 D.L.R. (4th) 597, the advantage of maintaining the presumption of advancement and the presumption of a resulting trust is that they provide a measure of certainty and predictability for individuals who put property in joint accounts or make other gratuitous transfers.

Paragraph 24

The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: see *Waters' Law of Trusts*, at p. 375, and E. E. Gillese and M. Milczynski, *The Law of Trusts* (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.

Paragraph 34

Next, does the presumption of advancement apply between parents and adult independent children? A number of courts have concluded that it should not. In reaching that conclusion, Heeney J. in *McLear v. McLear Estate* (2000), 33 E.T.R. (2d) 272 (Ont. S.C.J.), at Paragraphs. 40-41, focussed largely on the modern practice of elderly parents adding their adult children as joint account holders so that the children can provide assistance with the management of their parents' financial affairs:

Just as Dickson J. considered "present social conditions" in concluding that the presumption of advancement between husbands and wives had lost all relevance, a consideration of the present social conditions of an elderly parent presents an equally compelling case for doing away with the presumption of advancement between parent and adult child. We are living in an increasingly complex world. People are living longer, and it is commonplace that an ageing parent requires assistance in managing his or her daily affairs. This is particularly so given the complexities involved in managing investments to provide retirement income, paying income tax on those investments, and so on. Almost invariably, the duty of assisting the ageing parent falls to the child who is closest in geographic proximity. In such cases, Powers of Attorney are routinely given. Names are "put on" bank accounts and other assets, so that the child can freely manage the assets of the parent.

(A)

Given these social conditions, it seems to me that it is dangerous to presume that the elderly parent is making a gift each time he or she puts the name of the assisting child on an asset. The presumption that accords with this social reality is that the child is holding the property in trust for the ageing parent, to facilitate the free and efficient management of that parent's affairs. The presumption that accords with this social reality is, in other words, the presumption of resulting trust.

Paragraph 36

....given that a principal justification for the presumption of advancement is parental obligation to support their dependent children, **it seems to me that the presumption should not apply in respect of independent adult children** (*emphasis added*). As Heeney J. noted in *McLear*, at Paragraph. 36, parental support obligations under provincial and federal statutes normally end when the child is no longer considered by law to be a minor: see e.g. *Family Law Act*, s. 31. Indeed, not only do child support obligations end when a child is no longer dependent, but often the reverse is true: an obligation may be imposed on independent adult children to support their parents in accordance with need and ability to pay: see e.g. *Family Law Act*, s. 32. Second, I agree with Heeney J. that it is common nowadays for ageing parents to transfer their assets into joint accounts with their adult children in order to have that child assist them in managing their financial affairs. **There should therefore be a rebuttable presumption that the adult child is holding the property in trust for the ageing parent to facilitate the free and efficient management of that parent's affairs** (*emphasis added*).

Paragraph 38

The remaining question is whether the presumption of advancement should apply in the case of adult dependent children. In the present case the trial judge, at Paragraphs. 26-28, found that Paula, despite being a married adult with her own family, was nevertheless dependent on her father and justified applying the presumption of advancement on that basis.

Paragraph 39

The question of whether the presumption applies to adult dependent children begs the question of what constitutes dependency for the purpose of applying the presumption. Dependency is a term susceptible to an enormous variety of circumstances. The extent or degree of dependency can be very wide ranging. While it may be rational to presume advancement as a result of dependency in some cases, in others it will not. For example, it is not difficult to accept that in some cases a parent would feel a moral, if not legal, obligation to provide for the quality of life for an adult disabled child. This might especially be the case where the disabled adult child is under the charge and care of the parent.

Paragraph 40

....I am therefore of the opinion that the rebuttable presumption of advancement with regard to gratuitous transfers from parent to child should be preserved but be limited in application to transfers by mothers and fathers to minor children.

(A)

Paragraph 41

There will of course be situations where a transfer between a parent and an adult child was intended to be a gift. It is open to the party claiming that the transfer is a gift to rebut the presumption of resulting trust by bringing evidence to support his or her claim.

Paragraph 43

.....The evidence required to rebut both presumptions, therefore, is evidence of the transferor's contrary intention on the balance of probabilities.

Paragraph 55

Where a gratuitous transfer is being challenged, the trial judge must begin his or her inquiry by determining the proper presumption to apply and then weigh all the evidence relating to the actual intention of the transferor to determine whether the presumption has been rebutted *(emphasis added)*. It is not my intention to list all of the types of evidence that a trial judge can or should consider in ascertaining intent. This will depend on the facts of each case. However, I will discuss particular types of evidence at issue in this appeal and its companion case that have been the subject of divergent approaches by courts.

Appendix B

CANADA)
PROVINCE OF)
BRITISH COLUMBIA)
)
)
)
)

In the matter of .....

TO WIT:

I, (legal name of client), (occupation), of (address), in the City of XXX, in the Province of British Columbia DO SOLEMNLY DECLARE:

1. I am the applicant / appellant in this case (state other means of knowledge), and as such I have personal knowledge of the things I declare in this statutory declaration. Where I declare that I know something based on information and belief, I believe it to be true.

2. set out numbered paragraphs relating client's evidence, and attaching any exhibits as appropriate

AND I make this solemn declaration, conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath by virtue of the *Canada Evidence Act*.

DECLARED BEFORE ME at the City of XXX, in the Province of British Columbia, this xx day of March, 2011.

_____
A Commissioner for Taking Affidavits Within British Columbia

_____
(name of client)

Appendix C

Parent puts adult child on title to property for estate planning purposes

Sample submission

This submission was developed for the following situation:

A mother owned a house in the countryside. She put her adult son on joint title to the house with her for estate planning purposes (so he would inherit it when she died). The son did not live in the house. MSD alleged the house was not an exempt asset, and that the adult son was not eligible for benefits because of assets in excess.

Issue: Whether the house in which Mr. Adult Son lives is his "asset" under the EA legislation.

Facts: *This section must be custom tailored to the case you are working with. At any level of reconsideration or appeal (and even at the application level with MSD) seriously consider having your client and the other party to the transaction provide statutory declarations (i.e. sworn written evidence, like an affidavit, setting out what their intentions were at the time they arranged for how legal title of the property would be held. Despite who is on legal title, who did they intend to "really own" (or benefit from) the house now? Why? If the issue goes to the EAAT, statutory declarations are required.*

Argument

a) Mr. Adult Son holds joint legal title to a house that he does not live in. However, has no beneficial interest in the property; he holds it as a bare trustee for his mother, Ms. Mother.

Where a parent such as Ms. Mother gratuitously names their adult child as a joint tenant on the legal title of an asset, there is a legal presumption that, although the adult child holds bare legal title to the asset, the adult child does **not** have a beneficial interest in the asset, and rather holds the asset as a bare trustee for their parent (see *Pecore v Pecore*, 2007 SCC 17, copy attached).

In other words, there is a legal presumption that the adult child holds the property on a resulting trust for their parent. There is no legal presumption that the adult child has received a share in the house as a gift.

In the words of the majority decision of the Supreme Court of Canada in *Pecore v Pecore* at paragraph 4:

> *Equity.... recognizes a distinction between legal and beneficial ownership. The beneficial owner of property has been described as "the* real owner *of property even though it is in someone else's name": Csak v. Aumon, (1990), 69 D.L.R. (4th) 567 (Ont. H.C.J.), at p. 570* [emphasis added].

And, at paragraph 36:

> *There should therefore be a rebuttable presumption that the adult child is holding the property in trust for the ageing parent to facilitate the free and efficient management of that parent's affairs*

Legally, then, Mr. Adult Son must be presumed as joint tenant to be holding the property in trust for Ms. Mother. The legal presumption is that all of the beneficial interest in the house belongs to Ms. Mother.

Again in the words of the majority decision of the Supreme Court of Canada in *Pecore v Pecore*, at paragraph 20:

> *A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the orlginal title owner: see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., Waters' Law of Trusts in Canada (3rd ed. 2005), at p. 362.*

And at paragraph 24:

> *The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: see Waters' Law of Trusts, at p. 375, and E. E. Gillese and M. Milczynski, The Law of Trusts (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.*

Although MSD seeks to argue that Mr. Adult Son has a beneficial interest in the property, MSD has not offered any evidence to rebut the legal presumption that Mr. Adult Son has no beneficial interest in the property.

To the contrary, in its initial decision, MSD accepts as a fact that:

a) Mr. Adult Son does not receive the rental income of the house;
b) Mr. Adult Son does not pay the mortgage, taxes, fees or any utilities (other than phone, cable and internet).
c) Mr. Adult Son is not exercising a position as a landlord/owner.

It is submitted that MSD has accepted that there is no evidence to rebut the presumption that Mr. Adult Son does not have any beneficial interest in the house, and that accordingly he is not a real owner of the house. Ms. Mother is the real owner of the property, even though it is also in Mr. Adult Son's name (see *Pecore v Pecore*, op cit, at paragraph 4).

While not legally required to do so (since resulting trust is legally presumed), Mr. Adult Son and Ms. Mother have provided extensive evidence to confirm that they clearly did not intend Mr. Adult Son to have a beneficial interest in the property until such time as Ms. Mother passes away *(then briefly review the evidence you've provided to this effect).*

Remedy Sought:

It follows that Mr. Adult Son is does not have a beneficial interest in the house in question and, as such, it is not his "asset" under section xxx of the EA/EAPD legislation.

Appendix D

Parent puts adult child on title to property for estate planning purposes. Adult child lives in the house: eligibility for shelter benefits for rental payments?

Sample submission

This submission was developed for the following situation:

A mother owned a house in the city; she had clear title and did not owe a mortgage on it.. She put her adult son on joint title to the house with her for estate planning purposes (so he would inherit it when she died). The son lived in the house and received PWD benefits for support and shelter; he paid his mother "rent" even though he was on legal title to the house as an owner. MSD found out that he was a legal owner, and alleged the son had a huge overpayment for the shelter benefits he had received while on legal title to the house.

Facts: *This section must be custom tailored to the case you are working with. At any level of reconsideration or appeal (and even at the application level with MSD) seriously consider having your client and the other party to the transaction provide statutory declarations (i.e. sworn written evidence, like an affidavit, setting out what their intentions were at the time they arranged for how legal title of the property would be held. Despite who is on legal title, who did they intend to "really own" (or benefit from) the house now? Why? If the issue goes to the EAAT, statutory declarations are required.*

Argument

a) Mr. Adult Son has no beneficial interest in the property; he holds it as a bare trustee for his mother, Ms. Mother.

Where a parent such as Ms. Mother gratuitously names their adult child as a joint tenant on the legal title of an asset, there is a legal presumption that, although the adult child holds bare legal title to the asset, the adult child does **not** have a beneficial interest in the asset, and rather holds the asset as a bare trustee for their parent (see *Pecore v Pecore*, 2007 SCC 17, copy attached).

In other words, there is a legal presumption that the adult child holds the property on a resulting trust for their parent. There is no legal presumption that the adult child has received a share in the house as a gift.

(D)

In the words of the majority decision of the Supreme Court of Canada in *Pecore v Pecore* at paragraph 4:

> *Equity.... recognizes a distinction between legal and beneficial ownership. The beneficial owner of property has been described as "the* real owner *of property even though it is in someone else's name": Csak v. Aumon, (1990), 69 D.L.R. (4th) 567 (Ont. H.C.J.), at p. 570* [emphasis added].

And, at paragraph 36:

> *There should therefore be a rebuttable presumption that the adult child is holding the property in trust for the ageing parent to facilitate the free and efficient management of that parent's affairs*

Legally, then, Mr. Adult Son must be presumed as joint tenant to be holding the property in trust for Ms. Mother. The legal presumption is that all of the beneficial interest in the house belongs to Ms. Mother.

Again in the words of the majority decision of the Supreme Court of Canada in *Pecore v Pecore*, at paragraph 20:

> *A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner: see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., Waters' Law of Trusts in Canada (3rd ed. 2005), at p. 362.*

And at paragraph 24:

> *The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: see Waters' Law of Trusts, at p. 375, and E. E. Gillese and M. Milczynski, The Law of Trusts (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.*

Although MHSD seeks to argue that Mr. Adult Son has a beneficial interest in the property, MHSD has not offered any evidence to rebut the legal presumption that Mr. Adult Son has no beneficial interest in the property.

To the contrary, in its initial decision, MHSD accepts as a fact that:

a) Mr. Adult Son does not receive the rental income of the house;

b) Mr. Adult Son does not pay the mortgage, taxes, fees or any utilities (other than phone, cable and internet).
c) Mr. Adult Son is not exercising a position as a landlord/owner.

It is submitted that MHSD has accepted that there is no evidence to rebut the presumption that Mr. Adult Son does not have any beneficial interest in the house, and that accordingly he is not a real owner of the house. Ms. Mother is the real owner of the property, even though it is also in Mr. Adult Son's name (see *Pecore v Pecore*, op cit, at paragraph 4).

While not legally required to do so (since resulting trust is legally presumed), Mr. Adult Son and Ms. Mother have provided extensive evidence to confirm that they clearly did not intend Mr. Adult Son to have a beneficial interest in the property until such time as Ms. Mother passes away (then briefly review the evidence you've provided to this effect).

b) Mr. Adult Son is entitled to payment of shelter benefits as a bare trustee of the property

Because he holds the property on a resulting trust in favour of his mother, Mr. Adult Son - in the words of the Supreme Court of Canada in *Pecore v Pecore* at paragraph 20, "is under an obligation to return it to the original title owner" (his mother), if she were to demand it back from him.

Because he has no beneficial interest in the house, Mr. Adult Son he is not a real owner of it. As stated by the Supreme Court of Canada in paragraph 4:

> *The beneficial owner of property has been described as "the real owner of property even though it is in someone else's name": Csak v. Aumon, (1990), 69 D.L.R. (4th) 567 (Ont. H.C.J.), at p. 570* [emphasis added].

The *Employment and Assistance* legislation elsewhere recognizes that the house does not really belong to Mr. Adult Son. Section 1 of the *Employment and Assistance for PerAdult Sons with Disabilities Regulation* defines "asset" as follows:

> *"asset" means*
>
> *(a) 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;*



That is, because he has no beneficial interest in the property, and is not entitled to sell the house because he is holding it in trust for Ms. Mother, the welfare legislation recognizes that the house is not Mr. Adult Son's asset. In other words, that he does not really own the house, although his mother put his name on legal title to it, free of charge.

Ms. Mother, as the real owner of the house, has been charging Mr. Adult Son monthy rent of $525, which he has paid. She has issued him rent receipts to confirm these payments.

Ms. Mother is legally entitled to charge Mr. Adult Son rent to occupy the house, as he does not hold any equitable title or beneficial interest in it. For example, he has no right, as a bare trustee, to occupy the house. He gains the right to occupy the house only by payment of rent to Ms. Mother, thereby purchasing the right to occupy the house as a tenant.

Section 5 of Schedule A to the *Employment and Assistance for Persons with Disabilities Regulation* says:

5 (1) For the purpose of this section, utility costs for a family unit's place of residence include only the following costs:

(a) fuel for heating;

(b) fuel for cooking meals;

(c) water;

(d) hydro;

(e) garbage disposal provided by a company on a regular weekly or biweekly basis;

(f) rental of one basic residential single-line telephone.

(2) When calculating the actual monthly shelter costs of a family unit, only the following items are included:

(a) rent for the family unit's place of residence;

(b) mortgage payments on the family unit's place of residence, <u>if owned by a person in the family unit;</u> [emphasis added];

(c) a house insurance premium for the family unit's place of residence if owned by a person in the family unit;



(d) property taxes for the family unit's place of residence if owned by a person in the family unit;

(e) utility costs;

(f) the actual cost of maintenance and repairs for the family unit's place of residence if owned by a person in the family unit and if these costs have received the minister's prior approval.

Mr. Adult Son lives as a family unit of one. He is not the real owner of the property in question, but rather a bare trustee of it, holding it on resulting trust in favour of his mother. He is under a legal obligation to put the house in his mother's name only, if she so demands. As such, the house he lives in is not "owned by a person in (his) family unit" and as such he is not entitled to have mortgage payments for it covered by MHSD.

The purpose of shelter benefits is to allow a recipient to buy the right to occupy a place as their residence . Mr. Adult Son does not have the right to occupy the house as a bare trustee of it. To have the right to legally occupy the house, he is required to pay rent to the house's real owner, Ms. Mother. As a renter, he is therefore entitled to payment of shelter benefits for rent under Schedule A.

Remedy Sought:

It follows that Mr. Adult Son is, and has been, entitled to the payment of maximum shelter benefits for his rental payments to Ms. Mother.

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Appendix E

WATERS' LAW OF TRUSTS IN CANADA

Third Edition

By

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Types of Trust

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I. EXPRESS, IMPLIED, RESULTING, AND CONSTRUCTIVE TRUSTS

A trust can come into existence in one of two ways. It is either clear from a person's words or acts that there is an intention to settle property by way of a trust, or the law imposes trust machinery in a given situation to ensure that property passes from one party to another. What we are therefore concerned with is discovering the intention of a person, or the circumstances under which the law will deem a trust to arise in order to secure some result the law considers equitable. If we are looking for such an intention, we may find that oral or written words state quite clearly that certain property is to be subject to a trust. The words, however, may not be clear; we then have to examine them carefully in order to determine whether there is indeed an intention to make property subject to a trust. We have to infer intention. On the other hand, if we wish to know whether the law requires A to hold certain property for B, regardless of intention, we have to discover what the circumstances are in which the law imposes this requirement, and then whether A and B come within one of those circumstances.

Since the seventeenth century, common law courts have employed various terms to describe those distinct situations and the terms which have become familiar are "express trusts," "implied trusts," "resulting trusts" and "constructive trusts." But the courts have differed quite considerably in the ambit of meaning which they have associated with those terms, and since the nineteenth century, when writers began to compose treatises on the law of trusts, they have introduced further refinements into the use of those terms. Today, however, though the differences of usage still exist, and the student of trust law will observe those differences in judgments and non-judicial writing, there is no dispute that trusts arise either by intention or by

imposition of law. The differences exist as to the naming of one or another particular type of trust.[1]

In very large measure, therefore, whether a trust is to be called express, implied, resulting or constructive is only of academic importance; practitioners in the field are prepared to adopt the generally adopted current meaning of those terms, and leave it at that. There are instances, however, where the distinction can be of practical importance and these instances spring from the employment by statute of these terms. At one time limitation Acts, for example, made different legal results follow from whether a trust arose from the intention of a party, or by imposition of law. Much nineteenth-century case law flowed from this, and considerable judicial discussion, often of a confusing nature, took place to decide whether particular trusts were of this or that kind. Such limitation provisions have now been repealed, however, and contemporary trust law with its generally agreed use of terms is little bothered with the few Acts that do still attach differing legal results to the varying types of trust.[2] Modern litigation is more concerned with the rules that apply to what is agreed to be a trust of a certain type, such as pension trusts and income trusts.

In the common usage of today, the terms "express" and "implied"[3] refer to the intention of the alleged settlor. If he clearly and specifically says that certain property is to be held in trust, then he has created an express trust. Similarly, if his language has to be construed in order for its legal meaning to be discovered, and it is found that the maker of the statement intended a trust, then he has created a trust arising by implied intent.[4] The nature of a resulting trust is still the subject of some discussion, however; is it a trust which is concerned with the intent of the transferor of the property, or does it describe a trust obligation imposed by law? The reader will have noticed that the adjective "resulting" describes *what happens* to the property subject to the trust. Unlike the words "express" and "implied," it does not reveal a concern with the intent of the transferor, nor on the other hand does it show whether it comes into existence because the courts have imposed the trust obligation. Property "results" when it goes back to the transferor, and that can happen either because in certain circumstances the transferor impliedly intends the property to be returned to

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1 E.g., the question might be, is the trust which arises in these particular circumstances to be described as an implied trust, a resulting trust, or a constructive trust? Express trusts will usually be immediately recognizable as such.

2 See further, chapter 25, Part IV C.

3 However, this is a term which is also associated with those circumstances where the law lays down that because he has no personal entitlement to property, A shall hold on trust for B. Caution must always be exercised in the use of the term "implied trust"; because of the range of situations which it is used to describe, it can be confusing. See, e.g., D.J. Hayton, *Underhill and Hayton: Law Relating to Trusts and Trustees*, 16th ed. (London: Butterworths, 2003) at 54.

4 This is the "precatory trust", where expressions of wish or desire are construed in the context to mean that the transferor intended a trust. Whether precatory language reveals an intention or otherwise to create a trust is a question of construction for the court. It is also possible to say, however, that once the trust obligation has been construed to be the intention of the transferor, that gives rise to an express trust.

himself, or because in those circumstances the court imposes an obligation upon the holder of the property to return it to the transferor.[5]

A resulting trust occurs (1) where A purchases property and has it transferred into the name of B, or into the joint names of himself and B, (2) where A transfers property to B or into the names of himself and B, (3) where the purposes set out by an express or implied trust fail to exhaust the trust property. In this third situation, the trust may give a life interest to X, but say nothing as to what is to happen to capital and interest on X's death. Or a trust may have as its purpose provision for a young couple entering marriage, and for the children of the marriage. The trust purpose fails because the marriage never takes place. Again the trust terms may fail because the object is not sufficiently certain or it is illegal or against public policy.

Now in deciding whether the resulting trust is a product of intent or the imposition of law, it is possible to say that A in the first two of the above situations, and the settlor in the third, intend the property to be returned either immediately in the first instance or on failure of the purposes in the third situation. Alternatively, it is possible to say that some resulting trusts arise from intent, *others* from the law's imposition. The first two situations are truly matters arising from the implied intent of A, though here A's intent is construed from what he does, not from what he says. But where A's objects fail for uncertainty, illegality or public policy, the law is bringing about an equitable result by declaring that property goes back to the settlor. It might also be said in the situation where the marriage fails to take place, or the settlor has omitted to say what is to happen when the life tenant dies, that the law again imposes a trust in favour of the settlor. But the marriage and omission situations are arguably the kind of circumstance in which the settlor could have foreseen what has happened, and his consequent silence can reasonably be said to reveal intent. As a third line of analysis it could be said that in all resulting trust situations where A or the settlor has said nothing, his silence is irrelevant, and the court secures an equitable result by requiring the holder to hold on trust for A or the settlor, as the case may be.

Leading works take different views on this. The sixteenth edition of *Underhill and Hayton: Law Relating to Trusts and Trustees* is of the opinion that all trusts arising from intention, whether it is expressed or implied, are express trusts.[6] In the twelfth edition,[7] all three resulting trust situations were regarded by *Underhill* as trusts arising out of intent, and therefore to be express, except that where failure takes place for some reason of law, for example, lapse, uncertainty of objects, or illegality, the editor considered the trust obligation to be imposed by law. These for *Underhill* were therefore constructive trusts. In the fifteenth edition,[8] the present editor adopted the distinction drawn in *White v. Vandervell Trustees Ltd.*[9] between

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[5] The court's motivation in doing this is to secure a more equitable outcome between parties. See, e.g., *Todd v. Webster* (1976), 15 N.B.R. (2d) 343 (N.B. Q.B.), where both intention and equity led the court to speak of the "implied and actual" trustee.

[6] *Supra*, note 3, at 53-54.

[7] *Underhill's Law Relating to Trusts and Trustees*, 12th ed. (London: Butterworths, 1970) at 9-11.

[8] D. J. Hayton, *Underhill and Hayton: Law Relating to Trusts and Trustees*, 15th ed. (London: Butterworths, 1995), at 42. This was not carried forward in the sixteenth edition, *supra*, note 3, at 54-55.

[9] (sub nom. *Re Vandervell's Trust (No. 2)*, [1974] 1 Ch. 269, [1974] 3 All E.R. 205 (Eng. C.A.).

presumed and automatic resulting trusts. The first two situations described above thus arise from presumed intent, while the third is automatic. Though some automatic resulting trusts are also intended, all of them occur by operation of law.[10] Constructive trusts, too, are described as occurring by operation of law, but here the theme is described as arising from the unconscionability of the trustee's continued retention.

The seventeenth edition of *Lewin on Trusts* divides trusts into two broad types: express trusts and trusts arising by operation of law. It notes that "trusts arising by operation of law comprise resulting, implied and constructive trusts."[11] There is much force in the argument that all trusts other than express trusts should be classified as arising by operation of law, but it necessarily groups together a number of different forms of trust, and carries us very little way forward in the analysis of these various terms.[12] It is useful to remember, however, that the debate is one of terminology and classification. It is settled law which factual situations give rise to resulting trusts.[13]

The constructive trust arises when the court imposes trust machinery in order to describe A's obligation to transfer property to B. There are many examples of this type of trust; perhaps the most familiar is the vendor's liability towards the purchaser of land between contract and conveyance, and the obligation of a fiduciary to give up proprietary advantage acquired through the employment of his office. The trust is "constructive" because, regardless of anyone's intent, the law constructs a trust in order to enforce the obligation. In Canada that obligation is now recognized as arising out of unjust enrichment and "good conscience".[14] It is surely confusing to employ the term constructive trust to mean a trust arising from implied or construed intent. This has been done in Canada,[15] which is a matter for regret because this is one trust term upon which there is agreement.[16]

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[10] Lord Browne-Wilkinson, in an *obiter* statement in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*, [1996] 2 All E.R. 961 (U.K.H.L.) at 991, questioned the distinction drawn by Megarry, J. between presumed and automatic resulting trusts. At 990-91 he commented that, "[b]oth types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties. A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention."

[11] John Mowbray *et al.* (eds.), *Lewin on Trusts*, 17th ed. (London: Sweet and Maxwell, 2000) at 14.

[12] Express and implied intent are distinguished only by the character of the evidence of the intent. Express and implied trusts are therefore of the same species; contrasted with them are trusts owing nothing to intent. This seems to be a more promising analysis of what the various terms express, implied, presumptive, constructive and resulting are attempting to state.

[13] For example, the three resulting trust circumstances described in the text are the circumstances referred to in the judgment of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*, *supra*, note 10, at 990-92.

[14] *Becker v. Pettkus* (1980), 117 D.L.R. (3d) 257 (S.C.C.); *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, 146 D.L.R. (4th) 214, 17 E.T.R. (2d) 89 (S.C.C.).

[15] "Constructive trust" means, in this context, a trust construed from words, spoken or written, to be the intention of the speaker or instrument-maker.

[16] *Snell's Principles of Equity*, 30th ed. (London: Sweet & Maxwell, 2000) at 122, notes, however, that the term constructive trust has been employed in England also to include implied trusts.

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PART C – DECISION UNDER APPEAL

Appendix F

(State the reconsideration decision)

In its Reconsideration decision of February 3, 2009 the ministry found that:

1. they were unable to determine whether the appellant was ineligible for income assistance because he had assets in excess of the $1,500 limit set in s. 11(2)(a)(i) of the Employment and Assistance Regulation [EAR] for a sole applicant with no dependent children. In its original decision, the ministry found that the appellant owned a property with a value in excess of $300,000. At reconsideration, the ministry did not provide documentary evidence to show the legal description, the market value, or the appellant's equity, if any, in the property. The reconsideration officer was therefore unable to find that the appellant owned assets that exceeded the regulated limit;
2. the appellant was ineligible for hardship assistance pursuant to s. 46 of the EAR because he is a single person family unit with no dependent children;
3. the appellant was not ineligible for income assistance pursuant to s. 13(1) of the EAA for failure to accept suitable employment because the ministry did not provide sufficient information at reconsideration for such a finding.

PART D – RELEVANT LEGISLATION

(State the relevant Legislation considered)

Employment and Assistance Act [EAA], s. 13(1)(a)(i) and s. 13(2)(b); s. 14(1) and 14(3)
Employment and Assistance Regulation [EAR], Definitions 1(1) "asset"(a); s. 11(1)(c); s. 11(2)(a)(i); s. 11(3)(b); s. 29(3)(a); s. 31(1); s. 46(d)(i)

F

PART E – SUMMARY OF FACTS

Please set out the facts as determined by the panel, based on the evidence at the hearing. Please note that subsection 22(4) of the Employment and Assistance Act states that, in a hearing referred to in subsection (3), a panel may admit as evidence only:
(a) the information and records that were before the minister when the decision was being made, and
(b) oral or written testimony in support of the information and records referred to in paragraph (a).

The evidence before the ministry at Reconsideration was a copy of the appellant's Request for Reconsideration dated January 14, 2009 stating that:

1. the ministry had informed him that the only way he would be eligible for assistance was to list his property for sale;
2. he had a chance for a private sale but listed the property so he would be eligible for assistance; and,
3. he had told the ministry that he had applied for a job, not that he had been offered a job.

At reconsideration, the ministry found that the appellant was ineligible for hardship assistance pursuant to s. 46 of the EAR because he does not have dependent children. They also found that he was not ineligible for income assistance for failure to accept suitable employment pursuant to s. 13(1)(a)(i) of the EAA since there was no evidence presented by the ministry to support their original contention that he had turned down a suitable offer for employment.

The reconsideration officer stated that the ministry was unable to determine that the appellant was ineligible for income assistance pursuant to s. 11(2)(a)(i) of the EAR for owning assets in excess of the regulated limit of $1500. There was insufficient evidence relating to the appellant's equity in his house, i.e., its value, any mortgages, liens, etc. and the market value of the property. The reconsideration decision stated that the determination that the appellant was not ineligible did not mean that he was eligible.

In his Notice of Appeal, the appellant stated that he had listed his property for sale, that he now has a job, and only requires assistance for rent and expenses incurred while searching for employment.

At the hearing the appellant stated that:

- he was laid off in November 2008 from a job in the village where he lived and moved to the city to look for work;
- he co-owns a house and property [50% each] in the village that has been listed for $345,000;
- the house had been listed from Sep to Nov 2008 and they took it off the market because they had a prospect for a private sale that did not materialize;
- three different ministry employees told him that he would be eligible for assistance provided that he listed the property for sale, which he did as soon as he was told that he must do so. He provided this information and a copy of the listing document to the ministry office and offered to have it faxed to the panel – we accepted his testimony and told him we did not require a copy;
- there is a mortgage of approximately $185,000 on the property;
- the real estate market is very slow and there have been no offers on the property to date, and,
- he now has a good full-time job and only requires income assistance for December 2008, January and February 2009 when he was unable to pay his rent and expenses and has accumulated debt from these, which he must pay off.

The ministry stated that they did not find a copy of the listing on the appellant's file and that this would have been required for him to be eligible for income assistance. The ministry stated that if the ministry has this proof of listing, and if the market is slow and the house is priced properly, but still doesn't sell, the ministry looks to the EAR, s.11(3)(b) to treat the property as the appellant's residence for the prescribed period.

The panel found that the appellant had listed his property in the fall and relisted when told by the ministry that it was a requirement for eligibility for assistance, and that he is making a reasonable effort to sell it.

F

PART F – REASONS FOR PANEL DECISION (State the reasons for the panel decision)

The issue is whether it was reasonable for the ministry to deny the appellant income assistance because they did not determine whether the appellant was ineligible for assistance for having assets in excess of the $1,500 limit set out in s. 11(2)(a)(i) of the EAR.

The EAR, s. 1, Definitions, defines "asset" (a) as equity in any real or personal property that can be converted to cash. S. 11(1) lists those assets that are exempt for the purposes of subsection (2). S. 11(1)(c) exempts a family unit's place of residence. S. 11(2)(a)(i) states that a family unit is not eligible for income assistance if a sole applicant with no dependent children has assets with a total value of more than $1500. And s. 11(3)(b) states that the ministry may authorize 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. The EAA, s.14 requires that an applicant pursue assets that would help the applicant to become independent of assistance.

The ministry argued that they were unable to find the appellant ineligible for income assistance because they had insufficient evidence to find him eligible under s. 11(2)(a)(i) for owning assets in excess of $1500.

The appellant argued that he had told the ministry he and a friend owned a house and property in the village where he lived before coming to the city. He said that they had listed it from September to November 2008 but then were trying to sell it privately. As soon as the ministry advised him that he had to relist the property to be eligible for assistance, he did so and provided them with a copy of the listing. The real estate market is very bad right now and they have had no offers, despite a reasonable listing at $345,000.

The panel found that the ministry did have sufficient evidence to determine the appellant's eligibility for income assistance. The appellant had relisted his property as soon as he was advised to do so. He provided the ministry with information on his ownership of 50% of the property, the appraised and listing price, the amount of mortgage and his prior attempts to sell it. The property is located in a small village on a lake, but is not readily convertible to cash in this depressed real estate market, even though listed at a reasonable price.

By relisting his property the appellant met the criteria of s. 14 of the EAA not to be declared ineligible for assistance under s. 14(3)(b), nor to have his income assistance reduced pursuant to the s. 14(3)(a). It was unreasonable for the ministry to find that the appellant was not ineligible under s. 11(2)(a)(i), but then to state that this does not mean he is eligible. The property may be designated under s. 11(3)(b) as the appellant's residence, which is exempt under s. 11(2) from being considered an asset in excess of $1500 pursuant to s. 11(2)(a)(i), because of the difficulty in converting the property to cash easily, despite the appellant's reasonable efforts to do so.

Therefore, the panel finds that the ministry's decision was a not a reasonable application of the applicable enactment in the circumstances of the appellant and rescinds the ministry decision to declare the appellant ineligible for income assistance.

Appendix F(2)

PART C – DECISION UNDER APPEAL

(State the reconsideration decision)

The decision under appeal is the ministry's reconsideration decision dated April 29, 2009 which held that the appellant is liable under section 18 of the Employment and Assistance for Persons with Disabilities Act (EAPWDA) to repay assistance received from April 2008 to November 2008 ($4,657.54) because the family unit was not eligible for assistance as it had assets (real property) in excess of the allowable legislative limit.

PART D – RELEVANT LEGISLATION

(State the relevant Legislation considered)

Employment and Assistance for Persons with Disabilities Act (EAPWDA), section 18

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), section 10

F(2)

PART E – SUMMARY OF FACTS

Please set out the facts as determined by the panel, based on the evidence at the hearing. Please note that subsection 22(4) of the Employment and Assistance Act states that, in a hearing referred to in subsection (3), a panel may admit as evidence only:
(a) the information and records that were before the minister when the decision was being made, and
(b) oral or written testimony in support of the information and records referred to in paragraph (a).

The undisputed evidence before the ministry at the time of reconsideration was as follows. In 2003 the appellant had ownership of three properties: the first property being the appellant's residence of which he had sole ownership and the second and third properties, located next to his residential property, which were co-owned with the appellant's neighbour. In December 2003, the second property was subdivided into two parcels with the appellant receiving sole ownership of one of the parcels [the second property]. The appellant applied for assistance on April 21, 2008 at which time he stated that, in addition to his residence, he owned a second property that was of no real financial value and that a 2003 Employment and Assistance Appeal Tribunal (EAAT) decision held that his real property holdings were not considered assets in excess of allowable legislative limits. On April 29, 2008 the ministry conducted the third party checks and commented on the appellant's ownership of three properties; the appellant repeated that the matter had been addressed in 2003 by the EAAT. The appellant received assistance in the amount of $100.00 for the month April 2008 which was followed by varying amounts of assistance for months following up to and including November 2008 for a total amount of $4,657.54. The ministry began a review of the appellant's file on September 9, 2008 which was concluded on November 13, 2008 and advised the appellant of the result of the review which was that he was not eligible for assistance from the date his file was opened in April 2008 because he had assets in excess of legislative limits. The appellant requested a reconsideration of the ministry's decision on November 24, 2008; the original decision was upheld in a reconsideration decision dated January 26, 2009 which was subsequently confirmed on appeal to the EAAT on March 2, 2009 [a copy is included in the appeal package]. On March 20, 2009, as a result of the March 2, 2009 EAAT decision, the ministry determined that the appellant had received an overpayment of assistance for which he was not eligible and sent the appellant a Notification of Overpayment dated March 20, 2009 which stated that the appellant may be subject to a reduction in his assistance consequent upon a failure to accurately and completely report information or disqualification for, or a reduction of, assistance if a court gives a judgment in a favour of the government; the appellant was therein advised of his right to reconsideration. In its reconsideration decision dated April 29, 2009, which is the subject of this appeal, the ministry upheld the finding of an overpayment and determined that the appellant is liable to repay the assistance received under section 18(1) of the EAPWDA on the basis that he was not eligible for assistance during that period.

In a 3-page Request for Reconsideration submission prepared by the appellant's spouse, it is argued that when the appellant applied for assistance in April 2008 none of the information he provided was "false, misleading or incomplete" and that it is unreasonable to state that the appellant was overpaid from April to November 2008 as the ministry "deemed him eligible with all the facts before them". Reference is made to a legal reference booklet which states that the ministry could conduct an investigation into monies owing when an applicant made an error in reporting income and/or changes that resulted in receiving money an applicant was not eligible for or when false or misleading information was provided and it is argued that none of these circumstances exist. It is also argued that the ministry did not comply with its own policy respecting investigations of overpayment as there was no interview to discuss the issue or any consequences of "the supposed overpayment" only an indication that the appellant may contact the ministry. The appellant's spouse writes that ministry actions have been contradictory and unreasonable and that where the law allows for ministerial discretion the ministry has been adversarial. It is argued that instead of using its discretion, the ministry cut the appellant off from assistance and is requiring a full repayment which is not in accordance with the legal reference booklet of a Supreme Court of ruling.

Included in the appeal package is a November 14, 2003 EAAT decision which rescinded the ministry's

decision that the appellant's two additional properties are assets in excess of the legislative limits because of the following difficulties related to selling his shares in the properties: (a) barriers of sale by the co-owner that are not fully known; (b) lack of road access; and (c) cost of an application to the Supreme Court to partition and sell the properties. The decision stated that the ministry should consider the application of section 11(3)(b) of the Employment and Assistance Regulation [allows for saleable acreage and buildings owned by an applicant or recipient 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] for "some period appropriate to the difficulties related to the sale of his [the appellant's] assets".

At the hearing, the appellant stated that it is unreasonable for the ministry to require him to repay the assistance he received because (1) he was forthcoming with information, (2) he does not have the financial resources to repay the money received, and (3) it took the ministry 7 months to determine that he was ineligible. He stated that he advised the ministry on April 21, 2008 that, in addition to his residential property, he had sole ownership of a second property and co-ownership of a third property.

At the hearing, the appellant's spouse questioned how the Notification of Overpayment letter (March 20, 2009) was applicable given that the appellant supplied the ministry with complete documentation respecting his real property holdings and that a court order has not been issued. She also stated that she and the appellant tried to list the property for sale but that it cannot be listed for sale because it has been used as collateral to obtain a loan from an organization that provided a loan to start a business venture.

At the hearing, the ministry disputed the appellant's testimony that the ministry had been advised that the appellant had sole ownership of a second property on April 21, 2008 and stated that this fact was only revealed to the ministry through its own investigation. The ministry also questioned why the appellant had not sold the second property at some point after 2003 before it was encumbered by a loan. The ministry stood by the information in the reconsideration decision that on May 2, 2008 the appellant was advised, following a ministry review of the 2003 EAAT decision and consultation with a ministry supervisor, that the appellant's second property would be treated as his place of residence for now, in order to await the outcome of the appellant's CPP application. The appellant disputed this evidence and stated that no such conversation ever took place and that he was never advised that the assistance would be temporary.

Regarding the dispute as to whether or not the appellant was advised by the ministry that his second property would be treated as his place of residence for an unspecified time period, the panel makes a finding of fact that on May 2, 2008 the ministry did determine that the second property would be treated as the appellant's place of residence for an unspecified time period under section 10(3)(b) of the EAPWDR. The panel makes this finding on the basis that (a) the appellant received assistance and must therefore have been found eligible on some basis, and (b) no other explanation was offered into evidence by either party as to any other reason for issuing assistance given the appellant's undisputed financial interest in three properties.

F(2)

PART F – REASONS FOR PANEL DECISION

(State the reasons for the panel decision)

The issue to be determined is the reasonableness of the ministry's decision that the appellant is liable to repay assistance received from April 2008 through November 2008 on the basis that the appellant's family unit was not eligible for the assistance because it had assets in excess of the allowable legislative limit.

Section 18(1) of the EAPWDA provides that if disability assistance is provided to or for a family unit that is not eligible for it, recipients who are members of the family unit during the period for which the overpayment is provided are liable to repay to the government the amount or value of the overpayment provided for that period.

Section 10(3)(b) of the EAPWDR provides that the minister may authorize 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.

The appellant's position is that he is not liable for repayment of assistance received from April 2008 through November 2008 because the ministry found him eligible, he was forthcoming with all relevant information, and it is unreasonable for the ministry to require repayment.

The ministry's position is that the appellant is liable for repayment of assistance received from April 2008 through November 2008 because he was not eligible for assistance during that time period and the legislation requires repayment.

When considering whether the appellant was eligible for assistance for the period from April 2008 through November 2008, the panel finds that the evidence establishes that the ministry treated the appellant's second and third properties as his place of residence during this time period and notes that this determination appears to be, in large part, as a result of the ministry's review of the November 2003 EAAT decision. While the panel has difficulty understanding why the ministry would place such reliance on a 2003 EAAT decision based on circumstances of property ownership vastly different from those in April 2008 (2 of 3 difficulties associated with the sale of one of the properties, which appear to have been the grounds upon which the EAAT based its decision, had been resolved respecting the second property in December 2003) and reach the conclusion that the appellant's additional properties, particularly the second property, were not assets in excess, the ministry did and, although not directly referenced in the reconsideration decision, applied section 10(3)(b) of the EAPWDR. The panel also finds that the only evidence as to the time period of this asset exemption is that no time period was specified by the ministry. The panel finds that, as the ministry found the appellant eligible for assistance when it applied section 10(3)(b) of the EAPWDR without specifying a time period, the ministry, in effect, declared the appellant eligible for assistance until such time the ministry determines that the appellant's property is no longer an exempt asset under section 10(3)(b) of the EAPWDR and, that such a determination was not made by the ministry, or conveyed to the appellant, before November 13, 2008 when the ministry investigation was concluded. Therefore, as the panel finds that as the appellant was eligible for assistance due to an asset exemption which was not discontinued until after November 2008, the panel finds that it was not reasonable for the ministry to retroactively discontinue an exemption it granted and consequently, that the ministry did not reasonably determine that the appellant was not eligible for assistance received between April 2008 and November 2008 and is liable to repay it.

The panel finds that the ministry's reconsideration decision was not reasonably supported by the evidence and rescinds the decision.

Appendix G

Getting rid of assets or not going after income

Before you apply for welfare and while you get benefits, you are supposed to try to support yourself in any other way possible. You cannot refuse to accept assets, income, or other means of support in order to get welfare. You must also pursue (try to get) any available asset, income, or means of support. (For example, if someone owes you money, you have to ask for it.) In addition, you cannot dispose of any asset or property, which means you cannot give it away or sell it for less than it is worth.

If you dispose of assets in any of these ways, or refuse to pursue or accept any means of support, the ministry could apply a penalty.

If the amount is less than $2,000, the ministry will not apply a penality.

If the amount involved is more than $2,000, the ministry may reduce or cut off your benefits for a period of time. The penalties they may apply will depend on what they believe you did and the facts of your specific case. The ministry has some discretion in deciding which penalties to apply. You can also challenge their decision. Talk to an advocate for help with your situation if an EAW says they may apply penalties against you.

The table on the next page has some examples to help explain how penalties work.

Employment plans and obligations

As soon as the ministry approves you for benefits and opens a file for you, they will decide whether you have "employment-related obligations" (see page 94 for more information). They might also make you sign and follow an employment plan.

This plan is an agreement you make with the ministry when you apply for welfare that lists what you agree to do to find a job or to increase your chances of being hired. This can include attending a ministry job placement or training program. An employment plan is based on your training, education, and work history. It does not have to include a job search, and in some cases you may only be required to improve your skills in certain areas or work on your résumé.



Make sure you understand what you are agreeing to when you sign an employment plan. Ask questions about anything you do not understand. If you cannot speak or read English very well, ask for an interpreter or bring someone with you who can help you understand English.

Appendix G.

Penalties for getting rid of assets or not going after income

Situation	Possible penalties	Example
If you turned down income, an asset, or other means of support, and it is no longer available	• Your benefits could be reduced by $100 per month for each adult in your family for one calendar month for each $2,000 that you did not accept or pursue, OR • Your benefits could be cut off for one month for each $2,000 that you did not accept or pursue.	If you were single and your relative offered to give you $6,000 to help you out, you refused it, and now they have spent the money, your benefits could be cut off or reduced by $100 for 3 months.
If you turned down or did not try to get income, an asset, or other means of support, and it is still available	• Your benefits could be reduced by $100 per month for each adult in your family until you take reasonable steps to pursue the means of support, OR • Your benefits could be cut off until you take reasonable steps to pursue the means of support.	If your former employer owed you $4,000 in unpaid wages and severance pay, and you were single, your benefits could be cut off or reduced by $100 per month until you try to collect that money somehow. (For example, you could file a complaint with the Employment Standards Branch or take your former employer to court.)
If you sold something for less than its actual or market value, or if you gave it away (disposal for "inadequate consideration") EA Act s 14(1)(b) EAPD Act s 13(1)(b)	• Your benefits could be reduced by $100 per month for each adult in your family unit. The reduction will last for one calendar month for each $2,000 that you lost when you undersold or gave away your asset, OR • Your benefits could be cut off for one calendar month for each $2,000 that you lost when you undersold or gave away your asset.	If you and your spouse sold a $10,000 car for $6,000, you gave up $4,000 worth of its value. That means your family's benefits could be reduced by $200 per month — or cut off — for 2 months.
If you intentionally sold or gave away assets to make your family eligible for welfare (disposal of property to reduce assets) EA Act s 14(2)(a) EAPD Act s 13(2)(b).	• Your benefits could be cut off for 2 months for each $2,000 worth of assets that you got rid of.	If you gave away $6,000 to your sister to become eligible for welfare, your benefits could be cut off for 6 months.

8. Welfare and Disability Benefits

- **Child Tax Benefit (CCTB): Eligibility, Overpayment Allegations and Appeals**
    - Child Tax Benefit Materials
    - List of Appendices
    - Appendices
- ***Mothers without Legal Status (materials under Immigration)***

THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

Canada Child Tax Benefits: Eligibility criteria, overpayment allegations, and appeals to CRA and the Tax Court of Canada

***Prepared by Alison Ward, Barrister and Solicitor, CASL, Community Legal Assistance Society, November 30, 2010, and updated November 19, 2012.*

Both poverty law and family law advocates may have clients with problems concerning the Canada Child Tax Benefits ("CCTB"). Clients may want to know if they are eligible for CCTB benefits, or how CCTB eligibility is affected by family court orders allowing both parents shared time with the child. They may also have received correspondence from the Canada Revenue Agency ("CRA") alleging that they have received CCTB to which they are not entitled, and therefore have an alleged overpayment that they want to dispute. This fact sheet discusses some of the common client issues that may arise regarding CCTB. The criteria for CCTB have changed over time. This factsheet talks about criteria for the July 2012 to June 2013 benefit year (2011 base year).

Part I: Who is eligible for CCTB Benefits:

The legal eligibility criteria for CCTB are found in:

- sections 122.6 to 122.64 of the federal *Income Tax Act (*"the Act");
- section 248 (definition of "common law partner") of the Act*;* and
- sections 6300, 6301, 6302 and 6400 of the federal *Income Tax Regulations*.

Those sections are included in the handouts for this workshop. The legislation can be confusing to read. For example, under the Act, child tax benefits are technically described as a refund of an overpayment of income tax (s 122.61 of the Act), rather than as a "benefit."

The Canada Revenue Agency ("CRA") has some good basic information about eligibility criteria for CCTB on its website. CRA has a Canada Child Benefits guide at http://www.cra-arc.gc.ca/E/pub/tg/t4114/t4114-12e.pdf

To qualify for CCTB, you must be as an "eligible individual" under s. 122.6:

1. You must "**reside with"** a child, and the child must be under 18 years of age. You do not need to be the child's parent to qualify. The Act calls the child a "qualified dependent."

2. You must be the person "**primarily responsible"** for the child's care and upbringing. There are specific rules for shared custody situations, where a child spends time residing in the homes of different adults (e.g. father and mother, mother and grandmother, etc). See below for more information on shared custody situations.

3. You must be a resident of Canada for tax purposes; and

4. You must have the required **immigration status**. This means that either you OR your spouse or common-law partner (if you have one) must:

   - Be a Canadian citizen;
   - Have permanent resident status;
   - Be a "protected person" as defined in the *Immigration and Refugee Protection Act* ("IRPA") Note this category includes people who have been accepted as Convention Refugees; or
   - Have "temporary resident" status under IRPA, and have lived in Canada for at least the previous 18 months (i.e. the person can apply once they have a valid permit in the 19th month (other than one that states "does not confer status" or "does not confer temporary resident status").

5. The child in your care is *not* primarily maintained by a government department, agency, delegated agency or institution: examples include foster children where MCFD pays foster parents to care for the child; and others who receive kith and kin payments from MCFD. Caregivers and parents who receive welfare benefits or benefits for Child in the Home of a Relative still continue to be eligible for CCTB.

Primary responsibility for a child's care and upbringing: what is it?

Section 6302 of the *Income Tax Regulations* (attached) defines the factors CRA uses to asses who has primary responsibility for a child's care and upbringing. Generally, primary responsibility includes supervising a child's daily activities and needs, making sure the child's medical needs are met, and arranging for child care when necessary.

The *Act* presumes that if a child's mother lives with the child, the mother is primarily responsible for the child (and so CCTB is issued in her name). However, this presumption can be rebutted. The primarily responsible person can be a father, aunt, family friend, grandparent or guardian, etc

Shared eligibility: when 2 people are primarily responsible for a child

Legislative changes on this issue occurred in July 2011. Now, when a child lives equally, or near equally, with two separate people who are each primarily responsible for the child when the child is in their care, both caregivers or parents can be eligible for CCTB. If entitled, each would receive monthly CCTB payments equal to 50% of the amount they would have received if the child

resided with them on a full-time basis. They would receive CCTB cheques in this amount all year round.

Examples of equal, or near equal, time with a child include:

- Four days with one parent, then three days with the other;
- One week with one parent, then one week with the other;
- Any other regularly alternating cycle.

Before July 2011, in shared custody situations that lasted all year long (e.g. month on, month off; week on, week off, etc), CRA used to will issue CCTB to one caregiver for 6 months of the year, and to the other caregiver for the other 6 months. That option is no longer available due to legislative changes in July 2011.

Parents cannot determine who, as between themselves, will receive the CCTB for a child. Even if there is a court order saying one parent will receive the CCTB, CRA will make their own, independent assessment of who is entitled to the CCTB under its statutory criteria. (it used to be that CRA allowed caregivers in a shared situation to decide who would receive CCTB; this is no longer true).

Temporary sharing of CCTB eligibility: Where two caregivers or parents do not usually share time equally, or almost equally, with a child, the person who has the child for less time may still become temporarily entitled to CCTB in some situations, such as summer vacation.

Temporary sharing of CCTB eligibility happens when two individuals share eligibility more or less equally *for a determined temporary period of time* (e.g. summer holidays). A temporary shared custody situation must be for a period greater than 4 weeks and must include the first day of any month and the last day of the previous month. So, a parent who has their child for one month during the summer holidays, may qualify for CCTB for that month, so long as their time with the child includes the last day of the prior month, and at least four weeks of the month in question (e.g. June 30 to July 31st).

How is eligibility for CCTB calculated?

Eligibility for CCTB is calculated based on “family net income,” which is a person’s net income, plus that of their “spouse” or “common-law partner,” if they have one. The lower a person’s family net income, the higher the amount of the CCTB they are eligible for.

Many disputes have arisen where CRA says a client is living with a common law partner or spouse, when the client says they are just roommates, or not living together at all, or living separate and apart under the same roof. For this

reason, the issue of who is considered a "spouse or common law partner" for CCTB is important for appeals.

If CRA considers a person to be a parent's "spouse or common law partner," then that person's net income will be included in calculating how much CCTB the parent is eligible for (or should have been eligible for, if an overpayment is assessed retroactively). It is fairly common for a single parent to file taxes alone and claim CCTB benefits based on their own income. If CRA comes to believe that the person is in fact living with a spouse or common law partner that they have not declared to CRA, CRA will then investigate and may impose a CCTB overpayment. This happens in such cases because, if the income of the alleged spouse or common law partner is included in "family net income," the family net income will be higher than CRA originally thought, and as a result the recipient will be assessed as having been eligible for less CCTB than they received. As a result, CRA will allege that an overpayment of CCTB has occurred. The parent in this situation can file an objection to CRA's determination that she is living with a spouse or common law partner and, if necessary, appeal the resulting decision to the Tax Court of Canada.

Who is considered a "spouse or common law partner" for CCTB purposes?

Section 122.6 of the *Act* provides that "in this sub-division":

"**cohabiting spouse or common-law partner**" of an individual at any time means the person who at that time is the individual's spouse or **common-law partner** and who is not at that time living separate and apart from the individual and, for the purpose of this definition, a person shall not be considered to be living separate and apart from an individual at any time unless they were living separate and apart at that time, because of a breakdown of their marriage or common-law partnership, for a period of at least 90 days that includes that time"

The term "**common law partner**" is further defined in section 248 of the *Act*:

"*common-law partner*", with respect to a taxpayer at any time, means a person who cohabits at that time **in a conjugal relationship** with the taxpayer and

(*a*) has so cohabited with the taxpayer for a continuous period of at least one year, or

(*b*) would be the parent of a child of whom the taxpayer is a parent, if this Act were read without reference to paragraphs 252(1)(*c*) and (*e*) and subparagraph 252(2)(*a*)(iii),

and for the purposes of this definition, where at any time the taxpayer and the person cohabit <u>in a conjugal relationship</u>, they are, at any particular time after that time, deemed to be cohabiting in a conjugal relationship unless they were

not cohabiting at the particular time for a period of at least 90 days that includes the particular time because of a breakdown of their conjugal relationship;

CRA's Guide to Child Tax Benefits summarizes these legal definitions as follows (the underlining is my emphasis):

> "a common law partner means a person who is not your spouse (i.e. to whom you are not married), and "with whom you are living in a conjugal relationship, **and** to whom at least **one** of the following situations applies. He or she:
>
> a) has been living with you in a conjugal relationship for at least 12 continuous months;
> b) is the parent of your child by birth or adoption; or
> c) has custody and control of your child (or had custody and control immediately before the child turned 19 years of age) and your child is wholly dependent on that person for support.
>
> In addition, an individual immediately becomes your common-law partner if you previously lived together in a conjugal relationship for at least 12 continuous months and you have resumed living together in such a relationship."

See **Appendix A** of this paper for examples of some Tax Court decisions and analysis of common Issues in CCTB appeals, including the factors that courts examine in determining whether someone is in a conjugal relationship, or "residing with" a child, for CCTB eligibility purposes.

Concept: Base year and benefit year

Another important concept to understand in regard to CCTB disputes is that the CCTB rate that someone is entitled to now (that is, in this "benefit year"), is based on what the person's family net income was in the past (in the "base year").

The base year is the calendar year just before the start of the benefit year. The benefit year is the 12-month period during which the CCTB payments are paid. The benefit year starts on July 1 of the year *after* the base year and goes to June 30 of the next year.

This chart shows the relationship between the base year and the benefit year.

Base Year (tax return)	Benefit Year (payments)
2012	July 2013 – July 2014
2011	July 2012 – June 2013
2010	July 2011 – June 2012
2009	July 2010 - June 2011

Part II: Disputing CRA decisions under the Income Tax Act

A person affected by a CRA decision regarding eligibility for CCTB benefits has the right to apply for reconsideration of that decision under federal *Income Tax Act* and to appeal a negative reconsideration decision to the Tax Court of Canada. From there, Tax Court decisions can be appealed to the Federal Court of Appeal and Supreme Court of Canada; those levels of appeal are beyond the scope of this paper.

Examples of common decisions regarding CCTB that can be reconsidered and appealed include decisions that:

- a person is not an "eligible individual" because the child does not reside with them or the person is not primarily responsible for the child;
- a person is not eligible for shared eligibility of CCTB;
- a person was overpaid CCTB in the past as they had a spouse or common law partner living with them, but they filed their tax returns as a single person (i.e. did not declare that person's income to be part of their net family income);

Disputing decisions that affect CCTB benefits:

The process starts when CRA issues a *Notice of Assessment* or *Reassessment.*

This can be an assessment of income tax for a specific year, or for an amount of benefits (e.g. CCTB) for a specified time period. For benefits such as CCTB, there may not be a formal "Notice of Assessment"; however, there will be a date on which CRA first determined that there was a change in the benefit amount, and that date will count as the date of the assessment, for determining when appeal deadlines fall.

The *date* of the notice of assessment (or re-assessment) is extremely important – all appeal periods are calculated from this date.

The date of assessment (or re-assessment) can be much later than the time period being assessed – for example, taxes owing for the year 2001 could be assessed on March 25, 2004.

Objections and Appeals

If you disagree about the amount of tax you owe or the amount of benefits you are entitled to, take the following steps:

1. Call CRA and try to work things out informally

- Sometimes, providing CRA with more information, or presenting information in a more structured way, can be enough to resolve the issue
- Generally, CRA can *reassess* an amount of tax for up to 3 years after the initial notice of assessment
- CRA can reassess an amount of tax at any time within 10 years if:
    - The person consents, or
    - CRA has grounds to believe that there has been fraud or misrepresentation

2. File a Notice of Objection

- Must be filed **within 90 days** of the Notice of Assessment or Reassessment, or other decision (e.g. re CCTB).

    i. Note that you can file an Notice of Objection without including all relevant evidence, and request in your cover letter that you be given more time to provide additional documents in support.

- No official form required; however, there is a form you can use on the CRA website (included in handouts)

- The objection will be sent to the CRA appeals division for an informal review

- There will be an opportunity to provide further information in writing, over the phone, or in person, but no actual hearing

- The appeals division of CRA will either confirm or vary the assessment

3. File an appeal to the Tax Court of Canada:

- An appeal must be filed **within 90 days** of the date of CRA's reassessment or reconsideration decision (i.e. the decision made after you filed your Notice of Objection)

- There is no specific notice of appeal form that must be used (e.g. you could appeal in a letter), but a sample Notice of Appeal is included in the handouts

- If the amount in dispute is less than $12,000 in taxes owed **per taxation year**, then you can elect to appeal using the Tax Court of Canada's "Informal Procedure" (this is more or less like small claims court)

    - Under the Tax Court's informal procedure, the Court cannot assess court costs against a taxpayer (that is, even if a taxpayer loses an appeal, they cannot be required to pay any of CRA's legal costs. However, if the taxpayer wins the appeal, the Tax Court can order CRA to pay some of the taxpayer's costs of the appeal.

    - The informal procedure is very informal. E.g. there is no discovery before trial.

    - Anyone (a friend, an accountant, a lawyer, an advocate, etc) can represent the appellant under the informal procedure. CRA is represented by a lawyer.

    - The rules of evidence don't technically apply

    - Technically, informal procedure decisions don't set precedents for other cases (as opposed to general procedure cases, which do);

    - If the amount alleged to be owing is over $12 000, then the appellant can still access the informal procedure if they decide to limit the amount under appeal to $12 000 (otherwise the more formal, general procedure will apply to the appeal). In other words, they could concede that they owe any amount over $12 000, and use the informal procedure to dispute the other $12 000.

- CRA's reply to the Notice of Appeal will set out the assumptions they relied on in assessing the person's tax return. **These assumptions are legally presumed to be true.**

- **The onus of proof is on the taxpayer to refute those assumptions, on the balance of probabilities. Proper preparation for an appeal is**

essential, including gathering supporting documents, preparation of witnesses or affidavits from third parties, etc.

- Tax Court cannot apply "equity" or "fairness" – they must stick to the strict wording of the *Income Tax Act*, even if the outcome may seem unfair.

Time limits and extensions for Objections and Appeals

- For both the Notice of Objection and the Notice of Appeal to Tax Court, it is possible to apply for an extension of time beyond the 90 day deadline
- Application to extend must be made **within one year** of the 90 day deadline
- After the one year is up, there is no possibility of an extension for any reason
    - Must prove that you intended to file an appeal within the 90 day period, but were unable to and were also unable to get someone else to do it for you

See **Appendix A** of this paper for examples of Tax Court of Canada decisions on common Issues in CCTB appeals.

Part III: Collection of CCTB overpayments

Legally, CRA can take collection action as soon as they have determined there has been a benefit overpayment of CCTB, even if appeals are proceeding. In practice, I don't know if this is often done.

<u>Payment arrangements</u>

- If a person has outstanding debt with CRA, such as an overpayment of CCTB, and the time limit for an objection or appeal has passed (see above) or an appeal has been lost, then your best option is usually to negotiate a payment arrangement
- CRA will expect full disclosure of the person's financial circumstances, as well as up to date filing of all outstanding tax returns
- CRA will expect the person to make all reasonable payments possible to pay off their tax debts
- CRA CANNOT negotiate down the total amount of *principal* owning – they are forbidden from doing so by law

- However, if you have penalties or interest outstanding, you can ask CRA for “taxpayer relief” on the penalties and interest to have those amounts reduced
    - Usually applies when a person is late filing or paying taxes through no fault of their own
    - CRA will make a discretionary decision which can be appealed through a separate internal review process, and then to judicial review in Federal Court
    - If CRA will not accept a payment arrangement that client can afford, then normally the only other option is bankruptcy
    - Most tax and overpayment debts can be discharged in bankruptcy
    - However, note that any debt incurred through fraud or misrepresentation is *not* discharged by bankruptcy – e.g., if a person intentionally misrepresents their household status or income to obtain a larger Child Tax Benefit

Note that Child Tax Benefits can ONLY be set-off against overpayments of Child Tax Benefits. So, for example, if a person owes income tax to CRA, CRA cannot withhold that person’s CCTB benefits against their general income tax debt (see section 122.61(4).

A 10 year limitation period applies to the collection of all debts under the *Income Tax Act*, starting from 2003 (no limitation dates apply prior to that). The 10 year limitation period starts from the date of the decision in the last appeal in a case.

Appendix A: Some sample caselaw on common issues in CCTB appeals[1]

Tax Court of Canada ("TCC") caselaw on what it means to "reside with" a child:

- *Bouchard* v. *Canada* 2009 TCC 38, at http://www.canlii.org/en/ca/tcc/doc/2009/2009tcc38/2009tcc38.html

A single father was found to have "resided with" his child while the father was incarcerated for 20 months, but continued to provide financially for his teenaged child during that time. Therefore he was entitled to CCTB benefits during his incarceration. This temporary absence by a parent is analogized to temporary absences of children from the home (e.g. while hospitalized or attending school away from home) that do not disentitle a parent to CCTB.

In paragraph 18 the Court held "In my view, the child tax benefit provisions should be interpreted in a compassionate way in these types of circumstances so as not to frustrate the obvious intention of Parliament to assist low income families."

- *Burton* v. *Canada* 1999 CanLii 264 (TCC), at http://www.canlii.org/en/ca/tcc/doc/1999/1999canlii264/1999canlii264.html

The Court took a much more restrictive approach to the term "resides with" and found that a mother who returned frequently to care for 7 children in the family home (after separating from their father and sleeping elsewhere), did not "reside with" the children and so was not entitled to CCTB benefits. The Court notes she is living with a new common law partner, and appeared to struggle with the idea that she could "live with" the new partner and "reside with" the children under another roof. The

- *Buma* v. *Canada* 2004 TCC 808, at http://www.canlii.org/en/ca/tcc/doc/2004/2004tcc808/2004tcc808.html

Again taking a more liberal approach to the interpretation of "reside with," the Court found that in some circumstances, a caregiver can "reside with" children even if the caregiver does not sleep under the same roof. Here, two spouses operated a dairy farm and had four kids. They separated and the mother moved out, but for a period of time she continued to return to the farm each day to do farm and housework and care for the children. The Court

[1] Tax Court of Canada and Federal Court of Appeal decisions are available at www.canlii.org Go to the "federal" databases and from there you can either search, or go directly to all Tax Court decisions or Federal Court of Appeal decisions (both of which are also searchable).

found that during this period she “resided with” the kids for CCTB purposes, even though she did not sleep in their home.

Sample Tax Court of Canada caselaw on who is considered a “spouse or common law partner” for CCTB purposes:

(Note: the definition of “”spouse or common law partner” for CCTB has not changed since July 31, 2000).

- *Gartner* v *Canada* 2000 TCJ No 261 at http://www.canlii.org/en/ca/tcc/doc/2000/2000canlii374/2000canlii374.html

Two married co-habitating spouses can be considered to be living separate and apart for CCTB purposes, even where they are still living under the same roof.

In this case, the spouses had separated for two years, the children lived with the mother in a matrimonial home in joint tenancy. The mother saw a lawyer about getting a divorce in this period but could not afford it. After two years, the father moved back in as he was on title. The evidence showed they lived separate lives, not interacting socially, not sharing meals or chores or funds, etc while under the same roof.

- *Rangwala* v *Canada* [2000] Tax Court Judgment No. 624 at http://www.canlii.org/en/ca/tcc/doc/2000/2000canlii114/2000canlii114.html (and included in the handouts).

Another case in which two married spouses were found to be living separate and apart under the same roof (i.e. while still living together, not to be spouses for CCTB purposes).

The case contains a good discussion of the meaning of “separate and apart” at paragraphs 18, as follows:

In defining the meaning of "separate and apart", Bowman, T.C.J. quoted Holland, J. in Cooper v. Cooper (1973) 10 R.F.L. 184 (Ont. H.C.) at p. 187 as follows:

Certainly spouses living under the same roof may well in fact be living separate and apart from each other. The problem has often been considered in actions brought under s. 4(1)(e)(i) of the Divorce Act and, generally speaking, a finding that the parties were living separate and apart from each other has been made where the following circumstances were present:

(i) Spouses occupying separate bedrooms.

(ii) Absence of sexual relations.

(iii) Little, if any, communication between spouses.

(iv) Wife performing no domestic services for husband.

(v) Eating meals separately.

(vi) No social activities together.

- *Sanford* v. *Canada* 2000 TCJ 801 at http://www.canlii.org/en/ca/tcc/doc/2000/2000canlii389/2000canlii389.html

  Whether or not two people are common law partners cohabiting in a conjugal relationship, is to be determined by objective standards, not the subjective attitudes of the individuals involved.

  In this case, two people had lived together for 10 years, had a child together, shared expenses, owned property jointly, co-parented, ate meals together, and shared household chores, etc the Court found them to be cohabitating in a conjugal relationship, even though they considered each other to be merely "the person with whom they lived."

- *Brunette* v. *Canada* 2009 TCC 584, at http://www.canlii.org/en/ca/tcc/doc/2009/2009tcc584/2009tcc584.html

  Whether or not two people are common law partners cohabiting in a conjugal relationship, is to be determined by objective standards, not the subjective attitudes of the individuals involved.

  Case contains a discussion of the factors to consider in determining whether two people are "cohabiting in a conjugal relationship."

- *Sigouin* v *Canada* [2001] TCJ No 285, at http://www.canlii.org/en/ca/tcc/doc/2001/2001canlii685/2001canlii685.html

  Two parents, who were previously living together in a conjugal relationship as common law partners, can discontinue that relationship and continue to live as simply "roommates" such that they are not considered common law partners for CCTB purposes.

  The key is providing proper evidence to show that this is the case.

Sigouin contains a good discussion of what is meant by “conjugal relationship.”

And at paragraph 12, the Court holds: “It is my view that, in appeals such as this one, it must also be taken into account that the provisions involved are intended to financially assist people who have limited means or low incomes. This Court’s decision can have an impact on all the monetary assistance that a person has received, and these provisions which were intended to be of assistance may rather become extremely costly for that person where he or she is required to repay the assistance over several years. To dismiss the appeal, I must be thoroughly convinced that the appellant was cohabitating in a conjugal relationship.”

- *Henry* v. *Canada* [2002] TCJ 534, at http://www.canlii.org/en/ca/tcc/doc/2002/2002canlii1037/2002canlii1037.html *(and included in the handouts)*

  Another case in which parents who were previously living together in a conjugal relationship as common law partners, are found to have discontinued that relationship and be continuing to live together as simple “roommates” such that they are not considered common law partners for CCTB purposes. The key is providing proper evidence to show that this is the case.

  The case contains a good discussion of the legal test for a “conjugal relationship” and the kinds of evidence a Court will want to see in determining if two people are, or are not, common law partners.

Child Tax Benefits Workshop: November 21, 2012

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Legislation regarding Canada Child Tax Benefits
Extracted November 19, 2012

Income Tax Act

***Section* 248** (1) In this Act,

"common-law partner", with respect to a taxpayer at any time, means a person who cohabits at that time **in a conjugal relationship** with the taxpayer and

(*a*) has so cohabited with the taxpayer **for a continuous period of at least one year,** or

(*b*) would be the parent of a child of whom the taxpayer is a parent, if this Act were read without reference to paragraphs 252(1)(*c*) and (*e*) and subparagraph 252(2)(*a*)(iii),

and for the purposes of this definition, where at any time the taxpayer and the person cohabit in a conjugal relationship, they are, at any particular time after that time, deemed to be cohabiting in a conjugal relationship unless they were not cohabiting at the particular time for a period of at least 90 days that includes the particular time because of a breakdown of their conjugal relationship;

Subdivision a.1

Canada Child Tax Benefit

Definitions

122.6 In this subdivision,

"adjusted earned income"

"adjusted earned income"[Repealed, 1998, c. 21, s. 92(1)]

"adjusted income"
« revenu modifié »

"adjusted income", of an individual for a taxation year, means the total of all amounts each of which would be the income for the year of the individual or of the person who was the individual's cohabiting spouse or common-law partner at the end of the year if in computing that income no amount were

(*a*) included

(2)

- (i) under paragraph 56(1)(*q.1*) or subsection 56(6),
- (ii) in respect of any gain from a disposition of property to which section 79 applies, or
- (iii) in respect of a gain described in subsection 40(3.21), or

(*b*) deductible under paragraph 60(*y*) or (*z*);

"base taxation year"
« année de base »

"base taxation year" in relation to a month means

(*a*) where the month is any of the first 6 months of a calendar year, the taxation year that ended on December 31 of the second preceding calendar year, and

(*b*) where the month is any of the last 6 months of a calendar year, the taxation year that ended on December 31 of the preceding calendar year;

"cohabiting spouse or common-law partner"
« époux ou conjoint de fait visé »

"cohabiting spouse or common-law partner" of an individual at any time means the person who at that time is the individual's spouse or common-law partner ***(note the term "common law partner" is defined by section 248 of the Income Tax Act, above - Alison)*** and who is not at that time living separate and apart from the individual and, for the purpose of this definition, a person shall not be considered to be living separate and apart from an individual at any time unless they were living separate and apart at that time, because of a breakdown of their marriage or common-law partnership, for a period of at least 90 days that includes that time;

"earned income"

"earned income"[Repealed, 1998, c. 21, s. 92(1)]

"eligible individual"
« particulier admissible »

"eligible individual" in respect of a qualified dependant at any time means a person who at that time

(*a*) resides with the qualified dependant,

(*b*) is a parent of the qualified dependant who

(i) is the parent who primarily fulfils the responsibility for the care and upbringing of the qualified dependant and who is not a shared-custody parent in respect of the qualified dependant, or

(ii) is a shared-custody parent in respect of the qualified dependant,

(*c*) is resident in Canada or, where the person is the cohabiting spouse or common-law partner of a person who is deemed under subsection 250(1) to be resident in Canada throughout the taxation year that includes that time, was resident in Canada in any preceding taxation year,

(*d*) is not described in paragraph 149(1)(*a*) or 149(1)(*b*), and

(*e*) is, or whose cohabiting spouse or common-law partner is, a Canadian citizen or a person who

(i) is a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act* ,

(ii) is a temporary resident within the meaning of the *Immigration and Refugee Protection Act* , who was resident in Canada throughout the 18 month period preceding that time, or

(iii) is a protected person within the meaning of the *Immigration and Refugee Protection Act* ,

(iv) was determined before that time to be a member of a class defined in the *Humanitarian Designated Classes Regulations* made under the *Immigration Act*,

and for the purposes of this definition,

(*f*) where the qualified dependant resides with the dependant's female parent, the parent who primarily fulfils the responsibility for the care and upbringing of the qualified dependant is presumed to be the female parent,

(*g*) the presumption referred to in paragraph 122.6 eligible individual (*f*) does not apply **in prescribed circumstances**, and

(*h*) **prescribed factors** shall be considered in determining what constitutes care and upbringing;

"qualified dependant"
« personne à charge admissible »

"qualified dependant" at any time means a person who at that time

(*a*) has not attained the age of 18 years,

(*b*) is not a person in respect of whom an amount was deducted under paragraph (*a*) of the description of B in subsection 118(1) in computing the tax payable under this Part by the person's spouse or common-law partner for the base taxation year in relation to the month that includes that time, and

(*c*) is not a person in respect of whom a special allowance under the *Children's Special Allowances Act* is payable for the month that includes that time;

(4)

"return of income"
« déclaration de revenu »

"return of income" filed by an individual for a taxation year means

(*a*) where the individual was resident in Canada throughout the year, the individual's return of income (other than a return of income filed under subsection 70(2) or 104(23), paragraph 128(2)(*e*) or subsection 150(4)) that is filed or required to be filed under this Part for the year, and

(*b*) in any other case, a prescribed form containing prescribed information, that is filed with the Minister.

"shared-custody parent"
« parent ayant la garde partagée »

"shared-custody parent" in respect of a qualified dependent at a particular time means, where the presumption referred to in paragraph (*f*) of the definition "eligible individual" does not apply in respect of the qualified dependant, an individual who is one of the two parents of the qualified dependant who

(*a*) are not at that time cohabitating spouses or common-law partners of each other,

(*b*) reside with the qualified dependant on an equal or near equal basis, and

(*c*) primarily fulfil the responsibility for the care and upbringing of the qualified dependant when residing with the qualified dependant, as determined in consideration of prescribed factors.

Deemed overpayment

122.61 (1) Where a person and, where the Minister so demands, the person's cohabiting spouse or common-law partner at the end of a taxation year have filed a return of income for the year, an overpayment on account of the person's liability under this Part for the year is deemed to have arisen during a month in relation to which the year is the base taxation year, equal to the amount determined by the formula

1/12[(A - B) + C + M]

where

A

is the total of

(*a*) the product obtained by multiplying $1,090 by the number of qualified dependants in respect of whom the person was an eligible individual at the beginning of the month, and
(*b*) the product obtained by multiplying $75 by the number of qualified dependants, in excess of 2, in respect of whom the person was an eligible individual at the beginning of the month;
(*c*) [Repealed, 2006, c. 4, s. 177]

(5)

B

is 4% (or where the person is an eligible individual in respect of only one qualified dependant at the beginning of the month, 2%) of the amount, if any, by which

(*a*) the person's adjusted income for the year

exceeds

(*b*) the greater of $32,000 and the dollar amount, as adjusted annually and referred to in paragraph 117(2)(*a*), that is used for the calendar year following the base taxation year;

C

is the amount determined by the formula

F - (G × H)

where

F
is, where the person is, at the beginning of the month, an eligible individual in respect of

(*a*) only one qualified dependant, $1,463, and
(*b*) two or more qualified dependants, the total of

- (i) $1,463 for the first qualified dependant,
- (ii) $1,254 for the second qualified dependant, and
- (iii) $1,176 for each of the third and subsequent qualified dependants,

G
is the amount determined by the formula

J - [K - (L/0.122)]

where

J
is the person's adjusted income for the year,
K
is the amount referred to in paragraph (*b*) of the description of B, and
L
is the amount referred to in paragraph (*a*) of the description of F, and
H
is

(*a*) if the person is an eligible individual in respect of only one qualified dependant, 12.2%, and
(*b*) if the person is an eligible individual in respect of two or more qualified dependants, the fraction (expressed as a percentage rounded to the nearest one-tenth of one per cent) of which

- (i) the numerator is the total that would be determined under the description of F in respect of the eligible individual if that description were applied without reference to the fourth and subsequent qualified dependants in respect of whom the person is an eligible individual, and
- (ii) the denominator is the amount referred to in paragraph (*a*) of the description of F, divided by 0.122; and

M

is the amount determined by the formula

N - (O × P)

where

N
is the product obtained by multiplying $2,300 by the number of qualified dependants in respect of whom both

(*a*) an amount may be deducted under section 118.3 for the taxation year that includes the month, and
(*b*) the person is an eligible individual at the beginning of the month,

O
is the amount determined by the formula

J - [F/H + (K - L/0.122)]

where the descriptions of J, F, H, K, and L are described in the description of C, and

P
is 4% (or where the person is an eligible individual in respect of only one qualified dependant included in the description of N at the beginning of the month, 2%) of the amount determined for the description of O,

Shared-custody parent

(1.1) Notwithstanding subsection (1), if an eligible individual is a shared-custody parent in respect of one or more qualified dependants at the beginning of a month, the overpayment deemed by subsection (1) to have arisen during the month is equal to the amount determined by the formula

1/2 × (A + B)

where

A

is the amount determined by the formula in subsection (1), calculated without reference to this subsection, and

B

is the amount determined by the formula in subsection (1), calculated without reference to this subsection and subparagraph (*b*)(ii) of the definition "eligible individual" in section 122.6.

Exceptions

(2) Notwithstanding subsection (1), if a particular month is the first month during which an overpayment that is less than $20 (or such other amount as is prescribed) is deemed under that subsection to have arisen on account of a person's liability under this Part for the base taxation year in relation to the particular month, any such overpayment that would, but for this subsection, reasonably be expected at the end of the particular month to arise during another month in relation to which the year is the base taxation year is deemed to arise under that subsection during the particular month and not during the other month.

Non-residents and part-year residents

(3) For the purposes of this section, unless a person was resident in Canada throughout a taxation year,

(*a*) for greater certainty, the person's income for the year shall be deemed to be equal to the amount that would have been the person's income for the year had the person been resident in Canada throughout the year; and
(*b*) the person's earned income for the year shall not exceed that portion of the amount that would, but for this paragraph, be the person's earned income that is included because of section 114 or subsection 115(1) in computing the person's taxable income or taxable income earned in Canada, as the case may be, for the year.

Effect of bankruptcy

(3.1) For the purposes of this subdivision, where in a taxation year an individual becomes bankrupt,

(*a*) the individual's income for the year shall include the individual's income for the taxation year that begins on January 1 of the calendar year that includes the date of bankruptcy; and
(*b*) the total of all amounts deducted under section 63 in computing the individual's income for the year shall include the amount deducted under that section for the individual's taxation year that begins on January 1 of the calendar year that includes the date of bankruptcy.
(*c*) [Repealed, 1998, c. 21, s. 94]

Amount not to be charged, etc.

(4) A refund of an amount deemed by this section to be an overpayment on account of a person's liability under this Part for a taxation year

(*a*) shall not be subject to the operation of any law relating to bankruptcy or insolvency;
(*b*) cannot be assigned, charged, attached or given as security;
(*c*) does not qualify as a refund of tax for the purposes of the *Tax Rebate Discounting Act*;
(*d*) cannot be retained by way of deduction or set-off under the *Financial Administration Act*; and
(*e*) is not garnishable moneys for the purposes of the *Family Orders and Agreements Enforcement Assistance Act*.

Annual adjustment

(5) Each amount expressed in dollars in subsection (1) shall be adjusted so that, where the base taxation year in relation to a particular month is after 1998, the amount to be used under that subsection for the month is the total of

(*a*) the amount that would, but for subsection 122.61(7), be the relevant amount used under subsection 122.61(1) for the month that is one year before the particular month, and
(*b*) the product obtained by multiplying

(i) the amount referred to in paragraph 122.61(5)(*a*)

by

(ii) the amount, adjusted in such manner as is prescribed and rounded to the nearest one-thousandth or, where the result obtained is equidistant from 2 such consecutive one-thousandths, to the higher thereof, that is determined by the formula

(A/B) - 1

where

A
is the Consumer Price Index (within the meaning assigned by subsection 117.1(4)) for the 12-month period that ended on September 30 of the base taxation year, and
B
is the Consumer Price Index for the 12 month period preceding the period referred to in the description of A.

(5.1) [Repealed, 1998, c. 21, s. 93(2)]

Additions to NCB supplement — July 2005 and 2006

(6) Each amount referred to in the description of F in subsection (1) that is to be used for the purpose of determining the amount deemed to be an overpayment arising during months that are

(*a*) after June 2005 and before July 2006, is to be replaced with the amount that is the total of $185 and the amount otherwise determined under subsection (5) for those months; and
(*b*) after June 2006 and before July 2007, is to be replaced with the amount that is the total of $185 and the amount otherwise determined, for those months, by applying subsection (5) to the amount determined under paragraph (*a*).

Agreement with a province

(6.1) Notwithstanding subsection (5), for the purposes of any agreement referred to in section 122.63 with respect to overpayments deemed to arise during months that are after June 2001 and before July 2002, the amount determined under subparagraph (5)(*b*)(ii) for a month referred to in paragraph (6)(*b*) is deemed to be 0.012.

Rounding

(7) Where an amount referred to in subsection 122.61(1), when adjusted as provided in subsection 122.61(5), is not a multiple of one dollar, it shall be rounded to the nearest multiple of one dollar or, where it is equidistant from 2 such consecutive multiples, to the higher thereof.

Eligible individuals

122.62 (1) For the purposes of this subdivision, a person may be considered to be an eligible individual in respect of a particular qualified dependant at the beginning of a month only if the person has, no later than 11 months after the end of the month, filed with the Minister a notice in prescribed form containing prescribed information.

Extension for notices

(2) The Minister may at any time extend the time for filing a notice under subsection 122.62(1).

Exception

(3) Where at the beginning of 1993 a person is an eligible individual in respect of a qualified dependant, subsection 122.62(1) does not apply to the person in respect of the qualified dependant if the qualified dependant was an eligible child (within the meaning assigned by subsection 122.2(2) because of subparagraph (*a*)(i) of the definition "eligible child" in that subsection) of the individual for the 1992 taxation year.

Person ceasing to be an eligible individual

(4) Where during a particular month a person ceases to be an eligible individual in respect of a particular qualified dependant (otherwise than because of the qualified dependant attaining the age of 18 years), the person shall notify the Minister of that fact before the end of the first month following the particular month.

Death of cohabiting spouse

(5) If the cohabiting spouse or common-law partner of an eligible individual in respect of a qualified dependant dies,

(*a*) the eligible individual shall notify the Minister in prescribed form of that event before the end of the first calendar month that begins after that event; and

(*b*) subject to subsection (8), for the purpose of determining the amount deemed under subsection 122.61(1) to be an overpayment arising in that first month and any subsequent month on account of the eligible individual's liability under this Part for the base taxation year in relation to that first month, the eligible individual's adjusted income for the year is deemed to be equal to the eligible individual's income for the year.

Separation from cohabiting spouse

(6) If a person ceases to be an eligible individual's cohabiting spouse or common-law partner,

(*a*) the eligible individual shall notify the Minister in prescribed form of that event before the end of the first calendar month that begins after that event; and

(*b*) subject to subsection (8), for the purpose of determining the amount deemed under subsection 122.61(1) to be an overpayment arising in that first month and any subsequent month on account of the eligible individual's liability under this Part for the base taxation year in relation to that first month, the eligible individual's adjusted income for the year is deemed to be equal to the eligible individual's income for the year.

Person becoming a cohabiting spouse

(7) If a taxpayer becomes the cohabiting spouse or common-law partner of an eligible individual,

(*a*) the eligible individual shall notify the Minister in prescribed form of that event before the end of the first calendar month that begins after that event; and

(*b*) subject to subsection (8), for the purpose of determining the amount deemed under subsection 122.61(1) to be an overpayment arising in that first month and any subsequent month on account of the eligible individual's liability under this Part for the base taxation year in relation to that first month, the taxpayer is deemed to have been the eligible individual's cohabiting spouse or common-law partner at the end of the base taxation year in relation to that month.

Ordering of events

(8) If more than one event referred to in subsections (5) to (7) occur in a calendar month, only the subsection relating to the last of those events to have occurred applies.

(9) [Repealed, 1998, c. 19, s. 142(2)]

Agreement

122.63 (1) The Minister of Finance may enter into an agreement with the government of a province whereby the amounts determined under paragraph (*a*) of the description of A in subsection 122.61(1) with respect to persons resident in the province shall, for the purpose of calculating overpayments deemed to arise under that subsection, be replaced by amounts determined in accordance with the agreement.

Idem

(2) The amounts determined under paragraph (*a*) of the description of A in subsection 122.61(1) for a base taxation year because of any agreement entered into with a province and referred to in subsection 122.63(1) shall be based on the age of qualified dependants of eligible individuals, or on the number of such qualified dependants, or both, and shall result in an amount in respect of a qualified dependant that is not less, in respect of that qualified dependant, than 85% of the amount that would otherwise be determined under that paragraph in respect of that qualified dependant for that year.

Idem

(3) Any agreement entered into with a province and referred to in subsection 122.63(1) shall provide that, where the operation of the agreement results in a total of all amounts, each of which is an amount deemed under subsection 122.61(1) to be an overpayment on account of the liability under this Part for a taxation year of a person subject to the agreement, that exceeds 101% of the total of such overpayments that would have otherwise been deemed to have arisen under subsection 122.61(1), the excess shall be reimbursed by the government of the province to the Government of Canada.

Confidentiality of information

122.64 (1) Information obtained under this Act or the *Family Allowances Act* by or on behalf of the Minister of Social Development is deemed to be obtained on behalf of the Minister of National Revenue for the purposes of this Act.

Communication of information

(2) Notwithstanding subsection 241(1), an official (as defined in subsection 241(10)) may provide information obtained under subsection 122.62(1), 122.62(4), 122.62(5), 122.62(6) or 122.62(7) or the *Family Allowances Act*

(*a*) to an official of the government of a province, solely for the purposes of the administration or enforcement of a prescribed law of the province; or
(*b*) to an official of the Department of Social Development for the purposes of the administration of the *Family Allowances Act*, the *Canada Pension Plan* or the *Old Age Security Act*.

Taxpayer's address

(3) Notwithstanding subsection 241(1), an official or authorized person may provide a taxpayer's name and address that has been obtained by or on behalf of the Minister of National Revenue for the purposes of this subdivision, for the purposes of the administration or enforcement of Part I of the *Family Orders and Agreements Enforcement Assistance Act*.

Offence

(4) Every person to whom information has been provided under subsection 122.64(2) or 122.64(3) and who knowingly uses, communicates or allows to be communicated that information for any purpose other than that for which it was provided is guilty of an offence and is liable on summary conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 12 months or to both that fine and imprisonment.

(5) [Repealed, 1998, c. 19, s. 144(2)]

(12)

Income Tax Act Regulations

PART LXIII

CHILD TAX BENEFITS

Interpretation

6300. In this Part, "qualified dependant" has the meaning assigned by section 122.6 of the Act.

Non-Application of Presumption

6301. (1) For the purposes of paragraph (*g*) of the definition "eligible individual" in section 122.6 of the Act, the presumption referred to in paragraph (*f*) of that definition does not apply in the circumstances where

(*a*) the female parent of the qualified dependant declares in writing to the Minister that the male parent, with whom she resides, is the parent of the qualified dependant who primarily fulfils the responsibility for the care and upbringing of each of the qualified dependants who reside with both parents;

(*b*) the female parent is a qualified dependant of an eligible individual and each of them files a notice with the Minister under subsection 122.62(1) of the Act in respect of the same qualified dependant;

(*c*) there is more than one female parent of the qualified dependant who resides with the qualified dependant and each female parent files a notice with the Minister under subsection 122.62(1) of the Act in respect of the qualified dependant; or

(*d*) more than one notice is filed with the Minister under subsection 122.62(1) of the Act in respect of the same qualified dependant who resides with each of the persons filing the notices if such persons live at different locations.

(2) For greater certainty, a person who files a notice referred to in paragraph (1)(*b*), (*c*) or (*d*) includes a person who is not required under subsection 122.62(3) of the Act to file such a notice.

Factors

6302. For the purposes of paragraph (*h*) of the definition "eligible individual" in section 122.6 of the Act, the following factors are to be considered in determining what constitutes care and upbringing of a qualified dependant:

(*a*) the supervision of the daily activities and needs of the qualified dependant;

(*b*) the maintenance of a secure environment in which the qualified dependant resides;

(*c*) the arrangement of, and transportation to, medical care at regular intervals and as required for the qualified dependant;

(*d*) the arrangement of, participation in, and transportation to, educational, recreational, athletic or similar activities in respect of the qualified dependant;

(*e*) the attendance to the needs of the qualified dependant when the qualified dependant is ill or otherwise in need of the attendance of another person;

(*f*) the attendance to the hygienic needs of the qualified dependant on a regular basis;

(*g*) the provision, generally, of guidance and companionship to the qualified dependant; and

(*h*) the existence of a court order in respect of the qualified dependant that is valid in the jurisdiction in which the qualified dependant resides.

PART LXIV

PRESCRIBED DATES

Child Tax Credits

6400. For the purposes of subsection 122.2(1) of the Act, the prescribed date for each of the 1978 and subsequent taxation years is December 31st of that year.

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CCTB: Application and Eligibility

1. What is the Canada Child Tax Benefit?
2. What is the National Child Benefit?
3. What is meant by "adjusted family income"?
4. Can I get the Canada Child Tax Benefit?
5. What is meant by"primarily responsible for the care and upbringing of a child"?
6. Should I apply for the Canada Child Tax Benefit?
7. When should I apply for the Canada Child Tax Benefit?
8. How do I apply for the Canada Child Tax Benefit?
9. Where do I send my Canada Child Tax Benefits application?
10. Do I have to file an income tax return if I have no income to report?
11. When am I entitled to receive CCTB payments?
12. Has my application been processed?
13. How do I apply for the provincial/territorial benefits?
14. I am the legal guardian or tutor (Quebec) of a child for whom I receive financial assistance for the child's maintenance. Am I entitled to get the CCTB or any other child related benefits and credits?

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1. What is the Canada Child Tax Benefit?
The Canada Child Tax Benefit (CCTB) is a **non-taxable** amount paid monthly to help eligible families with the cost of raising children under 18 years of age.

The CCTB may include the Child Disability Benefit (CDB), a monthly benefit providing financial assistance for qualified families caring for children with severe and prolonged mental or physical impairments.

Also included with the CCTB is the National Child Benefit Supplement (NCBS), a monthly benefit for low-income families with children. The NCBS is the Government of Canada's contribution to the National Child Benefit, a joint initiative of federal, provincial, and territorial governments, and First Nations.

2. What is the National Child Benefit?
The National Child Benefit (NCB) is a joint initiative of the federal, provincial, and territorial governments, and First Nations. This initiative:

- helps prevent and reduce the depth of child poverty;
- ensures that families will always be better off as a result of parents working; and
- reduces overlap and duplication of government programs and services.

3. What is meant by "adjusted family net income"?
Family net income is one of the factors used in the calculation of your CCTB entitlement. Family net income is your net income at Line 236 of the tax return. If you have a spouse or common-law partner, their net income from their tax return is added to your net income to determine your family net income.

In order to maximize the benefits payable to low and modest income earners, the family net income is "adjusted" to exclude the Universal Child Care Benefit (UCCB) and Registered Disability Savings Plan (RDSP) you receive. However, any UCCB and RDSP amounts you have to repay will be included as part of your adjusted family net income.

4. Can I get the Canada Child Tax Benefit?
To be eligible, you must meet **all** the following conditions:

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- you must live with the child, and the child must be under the age of 18;
- you must be primarily responsible for the care and upbringing of the child;
- you must be a resident of Canada; and
- you or your spouse or common-law partner must be a Canadian citizen, a permanent resident, a protected person, or a temporary resident who has lived in Canada for the previous 18 months, and who has a valid permit in the 19th month.

NOTE:
If the child does not live with you all the time, see, Shared Custody

5. What is meant by "primarily responsible for the care and upbringing of a child"?
Primarily responsible for the care and upbringing of a child means that you are responsible for such things as supervising the child's daily activities and needs, making sure the child's medical needs are met, and arranging for child care when necessary. If there is a female parent who lives with the child, we usually consider her to be this person. However, if the male parent is primarily responsible, he must attach to Form RC66, Canada Child Benefits Application, a signed note from the female parent that states he is primarily responsible for all of the children in the household.

NOTE: You may not be considered primarily responsible for the care and upbringing of a child if the child is legally, physically or financially maintained by a child welfare agency. For more information, go to the Children's Special Allowances (CSA) fact sheet or call 1-800-387-1193.

6. Should I apply for the Canada Child Tax Benefit?
The person who is primarily responsible for the care and upbringing of the child should apply for the CCTB.

You should apply even if:

- Your child only lives with you part of the time, see Shared Custody.
- Your child is living with you for a temporary period of time, for example over the summer holidays.
- Your current adjusted family net income is too high. We recalculate your entitlement every July based on your adjusted family net income for the previous year.

NOTE: A temporary change in care must be for more than **14 days** and has to include the first day of any month and the last day of the previous month. A temporary shared custody arrangement must be for more than **4 weeks** and has to include the first day of any month and the last day of the previous month.

7. When should I apply for the Canada Child Tax Benefit?
Generally, you should apply for the CCTB as soon aspossible after

- your child is born
- a child starts to live with you; or
- you and your spouse or common-law partner meet the eligibility conditions, see question #4.

You should not delay applying as your application is considered late if it includes a period that started more than 11 months ago. If your application is late, you must attach clear photocopies (including both sides of all pages) of the following documents for the entire period:

- proof of citizenship status (for example, a Canadian birth certificate) or immigration status in Canada for you and your spouse or common-law partner, if you have one;
- proof that you resided in Canada, such as a lease agreement, rent receipts, utility bills or bank statements;
- proof of birth for each child; and
- proof that you were the person who is primarily responsible for the care and upbringing of the child(ren).

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8. How do I apply for the Canada Child Tax Benefit?
If you are the parent of a newborn, living in a participating province, you may now apply for the CCTB using the Automated Benefits Application (ABA) service. You will find all the information you need to use the ABA service in the provincial/territorial birth registration package provided by your province or territory.

If you do not live in a participating province, complete Form RC66, Canada Child Benefits Application or apply online on My Account by using the *Apply for child benefits service*.

> If you have provided your consent to use the ABA service on the provincial/territorial birth registration form, you must not re apply online or complete an RC66 for the child. Re-applying may result in a delay in processing your ABA application and issuing payments.

If you and your spouse or common-law partner were residents of Canada for any part of 2011, you must both file a 2011 return before we can calculate your benefit. To continue getting the CCTB, you both have to file a return every year, even if you have no income to report.

There are certain situations where you may be required to complete additional forms or provide extra documentation with your application.

a) If any of the following applies to you, you will also have to complete the schedule RC66SCH, Status in Canada/Statement of Income.

- You and/or your spouse or common-law partner are not Canadian citizens.
- You and/or your spouse or common-law partner have become new Canadian citizens within the last 12 months.
- You and/or your spouse or common-law partner have become residents of Canada within the last two years.
- You and/or your spouse or common-law partner have moved back to Canada and re-established residential ties.

b) If your spouse or common-law partner is a non-resident of Canada during any part of the year, you must complete Form CTB9, Canada Child Tax Benefit - Statement of Income for each year or part of a year he or she is a non-resident of Canada.

c) In cases of separation or divorce, both parents may share more or less equally in the care and upbringing of a child. If each parent wants to receive the CCTB, attach a note to the application that clearly states your shared parenting arrangement. If you have questions, call 1-800-387-1193.

d) You will have to provide proof of birth with your application if we have not previously paid benefits for this child and:

- Your child is born outside of Canada.
- Your child is born in Canada but is more than a year old.

Once we receive your application, we may ask you to provide supporting documents to prove that you are primarily responsible for the care and upbringing of the child, such as, but not limited to, the following:

- a signed statement from a nursery or school authority confirming the child's home address and guardian on record;
- a signed statement from a person in a position of authority (such as a doctor, lawyer or social worker);
- a registration form or a receipt from an activity or club the child was enrolled in for the period you indicated; or
- a court order, decree or separation agreement.

You do not have to provide these documents with your application. However, if you choose to do so, we may contact you only if we need more information or when the review is complete.

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NOTE: We will calculate your GST/HST credit using the **number of children** you have registered for the credit. If you have applied for the CCTB for your child, he or she is already registered for the GST/HST credit. For more information, see the GST/HST credit pamphlet.

9. Where do I send my Canada Child Tax Benefit application?
Your application must be mailed to the tax centre that serves your area. Please refer to the Tax Centres page to find out the mailing address of the tax centre that serves your area. You can also choose to apply electronically at the *Apply for child benefits* online service on My Account.

10. Do I have to file an income tax return if I have no income to report?
Yes. You **and** your spouse or common-law partner have to file income tax returns reporting that you have no income, so that we can correctly calculate your entitlement to the Canada Child Tax Benefit (CCTB). You have to do this each year to ensure that your CCTB payments continue.

11. When am I entitled to receive CCTB payments?
You are entitled to receive the CCTB for a particular month if you are an eligible individual at the end of the preceding month and continue to be so into the beginning of that particular month. CCTB payments begin the month after a person becomes an eligible individual.

12. Has my application been processed?
You can expect to hear from us within 80 calendar days after we receive your application. If your application is not complete, we will ask for the missing information. This will delay the processing of your application.

After we process your application, we will send you a *Canada Child Tax Benefit Notice*. It will tell how much you will get, if any, and what information we used to calculate the amount.

We may review your application at a later date to confirm that the information you gave us has not changed.

13. How do I apply for the provincial/terriorial benefits?
The Canada Revenue Agency (CRA) administers the Alberta Family Employment Tax Credit, the BC Family Bonus, the New Brunswick Child Tax Benefit, the Newfoundland and Labrador Child Benefit, the Northwest Territories Child Benefit, the Nova Scotia Child Benefit, the Nunavut Child Benefit, the Ontario Child Benefit, and the Yukon Child Benefit.

There is no need to apply separately to qualify under these programs. The CRA will use the information from your Canada Child Benefits application to determine your eligibility for these programs. If you are eligible, the amount of any payments will be calculated automatically based on information from the income tax returns you and your spouse or common-law partner file.

14. I am the legal guardian or tutor (Quebec) of a child for whom I receive financial assistance for the child's maintenance. Am I entitled to get the CCTB or any other child-related benefits and credits?
Effective January 2012, guardians or tutors of children are no longer entitled to the CCTB or any other child-related benefits and credits the Canada Revenue Agency (CRA) administers if they are paid by a government department, an agency, or a similar institution to maintain a child who has been placed in their permanent or temporary custody under a decree, order, or judgment. For more information, read the Children's Special Allowances (CSA) fact sheet or call 1-800-387-1193.

Date Modified: 2012-10-31

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Canada Revenue Agency | Agence du revenu du Canada

Canada

Benefits > CCTB

CCTB: Calculation and payment information

1. When are Canada Child Tax Benefit (CCTB) payments made?
2. I did not receive my Canada Child Tax Benefit payment this month. What should I do?
3. How do I tell the CRA about my change of address?
4. Can I start getting my CCTB payments by direct deposit?
5. How do I change my banking information if I receive my payments by direct deposit?
6. What happens to CCTB payments if the recipient dies?
7. When do we recalculate your CCTB?
8. What happens if you owe money for CCTB?
9. How are the Canada Child Tax Benefit and the National Child Benefit Supplement calculated?
10. What determines the maximum payment for the National Child Benefit Supplement (NCBS)?

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1. When are Canada Child Tax Benefit payments made?
Benefits are paid over a 12-month period from July of one year to June of the next year. Generally, payments are made on the 20th of each month or, if your annual entitlement is less than $240, we will send it all in one payment on July 20th.

You can subscribe to the Benefit Recipients – Payment Issuance electronic mailing list to be notified when the next CCTB payments will be issued.

CCTB and integrated payment* dates

July 20, 2012
August 20, 2012
September 20, 2012
October 19, 2012
November 20, 2012
December 13, 2012
January 18, 2013
February 20, 2013
March 20, 2013
April 19, 2013
May 20, 2013
June 20, 2013

*** Note:** Integrated payments include the BC Family Bonus, the New Brunswick Child Tax Benefit, the Newfoundland and Labrador Child Benefit, the Northwest Territories Child Benefit, the Nova Scotia Child Benefit, the Nunavut Child Benefit, the Ontario Child Benefit, and the Yukon Child Benefit.

Alberta Family Employment Tax Credit:
The Alberta Family Employment Tax Credit is issued twice a year, in July and January. The payments will be issued on July 27, 2012, and January 25, 2013, for the 2011 base year.

For more information regarding our benefit programs, please visit the Canada Child Tax Benefit (CCTB) page.

2. I did not receive my Canada Child Tax Benefit payment this month. What should I do?
We generally pay your benefit on the 20th of each month. If your payment does not arrive on that day, please wait five working days before calling us at 1-800-387-1193.

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3. How do I tell the CRA about my change of address?
See How to change your address.

4. Can I start getting my Canada Child Tax Benefit (CCTB) payments by direct deposit?
You can have your CCTB payments deposited directly into your account at a financial institution. To start direct deposit or change your banking information, use My Account or send us a completed Form T1-DD(1), Direct Deposit Request - Individuals. You **cannot** change your banking information by calling us unless you have other CRA products deposited into that same account.

If for any reason we cannot deposit a payment into your account, we will mail a cheque to you at the address we have on file.

5. How do I change my banking information if I receive my payments by direct deposit?
If you get your payments by direct deposit and your banking information changes, use My Account or send us a completed Form T1-DD(1), Direct Deposit Request - Individuals. You **cannot** change your banking information by calling us unless you have other CRA products deposited into that same account.

6. What happens to Canada Child Tax Benefit (CCTB) payments if the recipient dies?
If an individual dies who was receiving CCTB payments for a child, the child's new caregiver should contact us and give us the date of the recipient's death.

We may still send out a payment after the date of death because we are not aware of the death. If this happens, please return the payment to us with a brief letter of explanation to the tax centre that serves your area.

If you are the surviving spouse or common-law partner of the deceased individual and you lived with that person at the time of his or her death, in most cases you won't have to complete a new CCTB application. If certain requirements have been met, the children will be automatically transferred to your account.

If you are any other caregiver (such as grandparent or guardian), you will have to complete Form RC66, Canada Child Benefits Application, and send it to us or you can also use the *Apply for child benefits* online service on My Account to report this change to the CRA.

Note
If you are the new caregiver and the deceased individual was receiving payments under provincial or territorial child benefit programs that we administer, you do not have to apply separately to qualify for these payments. We will use the information from Form RC66 to determine if you are eligible for these programs.

7. When do we recalculate your CCTB?
We will recalculate your benefit and send you a *Canada Child Tax Benefit Notice* showing our revised calculation:

- every July based on the returns that you and your spouse or common-law partner filed for the previous year;
- after each reassessment of either your tax return or your spouse or common-law partner's tax return that affects the calculation of your benefit;
- after a child for whom you receive the CCTB turns 18 (the last payment you will receive will be for the month of his or her birthday); and
- after you tell us about changes to your situation that could affect your benefit (see When to contact us about your CCTB).

8. What happens if you owe money for CCTB?
If you received a CCTB overpayment, please refer to our Balance owing – Benefits overpayment page.

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9. How are the Canada Child Tax Benefit and the National Child Benefit Supplement calculated?
You can use our CCTB calculator to get an estimate of your benefits.

Your CCTB payments for the period of **July 2012 to June 2013** are calculated using the following information:

- The number of children you have;
- Your province or territory of residence;
- Your 2011 adjusted family net income and;
- Your child's eligibility for the Child Disability Benefit.

Basic benefit:

- The basic benefit is $1,405 ($117.08 a month) for each child under age 18 (the basic benefit is different for residents of Alberta, see the note below).
- There is a supplement of $98 ($8.16 a month) for your third and each additional child.
- We subtract a benefit reduction from this amount if your family net income is more than $42,707. For a one-child family, the reduction is 2% of the amount of your family net income that is more than $42,707. For families with two or more children, the reduction is 4%.

Note
The Alberta provincial government has chosen to vary the amount of the basic benefit that its residents receive. The basic benefit is:

- $1,292 ($107.66 a month) for children under 7;
- $1,380 ($115.00 a month) for children 7 to 11;
- $1,544 ($126.66 a month) for children 12 to 15; and
- $1,635 ($136.25 a month) for children 16 or 17.

National Child Benefit Supplement (NCBS):

- **One-child family:** $2,177 a year ($181.41 a month).
- **Two-child family:** $1,926 a year ($160.50 a month).
- **Three-or-more-child family:** $1,832 a year ($152.66 a month).
- We subtract a benefit reduction from these amounts if your family net income is more than$24,683. For a one-child family, the reduction is 12.2% of the amount of your family net income that is more than $24,683. For a two-child family, the reduction is 23% of the amount of your family net income that is more than $24,683. For a three-or-more-child family, the reduction is 33.3% of the amount of your family net income that is more than $24,683.

Note
If you are on social assistance, the NCBS may affect the amount of your social assistance payments. Many provinces and territories will consider the NCBS you get as income and will adjust your basic social assistance by this amount.

10. What determines the maximum payment for the National Child Benefit Supplement?
The National Child Benefit Supplement (NCBS) is intended for low-income families with children. Therefore, the maximum is paid only if family net income is less than $24,863. It is reduced by a percentage amount (which depends on the number of children) when family net income is more than $24,863. Families with three or less children and family net income between $24,863 and $42,707 will receive partial NCBS. Families with four or more children will still receive some NCBS if their family net income is less than $46,500.

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Date Modified: 2012-07-20

(22)

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Rangwala v. The Queen, 2000 CanLII 114 (T.C.C.)

Date: 2000-09-19
Docket: 2000-993-IT-I
Parallel citations: 54 D.T.C. 3652 • [2000] 4 C.T.C. 2430
URL: http://www.canlii.org/en/ca/tcc/doc/2000/2000canlii114/2000canlii114.html
Noteup: Search for decisions citing this decision

Reflex Record (related decisions, legislation cited and decisions cited)

Date:20000905

Docket: 2000-993-IT-I

BETWEEN:

MUMTAZ RANGWALA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Campbel, JTCC.

Appearances

For the Appellant: The Appellant herself

Counsel for the Respondent: Michelle Farrell

Judgment

The appeals from the assessments made under the *Income Tax Act* for the 1995, 1996 and 1997 taxation years are allowed and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

The appeal from the assessment for the 1998 taxation year is allowed and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment to give effect to the admission contained in paragraph 8 of the Reply to the Notice of Appeal.

There will be no order for costs.

Signed at Ottawa, Canada, this 19th day of September 2000.

"Diane Campbell"

J.T.C.C.

Date: 20000919

(23)

Docket: 2000-993(IT)I

BETWEEN:

MUMTAZ RANGWALA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Reasons for Judgment

Campbell, J.T.C.C.

[1] This is an appeal from an assessment for the Appellant's 1995, 1996 and 1997 taxation years whereby the Minister of National Revenue denied the Appellant's claim for a goods and services tax credit (GSTC) under section 122.5 of the *Income Tax Act* and also denied the Appellant's claim for child tax benefits with respect to the 1995, 1996 and 1997 base taxation years under sections 122.6 and 122.61 of the *Act*.

[2] By a notice of re-determination dated April 23, 1999, the Minister informed the Appellant that a revised GSTC had been calculated which resulted in an overpayment with respect to the Appellant's GSTC for the 1995, 1996 and 1997 taxation years.

[3] By a further notice of determination dated July 9, 1999 the Minister further advised the Appellant that she was not entitled to GSTC for the 1998 taxation year either. In the Reply of the Minister, it was conceded that for the 1998 taxation year, the Appellant was living separate and apart from the spouse having divorced and moved into her own residence. This was therefore no longer an issue.

[4] By Child Tax Benefit Notices dated May 20, 1999, the Minister informed the Appellant that with respect to the 1995, 1996 and 1997 base taxation years, it had been re-determined that the amount of child tax benefits received by the Appellant had been overpaid.

[5] In making these re-determinations the Minister denied the child tax benefits to the Appellant because under section 122.6 of the *Act* the spouse of the Appellant was her cohabiting spouse and they were not considered to be living separate and apart. The GSTC was denied under subsection 122.5(1) of the *Act* as the Minister made the determination that the Appellant's spouse was a "qualified relation". Therefore the spouse's income had to be taken into consideration.

[6] The relevant facts of the case follow. The Appellant married in December 1974 at Bombay, India. They came to Canada in 1975. Marital problems began in 1988. As early as 1991, the Appellant was contemplating separation and applied for a car loan without including her husband's income in order to establish credit in her own name. They unsuccessfully attended counselling and eventually a separation agreement was signed in 1993. After this agreement was signed, the Appellant took the necessary steps to advise her employer of her change in marital status in respect to superannuation and medical benefits. In fact one of the exhibits entered into evidence by the Appellant was correspondence from the Appellant's employer confirming that she had forwarded a copy of her separation agreement to them in April 1993. The Appellant also changed her RRSP beneficiary to her son, Riaz.

[7] The primary assets of the marriage were the matrimonial home which was in both names and the husband's pension (although no evidence was introduced to establish the value of the pension). The house was not subject to a mortgage. In the Appellant's evidence she indicated that she had determined in her mind what her one-half interest in the house was worth. She determined the house value by contacting a realtor although it was never actually appraised. Because the Appellant and her husband could not agree on the value and the husband wanted to keep the house, the Appellant continued to live in the lower part of the side split home. Her premises consisted of a

bedroom, bathroom and family room. She had the use of the kitchen, telephone and laundry. She had her own refrigerator located in her part of the house. She kept her food separately labelled and the parties never sat together for meals. She performed no domestic services for him whatsoever.

[8] Their son continued to reside in his own bedroom in the upper half of the home that his father occupied. Since the parties had agreed to joint custody each became responsible for the preparation of his meals and seeing that his needs were met during alternate months. The Appellant was also responsible for the son's expenses associated with sports, camp and clothing. In her testimony, the Appellant stated that, although employed, she could not afford to move out of the home prior to receiving her money for the house. In addition she felt the son would not want to stay with her during alternate months if she had only a one-bedroom apartment.

[9] On cross-examination, she testified that when she had surgery in 1995, she listed her son as next of kin. Her brother came from the United States to assist her at this time. She testified that she was not aware if the husband was ever sick, as she did not bother with him and did not really care. In response to questioning, she stated that she never dated while living in the house and was simply unaware whether the husband was dating or not.

[10] The separation agreement of 1993 referred to a $200.00 monthly child support payment that the husband was to pay. He made the payments until sometime in 1994. She testified that she never asked her husband to continue the monthly payments as she was just too proud and that it would be traumatic for the child to have the parents arguing over this. While it was being paid she used this money for the son's clothes, camp, etc. When the husband stopped payment, she still provided those items for her son by borrowing money from the Bank and not taking holidays herself.

[11] The Appellant gave evidence that there was no communication except for the occasional discussion concerning the welfare of their son. The one witness called by the Appellant testified that there appeared to be no communication between them. This witness was a friend of both the Appellant and her husband and she testified that she realized in the late 1980's there was a marital problem. She stated that if she invited them to a function each was invited separately and each attended in different cars with separate gifts and did not communicate with each other during the gathering. Other than this type of function, if the witness socialized with either, she did so separately.

[12] The Appellant stated that she did not contribute financially to the residence except for her long distance calls, as she felt that she was not charging, and would not charge, the husband any interest on the money she expected to eventually receive for her share of the residence. It was her decision to forego interest on money she felt she was otherwise entitled to in 1993 when the parties separated. She therefore saw this as more than offsetting any contribution she would otherwise be expected to make toward household expenses. This point was never discussed with the husband. The Appellant just simply decided this on her own. It was probably never discussed as the parties never talked unless it was occasionally in respect to their son.

[13] The 1993 separation agreement stated that all assets had been divided between the Appellant and her husband. Nothing could have been further from the truth. The Appellant's evidence was that she informed her solicitor at the time of drafting of the agreement that she was not signing off her interest in the home until she received a certain sum and that until she did, she would live in part of the home. I accept the Appellant's evidence on this as she presented herself as honest and straightforward. It is astonishing that the solicitor ignored the information conveyed by his client and drafted an agreement which in no way reflected the circumstances of the parties. I do not accept that the separation agreement speaks for itself.

[14] In calculating child tax benefits and GSTC in respect to the relevant tax years, the Minister took into consideration the income of the Appellant's spouse. The Appellant submits that the spouse's income should not have been considered as she was living separate and apart although under the same roof.

[15] Reference must therefore be made to subsection 252(4) of the *Act* and the definition of "spouse". This section in its definition talks about cohabitation in a conjugal relationship.

[16] It is an accepted statement of law that it is possible for spouses to live separate and apart even though they reside under the same roof. *Rushton v. Rushton,* reflex, [1969] 66 W.W.R. 764, 2 D.L.R. (3d) 25 (B.C.) is cited as one of the leading cases in support of this proposition.

[17] The cases in respect to spouses living separate and apart received a thorough review by Bowman, T.C.J. in *Kelner v. Canada* [1995] T.C.J. No. 1130. He stated that the expression "separate and apart", for the purposes of the *Act,* should not be given a different meaning from that given to it under the *Divorce Act.*

[18] In defining the meaning of "separate and apart", Bowman, T.C.J. quoted Holland, J. in *Cooper v. Cooper* (1973) 10 R.F.L. 184 (Ont. H.C.) at p. 187 as follows:

Certainly spouses living under the same roof may well in fact be living separate and apart from each other. The problem has often been considered in actions brought under s. 4(1)(e)(i) of the Divorce Act and, generally speaking, a finding that the parties were living separate and apart from each other has been made where the following circumstances were present:

(i) Spouses occupying separate bedrooms.

(ii) Absence of sexual relations.

(iii) Little, if any, communication between spouses.

(iv) Wife performing no domestic services for husband.

(v) Eating meals separately.

(vi) No social activities together.

[19] In M.N.R. v. *Longchamps*, 86 DTC 1694, Couture, C.J.T.C. concluded that it is a question of fact whether spouses are living separate and apart and each case is to be decided upon its own facts.

[20] *Milot v. Canada*, [1995] T.C.J. No. 412, dealt with the term "spouse" as defined in subsection 252(4) of the *Act* and the notion of "conjugal relationship" as referred to within the context of that subsection. In so doing, Lamarre Proulx, T.C.J. referred to *Moldowich v. Penttinen* (1980), 17 R.F.L. (3d) 376 (Ont. Dist. Ct.). That case identified relevant criteria to be used as a guide in establishing what constitutes cohabitation or a conjugal relationship.

[21] In applying the relevant case law to the facts of this case, I am of the view that between 1993 and 1998 the Appellant did not cohabit with her spouse in a conjugal relationship. Counsel for the Minister asked that I pay particular attention to the financial arrangements between the parties (i.e. no rent paid by the Appellant, no financial contribution from the Appellant toward household expenses other than payment of her long distance telephone calls).

[22] Counsel for the Minister quoted several passages from *Macmillan-Dekker v. Dekker*, [2000] O.J. No. 2927. I see nothing in this case that would establish support for the proposition that financial contribution or lack of it should be given any more importance than any one of the other aforesaid criteria. In fact, Wilson, J. states:

Based on a synthesis of prior case law, the court established a list of seven factors to be used to determine whether or not a conjugal relationship exists or existed. These organising questions permit a trial judge to view the relationship as a whole in order to determine whether the parties lived together as spouses. Reference to these seven factors will prevent an inappropriate emphasis on one factor to the exclusion of others and ensure that all relevant factors are considered.

[23] He also states that:

...

I conclude that there is no single, static model of a conjugal relationship, nor of marriage. Rather, there are a cluster of factors which reflect the diversity of conjugal and marriage relationships that exist in modern Canadian society. Each case must be examined in light of its own unique objective facts.

(26)

[24] Counsel also cited *Lavoie v. Canada*, [1999] T.C.J. No. 688 in support of the importance of financial arrangements. In this case, Dussault, T.C.J., in applying the seven criteria of *Moldowich*,appeared to place more importance on the criteria of economic support and financial arrangements between the parties. The facts in that case can be distinguished from the facts of the case before me. The parties in *Lavoie* purchased a share in a residence and shared a joint bank account from which mortgage payments were made.

[25] In reviewing the relevant case law it is clear that each of the criteria must be given its proper weight in the context of each particular case in determining whether a conjugal relationship exists or not. Each case by its nature will present its own unique set of facts to which the seven criteria established in *Moldowich* are to be applied. This approach is meant to provide a certain amount of flexibility in deciding each case.

[26] The most difficult aspect of this case was the financial arrangement. The wife contributed to household expenses by payment of her long distance telephone calls and in 1996 she paid for a new roof. Other than this, the Appellant looked after her own expenses of food, car, etc. During the alternate months in which she took charge of her son, she bought food, prepared meals, etc. for her son. The Appellant's idea of notional interest that she was foregoing on her share of the house value in lieu of contribution to household expenses was valid to her way of thinking. She felt her husband could afford to pay her as he was an accountant and although they were not able to discuss anything, much less negotiate her share of the house, she stated that by "staying in the house and staying in his face" (as she put it) she would eventually get her settlement. She felt that in foregoing any claim to her husband's pension as well as foregoing any interest she would otherwise have received on the money, she was sufficiently contributing to her share of the household expenses. In light of the evidence it is not surprising that no discussion took place between the Appellant and her husband in respect to this arrangement.

[27] In *Kelner v. Canada*, Bowman, T.C.J. found "both physical and psychological separation" in respect to the relationship. That is certainly the case before me. All the circumstances considered together within the context of the *Moldowich* criteria establish that they were living separate and apart due to a breakdown of the marriage. They shared the same address and little else.

[28] The appeals are allowed and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment to allow the Appellant the Goods and Services Tax Credit and the Child Tax Benefits for the relevant periods. The Goods and Services Tax Credit for the 1998 taxation year admitted to in paragraph 8 of the Minister's Reply is also referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the admission contained in paragraph 8 of the Minister's Reply to the Notice of Appeal.

Signed at Ottawa, Canada, this 19th day of September 2000.

"Diane Campbell"

J.T.C.C.

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by LEXUM for the Federation of Law Societies of Canada

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Canadian Legal Information Institute
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Henry v. The Queen, 2002 CanLII 1037 (T.C.C.)

Date: 2002-10-10
Docket: 2002-621-IT-I
Parallel citations: [2003] 1 C.T.C. 2001
URL: http://www.canlii.org/en/ca/tcc/doc/2002/2002canlii1037/2002canlii1037.html
Noteup: Search for decisions citing this decision

Reflex Record (related decisions, legislation cited and decisions cited)

Date: 20021010

Docket: 2002-621-IT-I

BETWEEN:

YVONNE HENRY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Reasons for judgment

Little, J.T.C.C.

A. FACTS

[1] The Appellant was born in Jamaica. The Appellant and her 10-year old son moved to Canada as landed immigrants in 1993.

[2] In 1993 the Appellant and her son lived with the Appellant's sister and brother-in-law in Toronto.

[3] The Appellant and her son were unable to continue to live with the Appellant's sister and in 1994-1995 the Appellant and her son moved into an apartment that was rented by a girlfriend of the Appellant. The Appellant paid $300.00 per month as her share of the rent.

[4] The girlfriend of the Appellant was deported by Canadian Immigration authorities to Jamaica and the rent of $650.00 per month for the apartment was more than the Appellant could afford to pay.

[5] At the time that the Appellant's girlfriend was deported to Jamaica the Appellant met Lloyd Dean on a bus. Shortly after the initial meeting the Appellant asked Mr. Dean if he were interested in sharing part of the rent of the apartment with her and Mr. Dean agreed to do so.

[6] Mr. Dean moved into the apartment with the Appellant in 1995 and paid for approximately one-half of the rent. In 1996 the Appellant gave birth to a daughter. Lloyd Dean was the father of the child.

[7] The Appellant filed income tax returns for the 1997, 1998 and 1999 taxation years in which she indicated that she was single.

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[8] From 1996 to 2000 the Appellant received child tax benefits from the Government of Canada for her son and her daughter. The amount of the child tax benefits received by the Appellant was based solely upon the income received by the Appellant.

[9] Sometime in 1998 an official of the Canada Customs and Revenue Agency (the "CCRA") talked to the Appellant by telephone. During this conversation the official asked the Appellant if she was living with Lloyd Dean. The Appellant replied, "we live together".

[10] On the 19th day of May 2000 Child Tax Benefit Notices were issued for the 1996, 1997 and 1998 base years. The net effect of the said Notices was to combine the Appellant's income with the income of Lloyd Dean and reduce the amount of the child tax benefits that the Appellant might claim.

[11] On the 18th day of August 2000 Child Tax Benefit Notices were issued for the 1998 and 1999 base years. The net effect of the said Notices was to combine the Appellant's income with the income of Lloyd Dean and reduce the amount of the child tax benefits that the Appellant might claim.

[12] As a result of the Notices issued by the CCRA the Appellant was obliged to return a major portion of the child tax benefits that she received for her son and daughter.

[13] The Appellant maintains that the relationship that she had with Lloyd Dean was nothing more than a "rent sharing" arrangement and therefore she should not be required to file her income tax returns on the basis that she had a common law marriage with Lloyd Dean.

B. ISSUE

[14] Did the Appellant have a common law relationship with Lloyd Dean in the 1997, 1998, 1999 and 2000 taxation years?

C. ANALYSIS

[15] The statutory provisions providing for child tax benefits require that the spouse's income be taken into account. Subsection 252(4) of the *Income tax Act* (the "*Act*") reads as follows:

(4) **Idem.** In this Act,

(a) words referring to a spouse at any time of a taxpayer include the person of the opposite sex who cohabits at that time with the taxpayer in a conjugal relationship and

(i) has so cohabited with the taxpayer throughout a 12-month period ending before that time, or

(ii) would be a parent of a child of whom the taxpayer would be a parent, if this Act were read without reference to paragraph (1)(*e*) and subparagraph (2)(*a*)(iii)

and, for the purposes of this paragraph, where at any time the taxpayer and the person cohabit in a conjugal relationship, they shall, at any particular time after that time, be deemed to be cohabiting in a conjugal relationship unless they were not cohabiting at the particular time for a period of at least 90 days that includes the particular time because of a breakdown of their conjugal relationship;

(b) references to marriage shall be read as if a conjugal relationship between 2 individuals who are, because of paragraph *(a)*, spouses of each other were a marriage;

(c) provisions that apply to a person who is married apply to a person who is, because of paragraph *(a)*, a spouse of a taxpayer; and

(d) provisions that apply to a person who is unmarried do not apply to a person who is, because of paragraph *(a)*, a spouse of a taxpayer.

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[16] This definition requires us to consider the meaning of a "conjugal relationship" i.e., when can two persons be considered to be living in a conjugal relationship.

[17] A very useful analysis of the meaning of a conjugal relationship can be found in the decision of my colleague Lamarre Proulx, J. in *Sylvie Milot v. The Queen,* reflex, [1996] 1 C.T.C. 2247. Her Honour Judge Lamarre Proulx said at page 2250:

In their book, *Introduction to Canadian Family Law*, Carswell, 1994, the Ontario authors Payne and Payne refer to the judgment by Kurisko J. in Molodowich and Penttinen, 17 R.F.L. (3d) 376. I cite these authors at pages 38 and 39 because it seems to me they provide an excellent synthesis of the elements that must apply in order to determine whether two persons are living in a conjugal relationship:

Not all arrangements whereby a man and a woman live together and engage in sexual activity will suffice to trigger statutory support rights and obligations. As was observed by Morrison J.A., of the Nova Scotia Court of Appeal:

I think it would be fair to say that to establish a common law relationship there must be some sort of stable relationship which involves not only sexual activity but a commitment between the parties. It would normally necessitate living under the same roof with shared household duties and responsibilities as well as financial support.

More specific judicial guidance as to what constitutes cohabitation or a conjugal or marriage-like relationship is found in a judgment of the Ontario District Court, wherein Kurisko D.C.J. identified the following issues as relevant:

(Note: I will refer to the issues cited by Kurisko D.C.J. and I will insert the comments that were made by the Appellant when asked about these issues at the trial.)

1. Shelter

(a) Did the parties live under the same roof?

Comment Yes

(b) What were the sleeping arrangements?

Comment: The Appellant said, "when we had two bedrooms we basically had to sleep together. But when we went to the three bedrooms then obviously I could get a room with my daughter and he had one, which he spent most of his time in, and my son had the other one. (Transcript page 111)

(c) Did anyone else occupy or share the available accommodation?

Comment: The Appellant's son and daughter.

2. Sexual and Personal Behaviour

(a) Did the parties have sexual relations?

Comment: The Appellant said that when she had a room by herself sex was very irregular. The Appellant said that in the later years she only had sexual relations with Mr. Dean when she was forced to do so.

(b) Did they maintain an attitude of fidelity to each other?

Comment: The Appellant said that Mr. Dean had lady friends but he did not bring them to the apartment.

(c) What were their feelings toward each other?

Comment: The Appellant's answer to this question was "NIL".

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(d) Did they communicate on a personal level?

Comment: The Appellant's comment "No".

(e) Did they eat their meals together?

Comment: The Appellant said that Mr. Dean would always take his food and eat his meals in his room and he would not eat with the family.

(f) What, it anything, did they do to assist each other with problems or during illness?

Comment: The Appellant said that she took care of her own problems and Mr. Dean never helped her in any way.

(g) Did they buy gifts for each other on special occasions?

Comment: The Appellant said with the exception of one Christmas present which Mr. Dean gave her when he first moved into the apartment in 1995 he never gave her a gift on any occasion.

3. Services

What was the conduct and habit of the parties in relation to:

(a) preparation of meals

Comment: The Appellant said that she prepared virtually all of the meals. The Appellant said that Mr. Dean would on infrequent occasions buy food from a take-out restaurant and bring it to the apartment.

(b) washing and mending clothes

Comment: The Appellant said that she washed and mended her clothes and her children's clothes and Mr. Dean washed his own clothes.

(c) shopping

Comment: The Appellant testified that she purchased virtually all of the groceries using her own money. The Appellant said that Mr. Dean would occasionally purchase beef or chicken but never other grocery items.

(d) maintenance

Comment: The Appellant said that this was her responsibility. She said that either she or her son would take care of maintenance problems in the apartment suite or she would telephone the superintendent. The Appellant said that Mr. Dean did not assist with any of the maintenance problems.

4. Social

(a) Did they participate together or separately in neighbourhood and community activities?

Comment: The Appellant answered "separately". The Appellant said that frequently Mr. Dean would go out by himself.

The Appellant said "He lives his own life and I live mine". The Appellant also said that Mr. Dean would frequently take holidays to the United States or elsewhere but he would never ask the Appellant to accompany him on these holidays.

During the trial the following exchange occurred:

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His Honour - Is it your view that you were sharing an apartment as opposed to living as husband and wife...?

The Appellant - Sure, that's all we were doing.

(Transcript p. 60)

(b) What was the relationship and conduct of each of them towards members of their respective families and how did such families behave towards each other?

Comment: The Appellant said that after they moved to a three-bedroom apartment Mr. Dean's children from a previous marriage would occasionally come to their apartment for dinner. On these occasions Mr. Dean would usually prepare the meal.

5. Societal

What was the attitude and conduct of the community toward each of them and as a couple?

Comment: The Appellant said that people in the community knew that we lived together but they did not see us together. However the Appellant stated: "He is always going out by himself and I am always by myself".

The Appellant also said that she went to church but Mr. Dean never went to church with her.

6. Support (economic)

(a) What were the financial arrangements between the parties regarding the provision of or contribution toward the necessaries of life (food, clothing, shelter, recreation, etc.)?

Comment: The Appellant said that Mr. Dean only paid for approximately one-half of the rent and the cost of a babysitter for his daughter. The Appellant said that Mr. Dean seldom bought any food and never bought any clothes for his daughter. The Appellant also testified that Mr. Dean never bought any furniture for the apartment and he never paid for any recreation or entertainment expenses for the Appellant or his daughter. The Appellant also said that she personally paid the utility bills and other expenses of operating the apartment.

(b) What were the arrangements concerning the acquisition and ownership of property?

Comment: As noted above the Appellant paid for all of the furniture and the Appellant did not own an automobile or any other assets. The Appellant said that the only piece of furniture purchased by Mr. Dean was a crib for his daughter.

(c) Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

Comment: The Appellant maintained that in her opinion the overall relationship was basically rent sharing. The Appellant testified that at the time they started to share the rent she was hopeful that she could establish a normal relationship with Mr. Dean. However, during the period that they shared the rent she determined that this was impossible. The Appellant said she discovered that Mr. Dean was very mean and cold to her and the family and in the year 2000 she forced him to leave her apartment.

7. Children

The Appellant stated that Mr. Dean was the father of her daughter.

[18] From an analysis of the above comments I have concluded that the Appellant had established a common law relationship with Lloyd Dean in 1995 which continued in 1996 and 1997. However, I have concluded from the testimony of the Appellant that this common law relationship broke down sometime in 1997. Consequently, it follows that in 1998, 1999 and 2000 the Appellant and Mr. Dean had nothing more than a rent sharing relationship.

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[19] Before disposing of these appeals there is a technical issue which I must address. Mr. Ather, counsel for the Respondent, stated that the Appellant's Notices of Objection for the 1996 and 1997 taxation years were late. Mr. Ather said that the Appellant missed the final extension deadline for the 1996 and 1997 taxation years by one year and one-half. Mr. Ather said that with respect to the Notices issued on August 18, 2000 for the 1998 and 1999 taxation years the Appellant missed the deadline by three or four days.

[20] While the Tax Court of Canada does not have the authority to extend the deadline imposed by the *Act* to enable the Appellant to file a Notice of Objection within the time specified in the *Act*, I urge the Minister to recognize the Appellant's Notices of Objection to the Notice issued on August 18, 2000 for the 1998 and 1999 taxation years.

[21] I also urge the Minister to issue a remission of tax under section 22 of the *Financial Administration Act* on the basis that the appropriate tax assessed against the Appellant for the period commencing January 1, 1998 to the period ending December 31, 2000 is remitted to the Appellant.

[22] The appeals will be dismissed on the basis as outlined above subject to the request that the Minister issue a remission of tax for the 1998, 1999 and 2000 taxation years.

Signed at Vancouver, British Columbia, this 10th day of October 2002.

"L.M. Little"

J.T.C.C.COURT FILE NO.:	2002-621(IT)I
STYLE OF CAUSE:	Yvonne Henry and
Her Majesty The Queen	
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	July 22, 2002
REASONS FOR JUDGMENT BY:	The Honourable Judge L.M. Little
DATE OF JUDGMENT:	October 10, 2002
APPEARANCES:	
For the Appellant:	The Appellant herself
Counsel for the Respondent:	A'Amer Ather
COUNSEL OF RECORD:	
For the Appellant:	
Name:	
Firm:	
For the Respondent:	Morris Rosenberg
	Deputy Attorney General of Canada
	Ottawa, Canada

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2002-621(IT)I

BETWEEN:

YVONNE HENRY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on July 22, 2002, at Toronto, Ontario, by

the Honourable Judge L.M. Little

Appearances

For the Appellant: The Appellant herself

Counsel for the Respondent: A'Amer Ather

Judgment

The appeals from the assessments made under the *Income Tax Act* for the 1995, 1996 and 1997, 1998, 1999 and 2000 taxation years are dismissed in accordance with the attached Reasons for Judgment.

Signed at Vancouver, British Columbia this 10th day of October 2002.

"L.M. Little"

J.T.C.C.

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by LEXUM for the Federation of Law Societies of Canada

(34)

Docket: 2007-861(IT)I

BETWEEN:

MARIE AUKSTINAITIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

2008 TCC 104 (CanLII)

Appeals heard on December 13, 2007, at Ottawa, Ontario.
Before: The Honourable Associate Chief Justice Gerald J. Rip

Appearances:

Appellant:	The Appellant herself
Counsel for the Respondent:	Marie-Claude Boisvert

JUDGMENT

The appeal from the assessment dated June 20, 2006, by which the Minister of National Revenue ("the Minister") disallowed the Canada Child Tax Benefit attributable to the Appellant for the 2002, 2003 and 2004 base years for the period from July 2005 to June 2006, and from the assessment dated May 26, 2006, by which the Minister disallowed the Goods and Services Tax Credit attributable to the Appellant for the 2002, 2003 and 2004 taxation years for the period from July 2003 to June 2006, are allowed, with costs, if any, and the assessments are referred back to the Minister for reconsideration and reassessment on the basis that the Appellant was an eligible individual within the meaning of the *Income Tax Act*.

Signed at Ottawa, Canada, this 19th day of February 2008.

"Gerald J. Rip"

Rip A.C.J.

Translation certified true
on this 11th day of April 2008.
Susan Deichert, Reviser

Citation: 2008TCC104
Date: 20080219
Docket: 2007-861(IT)I

2008 TCC 104 (CanLII)

BETWEEN:

MARIE AUKSTINAITIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Rip A.C.J.

I. INTRODUCTION

[1] These appeals, heard under the informal procedure, pertain to the 2002, 2003 and 2004 base years. The Minister of National Revenue ("the Minister") assessed the Appellant for the periods under appeal, and, based on the assumption that Marc Mongeon was her common-law partner, disallowed the Goods and Services Tax Credit ("GSTC") and the Canada Child Tax Benefit ("CCTB"). Consequently, the Minister assessed the Appellant for the periods from July 2005 to June 2006 and July 2003 to June 2006 for the deemed CCTB and GSTC overpayments.

[2] The Minister based his assessments on the following facts:

[TRANSLATION]

(a) The Appellant and Marc Mongeon have a child. (confirmed by the Appellant)

(b) The child was born on September 30, 2000. (confirmed by the Appellant)

(c) The Appellant and Marc Mongeon lived together throughout the relevant period.

(d) The Appellant and Marc Mongeon shared certain financial responsibilities throughout the relevant period.

(e) The Appellant and Marc Mongeon jointly assumed responsibility for the care and upbringing of the child throughout the relevant period.

2008 TCC 104 (CanLII)

[3] Thus, the issue for determination in the instant case is whether Marc Mongeon was the Appellant's common-law partner during the periods under appeal.

II. FACTS

[4] It should be noted that Marc Mongeon did not appear at the hearing of this appeal, even though he was served with a notice of appearance.

[5] The Appellant and Marc Mongeon lived together as common-law partners from 1999 to March 17, 2001. Their child was born during this period.

[6] On September 27, 2001, following the breakdown of their relationship, the Quebec Superior Court issued an agreement concerning the child's shared custody. Marc Mongeon subsequently had another common-law partner, and a second child was born from that relationship. In 2003, Marc Mongeon separated from this second common-law partner. He declared personal bankruptcy in November 2003.

[7] Mr. Mongeon then went to live with the Appellant from the beginning of 2004 to July 2006. It is this period of cohabitation that gave rise to the instant appeal.

III. THE PARTIES' POSITIONS

[8] The Appellant clearly did not consider herself to be Mr. Mongeon's common-law partner during the periods in issue. In her submission, they were merely cohabiting and sharing the custody of their child in accordance with a Superior Court order, and nothing more. Hence, she claims to be entitled to the credits that were disallowed.

[9] By contrast, the Respondent submits that the Appellant and Mr. Mongeon were common-law partners during the periods in issue. Based on this determination, the Respondent submits that the Appellant is not entitled to the credits in issue.

2008 TCC 104 (CanLII)

V. ANALYSIS

[10] The income of the common-law partner must be taken into account in computing the GSTC and CCTB.

[11] Subsection 248(1) of the *Income Tax Act* defines "common-law partner" for the purposes of the Act as follows:

> "common-law partner", with respect to a taxpayer at any time, means a person who cohabits at that time in a conjugal relationship with the taxpayer and
>
> (*a*) has so cohabited with the taxpayer for a continuous period of at least one year, or
>
> (*b*) would be the parent of a child of whom the taxpayer is a parent, if this Act were read without reference to paragraphs 252(1)(*c*) and (*e*) and subparagraph 252(2)(*a*)(iii),
>
> and for the purposes of this definition, where at any time the taxpayer and the person cohabit in a conjugal relationship, they are, at any particular time after that time, deemed to be cohabiting in a conjugal relationship unless they were not cohabiting at the particular time for a period of at least 90 days that includes the particular time because of a breakdown of their conjugal relationship;

[12] For the purposes of the GSTC and CCTB, section 122.6 of the Act defines "cohabiting spouse or common-law partner" as follows:

> "cohabiting spouse or common-law partner" of an individual at any time means the person who at that time is the individual's spouse or common-law partner and who is not at that time living separate and apart from the individual and, for the purpose of this definition, a person shall not be considered to be living separate and apart from an individual at any time unless they were living separate and apart at that time, because of a breakdown of their marriage or common-law partnership, for a period of at least 90 days that includes that time;

2008 TCC 104 (CanLII)

[13] The former subsection 252(4) defined the terms "spouse" and "marriage". In *Milot v. The Queen*,[1] my colleague Lamarre Proulx J. wrote the following:

> 11 This definition [the former subsection 252(4)] leads us to consider the notion of conjugal relationship. When can two persons be considered as living in a conjugal relationship? This notion has often been studied for the purposes of various statutes. In Quebec, for example, this notion was studied in particular for the application of the *Automobile Insurance Act*, R.S.Q., c. A-25, s. 2, para. 2, and the *Act respecting the Québec Pension Plan*, R.S.Q., c. R-9, s. 91. See *Les personnes et les familles*, Knoppers, Bernard et Shelton, Tome 2, Les éditions Adage, the first chapter of which is entitled "Les familles de fait". It states that cohabitation is fundamental in a conjugal relationship and in conjugal conduct. That conduct may be determined through sexual relations, emotional and intellectual exchange, financial support and common knowledge.

[14] Lamarre Proulx J. went on to apply the factors developed by Kurisko D.C.J. in *Molodowich v. Penttinen*[2] to determine what a conjugal relationship is. The judgment of the Ontario District Court provides more precisely what constitutes cohabitation or a conjugal or marriage-like relationship. Specifically, Kurisko D.C.J. provides the following list of relevant points:

1. Shelter:

(a) Did the parties live under the same roof?
(b) What were the sleeping arrangements?
(c) Did anyone else occupy or share the available accommodation?

---

1 1995 CarswellNat 1987, [1996] 1 C.T.C. 2247, at page 2250.
2 (1980), 17 R.F.L. (2d) 376 (Ont Dist. Ct.).

2. Sexual and personal behaviour:

(a) Did the parties have sexual relations? If not, why not?
(b) Did they maintain an attitude of fidelity to each other?
(c) What were their feelings toward each other?
(d) Did they communicate on a personal level?
(e) Did they eat their meals together?
(f) What, if anything, did they do to assist each other with problems or during illness?
(g) Did they buy gifts for each other on special occasions?

3. Services:

What was the conduct and habit of the parties in relation to:

(a) Preparation of meals,
(b) Washing and mending clothes,
(c) Shopping,
(d) Household maintenance,
(e) Any other domestic services?

4. Social:

(a) Did they participate together or separately in neighbourhood and community activities?
(b) What was the relationship and conduct of each of them towards members of their respective families and how did such families behave towards the parties?

5. Societal:

What was the attitude and conduct of the community towards each of them and as a couple?

6. Support (Economic):

(a) What were the financial arrangements between the parties regarding the provision of or contribution towards the necessaries of life (food, clothing, shelter, recreation, etc.)?
(b) What were the arrangements concerning the acquisition and ownership of property?
(c) Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

7. Children:

What was the attitude and conduct of the parties concerning children?

2008 TCC 104 (CanLII)

2008 TCC 104 (CanLII)

As Kurisko D.C.J. further observed, the extent to which each of the aforementioned seven different components will be taken into account must vary with the circumstances of each particular case.

[15] The approach laid down in *Molodowich* was later approved by the Supreme Court of Canada in *M v. H.*[3] As stated there, it should be borne in mind that these factors must not be followed blindly but rather applied based on the specific facts of each case:

> **59** *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), sets out the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple. However, it was recognized that these elements may be present in varying degrees and not all are necessary for the relationship to be found to be conjugal. While it is true that there may not be any consensus as to the societal perception of same-sex couples, there is agreement that same-sex couples share many other "conjugal" characteristics. In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is "conjugal".
>
> **60** Certainly an opposite-sex couple may, after many years together, be considered to be in a conjugal relationship although they have neither children nor sexual relations. Obviously the weight to be accorded the various elements or factors to be considered in determining whether an opposite-sex couple is in a conjugal relationship will vary widely and almost infinitely. The same must hold true of same-sex couples. Courts have wisely determined that the approach to determining whether a relationship is conjugal must be flexible. This must be so, for the relationships of all couples will vary widely. In these circumstances, the Court of Appeal correctly concluded that there is nothing to suggest that same-sex couples do not meet the legal definition of "conjugal".

[16] In *Rangwala v. Canada*,[4] Campbell J. also emphasized the importance of applying the test flexibly in order to take the facts of each case into consideration, by adopting the remarks made by Wilson J. in *Macmillan-Dekker v. Dekker*:[5]

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3 [1999] 2 S.C.R. 3. See also *Lavoie v. Canada*, 2001 DTC 5083 (F.C.A.), which followed *Milot*.
4 [2000] T.C.J. No. 624 (QL).
5 [2000] O.J. No. 2957 (QL).

(41)

23 He also states that:

> . . .
>
> I conclude that there is no single, static model of a conjugal relationship, nor of marriage. Rather, there are a cluster of factors which reflect the diversity of conjugal and marriage relationships that exist in modern Canadian society. Each case must be examined in light of its own unique objective facts.[6]

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[17] In *Sanford v. Canada*,[7] affirmed by the Federal Court of Appeal,[8] Morgan J. noted that a taxpayer's civil status should determined by objective standards, not by subjective attitudes.[9]

[18] All of this must be taken into consideration in applying *Milot* to the specific facts of the instant case.

[19] In fact, the Appellant responded to each factor of this test.

1. Shelter:

(a) Did the parties live under the same roof?

(b) What were the sleeping arrangements?

(c) Did anyone else occupy or share the available accommodation?

[20] Clearly, the Appellant and Marc Mongeon lived under the same roof with their son, and Mr. Mongeon's other son sometimes lived with them. Nonetheless, the Appellant testified that they each had their own bed and their own room.

[21] It is settled law that the mere fact that two people live together is not sufficient to conclude that they are common-law partners.[10] In fact, in *Kelner v. Canada*,[11] Bowman J. (as he then was) stated as follows:

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6 *Dekker*, at paragraph 68.

7 [2000] T.C.J. No. 801.

8 2002 DTC 7442.

9 "[18] In deciding whether the Appellant and Markus Buchart cohabit in a conjugal relationship within the meaning of paragraph 252(4)(*a*), their status must be determined by objective standards and not by subjective attitudes. . . . "

10 For example, see *Rangwala v. The Queen*, [2000] 4 C.T.C. 2430; *Sigouin v.The Queen*, [2002] 1 C.T.C. 2596; *Uwasomba v. The Queen*, [2003] 2 C.T.C. 2295 and *Bellavance v. The Queen*, [2004] 4 C.T.C. 2179.

17 I start from the premise that it is possible for spouses, as a matter of law, to live separate and apart even though they are under the same roof.

18 In *Murphy v. Murphy* [1962] NSWR 417 Nield J. said at p. 424:

> There is the old story of "absence making the heart grow fonder"; but when people have an inability to accommodate themselves to one another, and are forced to occupy the same dwelling, to live under the same roof, with that difference in feeling; then the antagonisms build up and build up, as they see one another day after day; and the possibility of their ever coming together again becomes more and more remote and they tend to be more and more separated, by their hostility to one another, and apart from one another, in that they have nothing in common at all. I can see no reason in logic why one cannot say of people living under the same roof that they are living separate and apart; just as if they were living in different home.

19 I tend to think that Nield J. may have gone a little further than our courts would have. Courts in Canada have however recognized that parties may live separate and apart even though they are under one roof. *Rushton v. Rushton* [1969] 66 W.W.R. 764; *Tuomi v. Ungarian* [1991] 5 W.W.R. 424.

[22] To hold otherwise could result in absurd consequences in a modern context where former common-law partners, who have no chance of reconciliation, sometimes decide to continue to live together for the welfare of their child or simply because they cannot financially afford not to.

[23] The fact that the Appellant lived with Mr. Mongeon under the same roof is not fatal to her case. It is actually only one of the factors to take into account.

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[11] [1996] 1 C.T.C. 2687, [1995] T.C.J. No. 1130 (QL).

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(43)

2. Sexual and personal behaviour:

(a) Did the parties have sexual relations? If not, why not?

(b) Did they maintain an attitude of fidelity to each other?

(c) What were their feelings toward each other?

(d) Did they communicate on a personal level?

(e) Did they eat their meals together?

(f) What, if anything, did they do to assist each other with problems or during illness?

(g) Did they buy gifts for each other on special occasions?

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[24] The Appellant stated that she had no sexual relations with Mr. Mongeon, and had no other partners during the periods in issue. Apart from trying to maintain good communications with Mr. Mongeon for the welfare of their child, and having eaten at the same time as him in rare instances, nothing suggests to me that this second factor militates against the Appellant. On the contrary, it seems that the contacts and exchanges between the Appellant and Mr. Mongeon were minimal and limited to what one would expect of anyone who has to live with another person, share certain spaces with that person, and try to live in a civilized manner.

3. Services:

What was the conduct and habit of the parties in relation to:

(a) Preparation of meals,

(b) Washing and mending clothes,

(c) Shopping,

(d) Household maintenance,

(e) Any other domestic services?

[25] It appears that household maintenance and dishwashing were the only things that were essentially done by the Appellant. All other duties were apparently shared.

I do not see how this factor could either favour or oppose the existence of a conjugal relationship in the case at bar. In my opinion, it is not a decisive factor here.

4. Social:

(a) Did they participate together or separately in neighbourhood and community activities?

(b) What was the relationship and conduct of each of them towards members of their respective families and how did such families behave towards the parties?

5. Societal:

What was the attitude and conduct of the community towards each of them and as a couple?

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[26] Based on the Appellant's testimony, these criteria weigh heavily against a finding that there was a common-law partnership, because the Appellant and Mr. Mongeon did no social activities together, did not visit each other's families, did not introduce themselves as partners, and were not considered partners.

6. Support (Economic):

(a) What were the financial arrangements between the parties regarding the provision of or contribution towards the necessaries of life (food, clothing, shelter, recreation, etc.)?

(b) What were the arrangements concerning the acquisition and ownership of property?

(c) Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

[27] The extent of Mr. Mongeon's financial contribution to this cohabitation is unclear, but it appears that he covered at least the excess costs that his presence generated. It is true that such an arrangement could, at first sight, appear "abusive" for people who are not living in a common-law partnership. But one must bear in mind that Mr. Mongeon went to live with the Appellant after going bankrupt, and that she wanted him to be in a position to leave her residence as quickly as possible.

(7) **Children:**

What was the attitude and conduct of the parties concerning children?

[28] With respect to the last factor, there is a judgment of the Quebec Superior Court under which the Appellant and Mr. Mongeon have shared custody of their son. There is nothing in the evidence submitted before me that causes me to doubt that they were complying with this order even though they lived under the same roof. As the Appellant admitted, they did sometimes exchange custody-related duties, such as where the parent who did not have custody during a certain week would go to pick up the child at school because the other parent had to work late.

2008 TCC 104 (CanLII)

Conclusion

[29] A few factors favour the existence of a common-law relationship, but the majority do not.

[30] Despite the Appellant's submissions, it is clear that, during the period in issue, she and Marc Mongeon lived together, shared certain financial responsibilities and were jointly responsible for the care and upbringing of their child.

[31] Marc Mongeon and their son nonetheless each had a separate room. Mr. Mongeon also had his own fridge, and each person looked after his or her own grocery shopping. Mr. Mongeon stored the rest of his personal belongings at the Appellant's house, but used only what was necessary to furnish his room. The Appellant wanted Mr. Mongeon to be able to leave as easily and quickly as possible when the time came, and she wanted to avoid arguments concerning what belonged to him upon his departure.

[32] The Respondent presented Marc Mongeon's income for the years in issue with a view to showing that he did not in any way depend on the Appellant's financial assistance during that period. Perhaps so, but everything suggests that the Appellant was unaware of this, and that she merely wanted to ensure her child's welfare pending Mr. Mongeon's discharge from bankruptcy.

[33] The Appellant's testimony ranked very high in terms of its credibility, and aside from the fact that I disagree with the terms that she uses to describe certain facts, I have to believe her. In addition, the fact that Mr. Mongeon did not testify benefited the Appellant. Thus, I accept the Appellant's testimony. Consequently, the burden was on the Respondent to overturn this finding, but since the Respondent did not adduce anything more than Mr. Mongeon's income during the periods in issue, I have no choice but to find for the Appellant.

[34] When the Appellant decided to house her ex-partner temporarily, she was merely trying to be a responsible parent, and she should not be penalized for that.

[35] Based on all of the foregoing, I find, on a balance of probabilities, that the Appellant and Mr. Mongeon were not common-law partners during the periods in issue.

[36] I therefore allow the appeal, with costs, if any, and refer the assessments back to the Minister for reconsideration on the basis that Ms. Aukstinaitis's CCTB and GSTC are to be remitted to her.

Signed at Ottawa, Canada, this 19th day of February 2008.

"Gerald J. Rip"

Rip A.C.J.

Translation certified true
on this 11th day of April 2008.
Susan Deichert, Reviser

2008 TCC 104 (CanLII)

(47)

CITATION:	2008TCC104
COURT FILE NO.:	2007-861(IT)I
STYLE OF CAUSE:	Marie Aukstinaitis v. Her Majesty the Queen
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	December 13, 2007
REASONS FOR JUDGMENT BY:	The Honourable Associate Chief Justice Gerald J. Rip
DATE OF JUDGMENT:	February 19, 2008
APPEARANCES:	
For the Appellant:	The Appellant herself
Counsel for the Respondent:	Marie-Claude Boisvert
COUNSEL OF RECORD:	
For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Ontario

2008 TCC 104 (CanLII)

Canada Revenue Agency / Agence du revenu du Canada

OBJECTION – *INCOME TAX ACT*

- You can use this form to file an objection to a notice of assessment or a notice of determination issued under the *Income Tax Act*.
- Deliver or mail your completed form to the Chief of Appeals at your tax services office or tax centre.
- **Filing deadlines** – If you are an individual (other than a trust) or filing for a testamentary trust, the time limit for filing an objection is whichever of the following two dates is later: one year after the date of the return's filing deadline; or 90 days after the day we sent the notice of assessment or notice of determination. In every other case, you have to file an objection within 90 days of the day we sent the notice of assessment or notice of determination.
- **Large corporations** – In addition to providing facts and reasons for objecting, large corporations have to describe each issue and specify the relief they want for each one.
- **Collection action** – We usually postpone collection action on amounts in dispute until 90 days after we mail the Minister's decision. In some situations we will not postpone collection action on disputed amounts, such as for taxes you had to withhold and remit. In all cases, interest will continue to accrue on any amount payable.
- For more information, contact the Appeals Division at your tax services office or tax centre.

To: **Chief of Appeals**

Address (as shown on your notice)

.....

.....

.....

Name

From:

Address

.....

.....

Telephone (including area code)

Home ( )

Business ( )

Name and address of any authorized representative (if applicable)

.....

Telephone (including area code)

( )

Please provide the following information or enclose a copy of your notice of assessment or notice of determination.

Date of notice (Year / Month / Day)	Number of notice (if printed on notice)	Tax year (for T2s show fiscal period end)	Social insurance number or Business number

Please state the relevant facts and reasons for your objection (if you need more room, attach a separate sheet).

Your signature (or of an authorized person, if a corporation or trust is filing the objection)

Date (Year / Month / Day)

Privacy Act – Personal Information Bank Number CRA PPU 005

Canada

Tax Court of Canada

Please Print in Ink

Notice of Appeal – Informal Procedure

Type of appeal

☐ Customs Act ☐ Excise Act, 2001
☐ Income Tax Act ☐ Excise Tax Act (GST)

Taxation Year(s) or Assessment Number(s)

(For an Excise Tax (GST) appeal, indicate the period of assessment and the assessment number)

Date of Reassessment, Confirmation or Decision from the Canada Revenue Agency

Name and Address of Appellant

Mr. ☐ Mrs. ☐ Ms. ☐ Miss ☐

Name and Surname of individual or company name

Address

City | Province | Postal Code

Telephone Number(s):

( ) Home ( ) Work

( ) Fax

E-mail address (if applicable)

☐ I ELECT TO HAVE THE INFORMAL PROCEDURE APPLY TO THIS APPEAL

TCC USE ONLY

Appeal No.:

If You Are Not Representing Yourself, Please Complete the Following

Name of representative

Name of firm if applicable

Address

City | Province | Postal Code

Type of Representation

Lawyer ☐ Accountant ☐ Other ☐

Other, please specify:

Telephone Number(s)

( ) Home ( ) Work

( ) Fax

E-mail address (if applicable)

see reverse

Statement of relevant facts and reasons in support of your appeal in which you say why you disagree with the Canada Revenue Agency's decision

(use another sheet, if required)

Date Signature

(51)

Skip to main content Skip to institutional links

Income Tax & Excise Tax (GST)

Note: The forms and information on these pages are provided as a public service. They were written by employees of the Court. Employees are **not** permitted to give legal advice. For legal advice, you are encouraged to refer to the particular statute or to consult a lawyer.

- Procedure prior to appealing to the TCC
- Ways in which an appeal may be resolved
- The two types of procedure
- Informal Procedure
- Submitting the notice of appeal
- What to include in the notice of appeal
- What happens once I submit my notice of appeal
- Extending the time to appeal
- How to appeal a decision of the TCC
- Notice of Appeal Form (Informal Procedure) PDF Version (for printing only)
- General Procedure
- Submitting the notice of appeal
- Filing Fees
- What happens once I submit my notice of appeal
- Extending the time to appeal
- How to appeal a decision of the TCC
- Notice of Appeal Form (General Procedure) PDF Version (for printing only)

PROCEDURE PRIOR TO APPEALING TO THE TCC

Before appealing to the TCC to have it resolve an income tax or GST dispute, you must first send a "notice of objection" to the Canada Revenue Agency (CRA). The review of your notice of objection by the CRA will result in a reassessment, a confirmation or a determination. If you do not agree with the CRA's answer to your notice of objection, you have 90 days from the date of the CRA's reassessment, confirmation or determination in which to appeal to the TCC.

You may also appeal to the TCC if the CRA does not respond to your notice of objection within 90 days in an income tax case or 180 days in a GST case.

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WAYS IN WHICH AN APPEAL MAY BE RESOLVED

If the appeal proceeds to a court hearing, the appeal is resolved by having both parties appearing in court to present their versions of the facts to a judge. It is important to note that you will have to explain why you disagree with the CRA's decision and provide evidence to that effect.

The judge will then decide the appeal based on the evidence and arguments presented to the Court.

It is always advisable to attempt to resolve a dispute without going to court. Both parties are encouraged to communicate with each other throughout the process to see if they can reach an agreement without going to court.

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THE TWO TYPES OF PROCEDURES

There are two types of procedures for appealing to the TCC: (1) the Informal Procedure and (2) the General Procedure.

Please refer to Your Day in Court for an overview of court procedure.

(1) INFORMAL PROCEDURE

The Informal Procedure is intended to minimize and simplify the legal steps involved in the appeal process: see section 18.3001 of the Tax Court of Canada Act and the Rules.

For income tax appeals the Informal Procedure is limited to cases in which the amount of federal tax and penalties in dispute for each taxation year, excluding interest, is $12,000 or less. For GST appeals, on the other hand, there is no limit to the amount in dispute.

When the amount in dispute in an income tax case is greater than $12,000, a taxpayer who chooses the Informal Procedure must decide to limit the amount under appeal to $12,000; otherwise the General Procedure will apply.

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SUBMITTING THE NOTICE OF APPEAL

In the Informal Procedure, you may represent yourself or be represented by a lawyer or an agent. You are encouraged to use the "Notice of Appeal - Informal Procedure" form, or our online document-filing facility accessible through our Web site. A letter is also acceptable. An original and two (2) copies of your notice of appeal must be submitted to a TCC office of your choice. You may do this in person or by mail. Facsimiles and electronic documents are also accepted, and do not require the filing of the original and two (2) copies.

You are encouraged to use our Electronic Filing facility when submitting your completed "Notice of Appeal" form, and any other document. A letter is also acceptable. Facsimiles and electronic documents are accepted without the need to forward the original notice of appeal and two (2) copies.

If you submit in person or by mail, the original notice of appeal and two (2) copies must be submitted to the Registry at any Tax Court of Canada office.

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WHAT TO INCLUDE IN THE NOTICE OF APPEAL

Your notice of appeal must include: See section 4 of the Informal Procedure Rules.

- your full name, your mailing address, telephone number and fax number (if available), and those of your lawyer or agent (if applicable);
- the taxation year(s) under appeal or the assessment number;
- the date of the reassessment or confirmation (if applicable, please attach a copy);
- the grounds for the appeal;
- a statement that you are appealing under the Informal Procedure;

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- if applicable (in an income tax appeal), a statement that you are limiting the amount of your appeal to $12,000 for each year under appeal; and
- the date of your appeal and your signature.

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WHAT HAPPENS ONCE I SUBMIT MY NOTICE OF APPEAL TO THE TCC

Once your notice of appeal has been received by the Registry, you will receive a letter of acknowledgement. The TCC will forward a copy of your notice of appeal to CRA, which will reply to your notice of appeal within 60 days.You or your representative will receive a copy of this reply, which contains the CRA's position regarding your appeal.

Usually within 180 days after receiving the reply to your notice of appeal, the TCC will schedule a hearing. A "notice of hearing" which indicates the time and location of your hearing will be sent to you or your representative by registered mail. The notice of hearing will be mailed at least 30 days before your hearing.

An adjournment may be requested prior to the hearing date; however, the Court is reluctant to grant adjournments unless the parties are faced with circumstances which would not permit the hearing to proceed.

On the hearing day, all the parties will appear in court to present their evidence and arguments before the judge. You should think carefully and well ahead of time on how you will present your evidence, and which witnesses and documents you may need to support your position. The parties are encouraged, throughout the process, to contact each other and discuss their positions and any tentative settlement.

The judge may render a decision on your appeal immediately at the end of the hearing but in most cases this is done within 90 days after the hearing. The TCC will send a copy of the judge's decision to both parties.

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EXTENDING THE TIME TO APPEAL

If you miss the deadline for initiating an appeal, you may apply to the TCC to extend the time limit. You have one year and 90 days from the date of the reassessment or from the date of the confirmation of the original assessment to file an application to extend the time to appeal.

This application may be in the form of a letter. Your application must indicate that you are applying to extend the time within which an appeal may be brought and you must give the reasons why it was not possible to appeal by the deadline. You can also use our online document-filing facility accessible through our Web site. In the former case, the original and two (2) copies of the application, together with the original and two (2) copies of the notice of appeal, must be sent to the Registry at a TCC office.

Once the Registry has received your application, it will be forwarded to the CRA. Justice Canada, which represents the CRA, may respond to the application. If the CRA opposes the application, the TCC will schedule a hearing to give both parties the opportunity to present evidence and make arguments to a judge. The judge will then issue a decision either dismissing or granting the application. If the CRA does not oppose the application, the TCC will review your application without a hearing. The decision will be sent to you or your representative, if applicable.

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HOW TO APPEAL A DECISION OF THE TCC

If you are dissatisfied with a decision of the TCC under the Informal Procedure you may apply to the Federal Court of Appeal to have it review the decision. The deadlines for appealing can be found in the reference table.

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(2) GENERAL PROCEDURE

Appeals under the General Procedure are subject to a number of formal procedures and legal steps. A copy of the TCC's rules may be required to help you follow the entire process. The rules may be obtained from any TCC office or consulted on our Web site.

See section 17 of the *Tax Court of Canada Act* and the General Procedure Rules

Under this procedure, formal court procedures are closely followed.

When appealing under the General Procedure, you may represent yourself or be represented by a lawyer. A corporation must be represented by a lawyer unless the TCC grants a request allowing an officer of the corporation to represent it.

An appeal is initiated by submitting the original and two (2) copies of your notice of appeal, together with the appropriate filing fee, to the Registry at a TCC office. You may do so in person or by mail.

You may also send your notice of appeal by fax or by using our online document-filing facility accessible through our Web site. Facsimiles and electronic documents are accepted without the need to forward the original notice of appeal and two (2) copies. The filing fee must follow by mail.

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SUBMITTING THE NOTICE OF APPEAL

Under the General Procedure, your notice of appeal must be submitted in the format set out in the "Notice of Appeal - General Procedure" form.

You are encouraged to use our Electronic Filing facility in submitting your documents, including the "Notice of Appeal" form. Facsimiles and electronic documents are accepted without the need to forward the original notice of appeal and two (2) copies.

If you submit in person or by mail, the original notice of appeal and two (2) copies must be submitted to the Registry at any Tax Court of Canada office.

FILING FEES

The following fees are required at the time the appeal is initiated:

- where the amount in issue is less than $50,000 -- the fee is $250;
- where the amount in issue is $50,000 or more but less than $150,000 - the fee is $400;
- where the amount in issue is $150,000 or more -- the fee is $550.

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Cheques must be made in Canadian funds payable to the Receiver General for Canada. If the notice of appeal is filed in person, a debit card may also be used.

WHAT HAPPENS ONCE I SUBMIT MY NOTICE OF APPEAL

Once your notice of appeal has been sent to the Registry and the appropriate filing fee has been paid, the TCC will forward your notice of appeal to Justice Canada, CRA's representative. Justice Canada must reply to the notice of appeal within 60 days. You or your lawyer will receive a copy of this reply, which contains the CRA's position regarding your appeal. You or your lawyer may answer the reply within 30 days of receiving it.

Once you have answered the reply or the time limit for answering has expired, the parties are required to exchange lists of the documents they will be relying on at the hearing. Examinations for discovery usually follow. An application to schedule a hearing date may be made jointly by the parties to the appeal, or by one of the parties, after these procedural steps are completed or the parties have agreed that they are unnecessary. Other procedural steps can also occur in preparation for the hearing, such as motions, the filing of experts' reports, and pre-hearing conferences.

If no application has been received within 2 months after the reply was received from Justice Canada, the Court may call the parties together to determine the status of the appeal. At that time, the judge may set time limits for completing any remaining steps and schedule a date for your hearing.

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EXTENDING THE TIME TO APPEAL

If you miss the deadline for initiating an appeal, you may apply to the TCC to extend the time limit. You have one year and 90 days from the date of the reassessment or from the date of the confirmation of the original assessment to file an application to extend the time to appeal.

This application may be in the form of a letter. Your application must indicate that you are applying to extend the time within which an appeal may be brought and you must give the reasons why it was not possible to appeal by the deadline. You can also use our online document-filing facility accessible through our Web site. In the former case, the original and two (2) copies of the application, together with the original and two (2) copies of the notice of appeal, must be sent to the Registry at a TCC office.

Once the Registry has received your application, it will be forwarded to the CRA. Justice Canada, which represents the CRA, may respond to the application. If the CRA opposes the application, the TCC will schedule a hearing to give both parties the opportunity to present evidence and make arguments to a judge. The judge will then issue a decision either dismissing or granting the application. If the CRA does not oppose the application, the TCC will review your application without a hearing. The decision will be sent to you or your representative, if applicable.

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HOW TO APPEAL A DECISION OF THE TCC

If you are dissatisfied with a decision of the TCC you may appeal it to the Federal Court of Appeal within 30 days after the issuance of the TCC judgment. The deadlines for appealing can be found in the reference table.

9. Other Issues and Resources

- **LSS Update PowerPoint presentation**
- **Investigations: Office of the Ombudsperson PowerPoint presentation**
- **Boundaries and Self Care**
    - Boundaries and Self Care PowerPoint presentation
    - Boundaries Table
    - Boundary dilemma
    - Boundary setting tips
    - Compassion and Caretaking
    - The No Credo
- **Discussion on Seniors' Issues PowerPoint presentation**
- **Working Effectively with Clients with Mental Health Issues**
    - Working Effectively with Clients with Mental Health Issues PowerPoint presentation
    - Values Sheet

THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

Working Together with LSS Intake



November 20, 2012

Sarah Khan
Coordinator, Intake and Referral Services
Tel: 604-601-6207

1

There are two ways to apply for legal aid at this time:

- 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.)

2

Our clients







3

Who qualifies?

How does a person qualify for legal aid? The following two criteria must be met:

1. Their legal problem is covered by LSS; and
2. They qualify according to our financial guidelines

Approved

4

What legal problems are eligible for coverage?

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



5

- **Family Law** – Serious family situations regarding custody, access, guardianship, restraining orders, child support and more depending on the issues. These situations need to be addressed immediately to ensure the safety of the applicant and or children.



6

- **Child removal** – Where the Ministry of Children and Family Development has removed a child or where there is a threat of a child being removed. These matters also include any custody or access issues arising from a child in care.



7

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



8

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



9

Financial Eligibility

Income chart(All case types)

Household Size	Monthly Net Income
1	$1,470
2	$2,050
3	$2,640
4	$3,230
5	$3,810
6	$4,400
7 or more	$4,990

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Financial Eligibility

Personal Property (All case types)

Household Size	Exemption
1	$2,000
2	$4,000
3	$4,500
4	$5,000
5	$5,500
6 or more	$6,000

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Appealing a refusal

- **If a client is refused legal aid he or she has the right to appeal the refusal.**
  - This must be in writing.
  - The client should note the reasons for disagreeing with the refusal.
  - The client should include any supporting documents.
- Coverage and financial eligibility reviews must be submitted within 30 days of being refused legal aid to:

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

12

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
- Provide public legal information education and information materials

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More information

- Legal Services Society www.legalaid.bc.ca
- Family Law in BC www.familylaw.lss.bc.ca
- QR mobile website link

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Presenter: Sarah Khan
Coordinator, Intake and Referral Services

- Phone: 604-601-6207
- Fax: 604-682-0787
- Email: sarah.khan@lss.bc.ca

15

Provincial Training Conference

Richmond, B.C. November 20, 2012

Contents

- Role of the Office
- Jurisdiction
- Authorities
- Enquiries and complaints
- Powers
- Office structure
- How we deal with complaints
- Investigation process
  - What we look at
- Systemic investigations
  - *Best of Care, Part 2*
  - *Last Resort*
- Case summaries
- Questions

Linda Carlson

Executive Director of Investigations

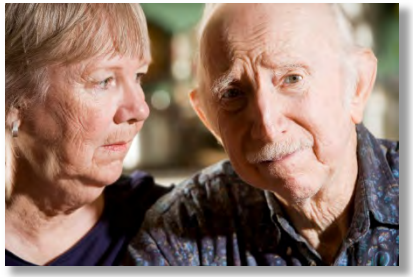
Christina McMillan

Ombudsperson Officer

Ombudsperson
B.C.'s Independent Voice For Fairness







Role of the Office

- "...to generally oversee the administrative actions of government authorities with a view to upholding the democratic principles of openness, transparency and accountability"

(Report of the Special Committee to Appoint an Ombudsman, Legislative Assembly of British Columbia, Second Session, Thirty-Eighth Parliament, April 26, 2006, page 1)

- Investigations can be
  - Individual
  - Ombudsperson-initiated
  - Systemic



Jurisdiction

- Provincial ministries
- Provincial boards and commissions (i.e. WorkSafe BC)
- Provincial Crown corporations (i.e. BC Hydro)
- Municipalities, regional districts, Islands Trust, etc.
- Schools, school boards
- Hospitals and health authorities
- Various pension boards of trustees
- Universities and colleges
- Self-regulating professional associations (i.e. College of Physicians and Surgeons)

Significant Authorities, 2011/12
(Files opened)

- Ministry of Social Development
- Ministry of Justice (includes former Attorney General and Public Safety and Solicitor General ministries)
- Ministry of Children and Family Development
- Insurance Corporation of British Columbia
- Workers' Compensation Board/WorkSafeBC
- Ministry of Health
- Ministry of Finance
- BC Hydro and Power Authority
- Public Guardian and Trustee
- BC Housing

Numbers of Enquiries and Complaints

8,014 intakes in 2011/12 fiscal year:

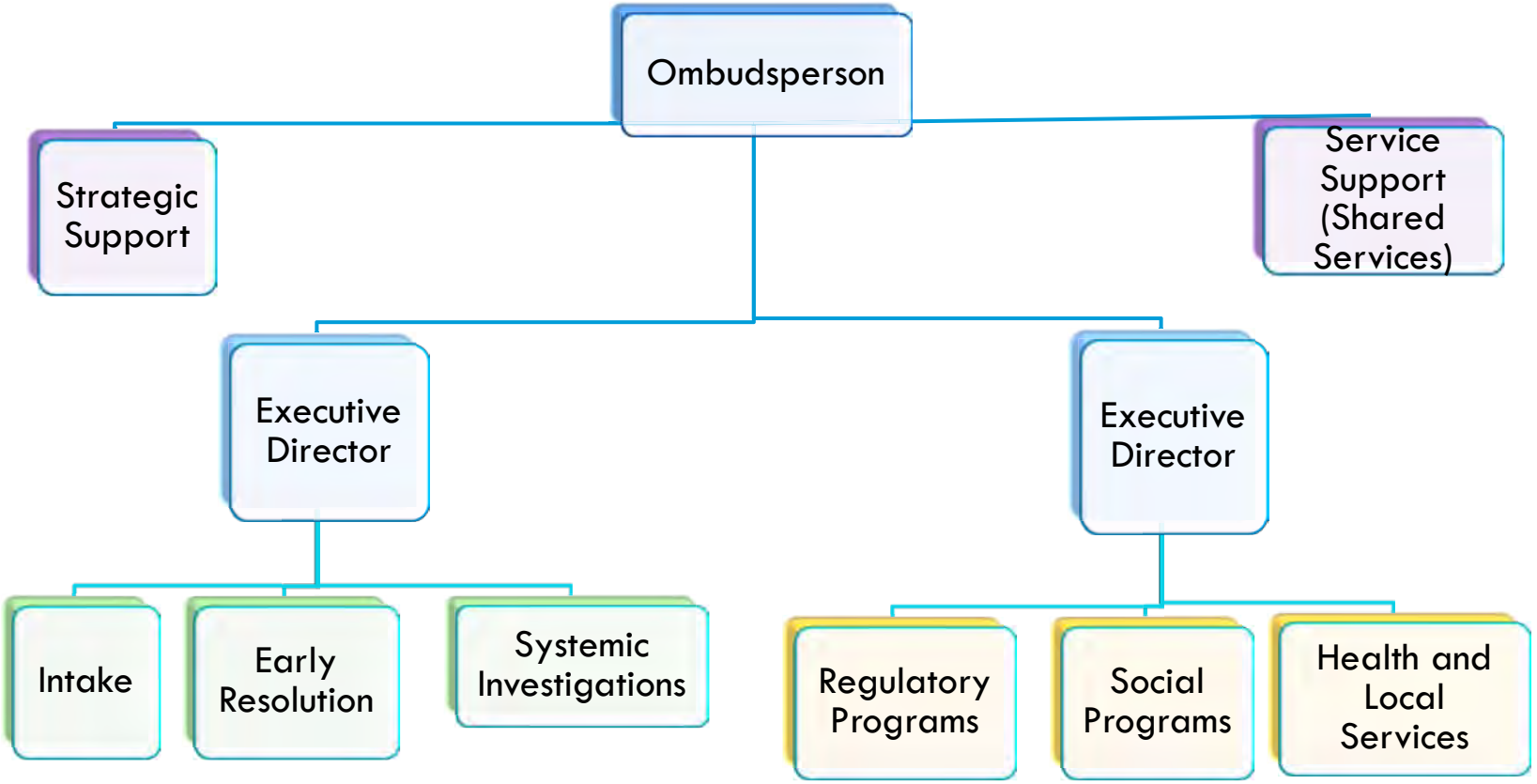
- Ministries: 54%
- Commissions and boards: 15%
- Crown corporations: 12%
- Health authorities: 7%
- Municipalities: 5%
- Regional districts: 2%
- Professional associations: 3%
- Schools and Boards of Education: 1%
- All others: 1%



Powers

- Obtain information
- Consult in order to settle
- Make findings
- Recommend changes to address unfairness
- Report to the legislature and the public

Office Structure



How We Deal With Complaints

INTAKE

- Phone
- Writing
- Online complaint form
- In person



COMPLAINTS ANALYSIS

- Jurisdiction
- Referral
- Early resolution
- Open investigation file

How We Investigate

- Contact with complainant
- Analysis
- Decline, Refer or
- Investigate
  - Notice to Authority (Section 14)
  - Obtain information and interview people (Section 15)
  - Consultation to attempt settlement/resolution (Section 14)

Investigations - What We Look At

- Was the person treated in a fair and reasonable manner?
- Were the rules of administrative fairness followed?
  - Right to be heard, relevant information considered, reasons given?
- Are the rules fair and reasonable?

Possible Outcomes

- Re-assessment or reconsideration
- Access to a benefit
- Apology
- Reimbursement of expenses
- Improved policy or procedure
- Better explanation of decision

A complaint from one person can often lead to changes that benefit many others.

Systemic Investigations

- Broad societal issues
- Multiple findings and recommendations
- Public reports
- Examples - victims of crime; lottery prizes; drinking water safety; seniors care programmes

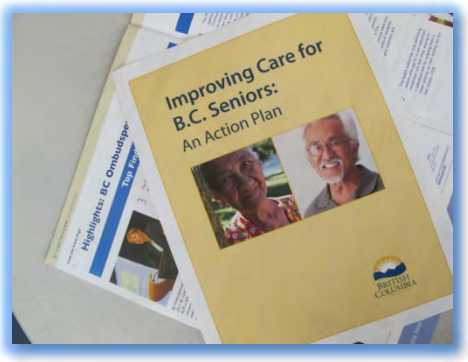
The Best of Care (Part 2)

- Investigation of home and community care issues, home support, assisted living and residential care
- 143 Findings 176 Recommendations to the Ministry of Health, Ministry Responsible for Housing, and five regional health authorities



Responses

- Unparalleled interest
- Government releases "Improving Care for B.C. Seniors: An Action Plan"
- Letters calling on government to implement recommendations







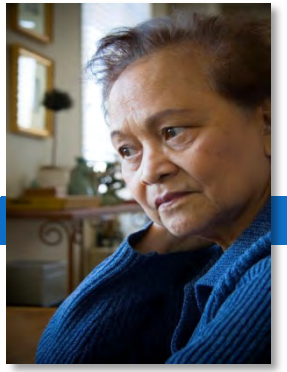
Last Resort: Improving Fairness and Accountability in British Columbia's Income Assistance Program

- Report issued March 2009
- Included 28 recommendations (R) to the then Ministry of Housing and Social Development, with timelines for implementation. The ministry accepted and agreed to implement all recommendations, except (R) 23, that the ministry compensate people adversely affected by the ministry's delay in initiating a regulatory amendment.
- Recommendations addressed four areas: applying for income assistance, persons with persistent multiple barriers to employment (PPMB), medical and other documentation requirements, and implementation of previous commitments

Update on Recommendations (to March 2012)

- The Ministry of Social Development provided training to all front-line staff, in anticipation of system upgrades. Training specific to immediate needs assessment provided to staff in intake portion of training.
- Policy changes are in process of being implemented following review of circumstances where applicants and clients must sign forms in person. Policies will be available publicly once implemented (R 21(A))
- We continue to be disappointed that the ministry has not yet implemented the six recommendations it accepted regarding the PPMB program (Rs 12, 13, 14, 15, 16(A) and 16(B)). The ministry, more than three years after accepting the recommendations, reports that it continues to review the PPMB program as a whole.

Case Summary



Ministry of Social Development

Ministry restores $20,000 in benefits wrongly denied to woman

A woman with a disability received an inheritance while she was on disability assistance. The ministry said she no longer qualified for benefits and closed her file. They didn't tell her that she had the option to put the money in a trust, which she could have used to pay for things that enhanced her independence. She later found out about this option from another source, and asked the ministry for compensation. The ministry apologized for the error, but it was past the deadline for reconsideration. The Employment and Assistance Appeal Tribunal said the decision was not open to appeal.

She came to us. We asked the ministry to consider paying her for the months she had been incorrectly told she was ineligible. The ministry eventually agreed and paid her $20,000.

Case Summary

Ministry of Social Development

A home for the holiday

Kyle, a 17-year-old youth, called on a Friday afternoon before the Labour Day long weekend. He said he was living on his own and was planning to return to school the next week. He told us he'd applied for income assistance three days earlier and the Ministry of Social Development hadn't approved his application yet. Kyle said he was homeless and didn't have money for food. He'd found a place to stay, but couldn't move in until he received assistance.

We investigated Kyle's complaint on an urgent basis because he had no place to stay for the long weekend and no money for food. That afternoon, we reached a supervisor at the ministry's office. She said that they'd been waiting to receive the final piece of the application, a letter from the Ministry of Children and Family Development, which was required since Kyle was still a minor. It turned out the office had received this letter a day earlier, and had sent the application to the field manager for review and approval. When we asked about the status of Kyle's application, they told us it had been approved and a cheque was ready for pick-up. We phoned Kyle to let him know. Kyle was close to the office and said he would go there right away. The supervisor agreed to look out for Kyle as the office was about to close. Kyle picked up his cheque and was able to move into his new home for the weekend.

Case Summary



Burnaby Youth Custody Services

Respecting the rights of youth in custody

A youth complained that he wasn't given privacy when he called his lawyer from the Burnaby Youth Custody Centre. He told us that the telephone was directly across the hall from the staff office and a staff member stood two feet away from him during the call.

We investigated whether the Centre acted contrary to law by not giving the youth privacy during the privileged conversation. The Director of the Centre replied that staff need to monitor the telephones to make sure the youth are not making unauthorized calls. We were not satisfied with that response.

We expanded our investigation and visited all of the youth custody centres in the province. We found that all of the telephones in the units were out in the open and close to staff offices.

After consultations, the Ministry agreed to install soundproof booths in all the centres and implemented policy requiring all privileged conversations to take place in private.

Case Summary



Residential Tenancy Branch
Cut-off time

Peter was unhappy with the decision from a RTB hearing. The *Residential Tenancy Act* stated that an application for review of a decision must be submitted to the RTB within 15 days after receipt of the decision. On the 15th day, Peter submitted an application through a Service BC office for review. Later that evening, Peter faxed additional information in support of the request. The review decision upheld the original hearing decision. The additional information sent in the evening wasn't considered because it was received after the office closed. Peter complained his additional information should have been considered because it was sent on the due date.

We investigated whether the RTB followed a reasonable procedure in processing Peter's application. The *Residential Tenancy Act* specified the number of days to apply for a review. The RTB told us it considers 4:00 p.m., RTB's office closing time, to be the cut-off time for accepting documents, with documents received after closing processed as being received the next day.

We identified that the cut-off time and fax number for receiving evidence was not published on its website or correspondence. We noted that ensuring people are provided with clear information about deadlines is an important feature of a fair process. The RTB acknowledged it would be important from a service perspective to provide its fax number and cut-off times on the website and in correspondence for the public to avoid future problems. As a result, the RTB updated its website, correspondence and relevant fact sheets to include a fax number and the cut-off time of 4:00 p.m.

Peter understood that the change in practice did not benefit him directly, but was pleased the change could benefit persons who submit documents in future. Happily, his landlord did not follow through with his eviction.

Case Summary



WorkSafeBC

Intervention helps worried woman

Judy called us a week before she was scheduled to undergo hand surgery for a work- related injury. This meant she would temporarily lose the use of one of her hands, which was a particular problem for her since she had a digestive disorder that required her to take special measures to feed herself, for which she needed both hands. WorkSafeBC had not yet responded to her request to provide her with post-operative care.

We asked WorkSafeBC to treat the file as urgent. WorkSafeBC then took rapid steps to address the situation. A manager called Judy within two days to assure her that WorkSafeBC would pay for her surgery and arrange for her to have home care after the operation. When we spoke to Judy after her surgery, she confirmed that WorkSafeBC had reopened her claim, paid for her operation, and arranged for nursing care.

Case Summary

Ministry of Social Development

Time matters

Anette, a single parent, was designated as a Person with Persistent Multiple Barriers (PPMB) for the past two years. Under this program she received a higher rate of income assistance and an earnings exemption of $500 a month. She contacted us after learning she was given only three weeks warning to renew her PPMB designation. She submitted a medical form as the ministry asked, but it had not been processed before the end of the month, and when she contacted us her income assistance had been reduced and earnings from her part-time job had been deducted from the reduced cheque. She was left without enough money for food or rent.

It appeared the ministry had correctly followed part of its policy in identifying Anette's file for review, as all persons designated as PPMB are reviewed at least every two years. The policy also required the ministry provide three months notice of the PPMB review date, to allow time for recipients to complete a medical form and meet with an employment and assistance worker for a review. The review also involved updating an employability screening form, a checklist of job and training related activities, and an employment plan.

We investigated the fairness of the process used by the ministry to notify Anette about the PPMB review, including whether the relevant policies were followed. The ministry's records confirmed it did not provide three months notice prior to discontinuing the PPMB designation. A written notification three months ahead was overlooked, and when the omission later came to staff's attention, written notice was not sent out due to a Canada Post labour disruption. Instead staff left a message with information about the review on Anette's answering machine. Anette heard the message and picked up a medical form to begin the review process.

The ministry confirmed it had received Anette's medical form and would contact her to complete the other review documents. The application would then be sent for review. The ministry said it would reinstate the PPMB rate and earnings exemption for three months to allow the review to be properly completed.

Case Summary



Ministry of Social Development

Immediate response

Judy told us she was experiencing a financial crisis. She had applied for assistance from the Ministry and a telephone appointment for the following night had been made to assess her application. Judy said she was at risk of losing her housing, had not been able to buy medicine for her rheumatoid arthritis and was concerned that the ministry would not be able to complete the application process because she was not sure how to make certain that her supporting documents could get to the assessor so she could get immediate help.

We immediately spoke with the ministry's manager of community relations and service quality regarding Judy's situation. The manager contacted the ministry office in Judy's community and arranged for her to be seen in person that day. Judy was approved for and received financial assistance immediately. She would also receive medical coverage, and ministry staff talked with her about applying for disability benefits.

The ministry's immediate response ensured that Judy received both the financial and medical assistance she needed.

Case Summary

BC Assessment

Homeowner's address and assessment corrected

Steve contacted us because BC Assessment had valued his mobile home as worth $42,000 more than what he'd paid for it just a few weeks before the assessment was done. He had tried to dispute the assessment, but BC Assessment told him the deadline for doing so had already passed. Steve said he did not receive his Notice of Assessment, and so had not been given the opportunity to appeal.

When we investigated Steve's complaint, we found that BC Assessment didn't have his correct postal code when it had sent out Notices of Assessment. In response to our investigation, BC Assessment had an appraiser review Steve's file. The appraiser found that the assessment was incorrect because it did not account for the fact that an attached double garage and set-up costs were included in the sale price of the home. To fix this problem, BC Assessment issued a supplementary assessment for Steve's home that better reflected its market value. BC Assessment also found two other mobile homes in the area had been affected by the same error, and it issued supplementary assessments for these homes as well. Steve's new assessment was approximately $52,000 lower than his original one, and he now had the option to appeal it.

Case Summary

BC Hydro and Power Authority

How can I pay once a month when my pay is on a different schedule?

Marjorie called in a panic as her power was about to be disconnected. She was behind on her payments to BC Hydro, but could not afford the repayment option. Marjorie had two children in her house and needed heat and light. Given her urgent circumstances, we investigated whether BC Hydro had followed a fair process in deciding that Marjorie's power would be cut off if she did not immediately start paying $400 twice a month as well as her regular hydro charges.

We focused our investigation on the fairness of Marjorie's repayment schedule. We reviewed Marjorie's account history with BC Hydro (records of telephone conversations, letters, bills sent, and payment plans created). Marjorie's account had not been paid in full since she opened it two years earlier. BC Hydro had created many payment plans to help Marjorie pay the overdue amounts, but none of them had been successful. Although Marjorie usually made payments every couple of weeks, the payments were often late, or for less than the amount she had agreed to pay.

Marjorie said it was hard for her to budget for monthly instalment payments because she got paid every two weeks. She tended to lose track of when bills were due, and for how much. Although she had taken on a second job, she was falling further behind with BC Hydro every month.

We discussed this with BC Hydro and what might be done to address the situation. BC Hydro agreed to start another instalment plan for the overdue amount. This time BC Hydro agreed to let Marjorie spread her payments on the overdue amount over a longer period. To help Marjorie, BC Hydro also agreed to automatic withdrawal through her bank for the new instalment payments as well as her payments for current use. Marjorie was confident that she could manage the reduced payments over the longer term and felt automatic deductions would work better. We were satisfied BC Hydro had offered a fair resolution to Marjorie's situation.

Questions?

CONTACT US:



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www.bcombudsperson.ca

947 Fort Street, Victoria

PO BOX 9039 STN PROV GOVT
VICTORIA, BC V8W 9A5

Ombudsperson Link:

Pamphlet on the Ombudsperson Office
http://www.ombudsman.bc.ca/files/Ombudsperson_Brochure_English.pdf

9. Other Issues and Resources

- **Boundaries and Self Care**
  - Boundaries and Self Care PowerPoint presentation
  - Boundaries Table
  - Boundary dilemma
  - Boundary setting tips
  - Compassion and Caretaking
  - The No Credo

THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

Boundaries and Self Care for Advocates

1

Lawyers Assistance Program
Facilitated by
Robert Bircher B.A.,J.D.,M.A.,R.C.C.

Confidentiality

- All LAP classes are highly confidential, this includes mentioning names of people in attendance

In psycho educational classes like this one you will be talking about your life-you can set your own boundaries about how much or little you disclose to others

- The main purpose here is to increase awareness of boundaries leading to changes in behavior-the academic content is of secondary importance
- Introduction exercise-Where in my life do I have good boundaries?-What boundaries do I want to learn more about in this class?

2

Importance of Boundaries

- In helping lawyers with practice and personal problems we notice that many are created by a lack of healthy boundaries
- Almost all of the complaints made by clients or the Law Society can be traced to poor boundaries
- "Burnout or Compassion Fatigue", for example, has its roots in poor boundary setting
- Many people know a lot about boundaries but are poor at putting them into place in their lives

3

Boundaries and Relationships

- Although we will focus on work boundaries in this course, healthy boundaries are the basis for good relationships in life and we will talk about personal relationships as well.
- Many relationship problems have their roots in poor or no boundary setting
- Difficulty in boundary setting depends on who you are setting the boundary with-setting boundaries around, a telemarketer, your mother, a friend or your boss all have different dynamics and levels of skill required

4

Healthy Boundaries

- Good boundaries are usually learned in childhood, unfortunately so are bad boundaries!
- Most people have good boundaries in many areas of their life but often have gaps-depending on parenting
- Most advocates are "helpers" which sometimes also means they are good at pleasing others-this balance between caring for self and caring for others is where boundary problems arise

5

Characteristics of Healthy Boundaries

- I must have awareness that a boundary needs to be set and that the problem I face is a boundary problem-this is not as obvious as it may seem
- **Appropriateness**-I need to decide whether a boundary should be set or if I should just let it go-In some cases a boundary could be set but it may not be worth the time or effort
- **Clarity**-Boundaries must be clear and unequivocal-fuzzy boundaries are as bad as no boundaries
- **Firmness**-People will often test your boundaries-do you really mean it?
- **Maintenance**-Boundaries may need to change or be redefined over time

6

Characteristics of Boundaries

- **Flexibility**-some boundaries need to flexible-in some cases even dropped
- Healthy boundaries are **not:**
- **Set by others-** this works when you are little; but as you individuate you need to set your own boundaries-usually with some resistance from your family!
- **Primarily Hurtful or Harmful-** Boundaries often create some pain but this is not the purpose-a good test is if I don't set a boundary here what will the long term consequences be?
- **Controlling or manipulating-** This is different than boundary setting

7

Characteristics of Boundaries

- Manipulating is trying to influence or get something indirectly-Controlling is invasive or domineering
- In boundary setting I decide what will happen if the boundary is not honored-if I am controlling I want someone else to change their behavior!
- A Wall- is not a boundary, it is inflexible and cuts me off from people, places or experiences

8

What are Boundaries?

- Various definitions:" how far we can go with comfort go in a relationship. It delineates where I and my physical and psychological space end and where you and yours begin."
- Boundaries provoke real experiences within us-thus in my relationships with people places and things, the boundary is real
- Another definition: "A boundary is a limit that promotes integrity"

9

What are Boundaries?

- One example is your skin, another is the walls of a cell in your body
- A good metaphor is that of the wall of a cell, that is a semi –permeable membrane
- "To know when to allow in and when to keep out, means you have a choice in your life, and means you will be an active rather than a passive participant in it"

10

BOUNDARIES

- It is hard to define or understand yourself without a clear understanding of your boundaries
- It requires a good understanding of our inner life-our beliefs, thoughts, feelings, decisions ,choices and experiences. It also includes wants, needs, sensations, intuitions and unconscious factors.
- Many people go to extremes with boundaries, either being boundary less or being overly ridged, or flip-flopping between these

11

BOUNDARIES

- Healthy boundaries will enhance your relationship with your self, your body, your health, friendships, marriage, work, your integrity
- Poor boundaries can limit your life and cause misery
- It is useful to know where you have erected defenses instead of healthy boundaries
- This workshop is about handling life in a way that protects your time and energy for the things that really matter to you.

12

Boundary Setting Tips

- If you are resentful or angry with someone or silently fuming or even irritated it is usually the universe inviting you to set a boundary
- The Boundary must be appropriate under the circumstances-there will be a consequence whether you set a boundary or not or if you delay it
- The boundary may require a consequence involving **your behavior** i.e.. If you do that again I will leave the room-I won't drive with you again unless you drive the speed limit

13

Boundary Setting Tips

- Complaining to others about them is not boundary setting- "he is such a jerk, why does he drive so fast?"- this is gossip
- Your boundary will be tested sometimes within minutes-expect it- prepare for it
- If it is a Physical boundary it is not a debate or a discussion-no reasons are necessary-the boundary discussion should be in as few words as is possible "you are on my foot – get off" is all you need
- Do not justify or rationalize- "No" is a complete sentence

14

Boundary Setting Tips

- The more reasons you give the more ammunition you give the other person-you don't want to invite a discussion
- The other person usually will not like it and may not take it well-if they choose to hurt themselves with your boundary it is their issue not yours-don't buy into it
- Be prepared to face whatever consequences that result and be aware that they are almost always less than if you don't set a boundary
- Boundaries are not about control or manipulation

15

Boundary Setting Tips

- Good boundary setting comes with practice, start small and work up to more difficult boundaries- start with a telemarketer and work up to mom
- Some people believe that they can't set boundaries at work or they will be fired, that is quite rare- much more often people quit or get fired or burn out by **not setting enough boundaries**
- **Do you really want to work anywhere that doesn't respect your boundaries?**
- **See the boundary setting tips attached**

16

Types of Boundaries

- Boundaries cover a huge part of our lives and can be internal(intra-psychic)within your own mind or external (inter-psychic) dealing with other people
- Boundaries can be physical or mental/emotional or spiritual
- See table 1.1 for list of these types of boundaries
- In general, physical boundaries deal with what happens with your physical body, your privacy and your possessions
- In general mental boundaries deal with your beliefs, choices, decisions and how you spend your energy

17

Testing Your Physical Boundaries

- Stand close exercise
- Crazy driver exercise
- What did it take for you to set your boundary?
- What gets in your way of setting your boundaries?
- Did you set a boundary it at all?

18

Not Setting Boundaries

- Due to the difficulty in setting boundaries many people chose not to set them at all
- This will result in frustration, passive aggressiveness, inner conflict and a general limiting of your life
- Many people will run up against their tendency to be a "people pleaser" in this class
- If you want to live life large you need to understand and set healthy boundaries

19

Resistance to Boundary Setting

- Even though it is simple enough to understand boundaries many people have trouble setting boundaries for fear that it will hurt the relationship
- In many cases great damage can occur to a relationship if boundaries are not set or discussed
- Often it is a case of short term pain to facilitate long term gain
- Boundary Dilemma-get into groups of 4 and discuss the boundary dilemma in the workbook-is this happening in your life?

20

Formation of Boundaries

- Families can range from being fairly dysfunctional where boundaries were ignored, confused, or commonly violated to families that were fairly functional
- It is quite rare for any family to have excellent boundaries in all areas of life
- You learn your original boundaries in your family but obviously people change and you may now have healthy boundaries in areas where they were unhealthy in your family and vice versa

21

Protective Boundaries and Expansive Boundaries

- In general there are two types of boundaries-those involving the protection of physical and psychological space and those involving the extent of interaction with your world
- Physical boundaries are simple to understand-they involve the protection of your body and possessions-car exercise
- Psychological boundaries are much more difficult to understand or even detect

22

Protective and Expansive Boundaries

- Almost no person will tolerate being hit by another person but surprisingly many will allow the most severe psychological boundary violations
- Expansive boundaries can be described as how large you live-some people live large and impact almost everyone around them-some live small and barely cause a ripple-some do both at different times and with different people
- You will be treated in the world the way you teach others to treat you

23

Boundaries and your Family of Origin

- Many of your boundary issues began at home (because parenting is an imperfect art) so boundary problems can come in several varieties
- *Too Ridged* -also called walls-these are absolute rules that can be too confining: you can't ever play in the living room
- *Too Flexible* -where the boundaries change easily or are not enforced-one day you are allowed to do something the next day you are not

24

Family Boundaries

- *Too Distant*: When the parent is very distant, rarely touches, abandons the child or spends little time with the child
- *Too permeable*: when a parents identity becomes immersed in the child's-this sometimes happens to mothers and daughters
- *Too closed:* some parents have very ridged beliefs such that new ideas can't get in-it's their way or the highway-these parents are often cut off from their feelings and can't handle disagreements

25

Family Boundaries

- *Enmeshment*: this is where a person doesn't distinguish themselves from the other at all-they take on the others attitudes ,beliefs, interests, friends, goals as if they were their own-they even speak for the other
- Exercise: Groups of 4-Think /Pair/Share- what were the boundaries like in your family? Which ones were healthy/unhealthy?

26

Workplace Boundaries Problems Saying No

- **"Burnout" is actually not a primary problem -it is a symptom of poor or non existent boundary setting**
- Poor boundary setting has many underlying causes: people pleasing, unwillingness to say no, poor boundaries in family of origin, fear of standing up for yourself, lack of understanding of your own core values, poor emotional self care etc.

27

Compassion Fatigue

- The form of burnout that people in the helping professions can get is often called Compassion Fatigue
- It is similar to burnout in that it has some of its roots in being overwhelmed by the volume of work, limited support and a frustration stemming from the disappointment that occurs when our expectations are significantly different from the reality of the job
- The difference is that it is a form of professional burnout which results from the empathic connection created with your clients
- On a scale of 1-10 rate your own level of compassion fatigue

28

Over-Helping and Compassion Fatigue

- The symptoms are similar to burnout but may also include elements of secondary trauma
- To avoid compassion fatigue there are usually many boundaries that can be put in place.
- The main obstacle is to overcome the common syndrome of over helping people-many helpers are not well boundaried in how much help they give to others-they believe you can't help too much
- Actually you can help too much! You can violate the clients boundaries by caretaking rather than compassion

29

Caretaking instead of Compassion

- Compassion is always helpful, but trying to take away the pain of others is not appropriate.
- Over-helping or caretaking robs clients of the consequences of their own actions
- It can take away suffering, which deprives people of learning-of all the great teachers in life suffering is the best
- If you are doing something for another that they can do for themselves, you are caretaking not helping
- Compassion and caretaking discussion exercise

30

Is Your Helping Helping?

- A good question for helpers is to think carefully about whether what you think is helping actually is
- A good boundary here is if you are more concerned about the clients problem than they are-you are over-helping
- Get used to the idea that suffering is often a good thing-most people won't make any change until they have suffered enough
- People in addictions treatment are aware of this and sometimes what needs to happen is the client needs more suffering-nobody quits an addiction if it is just a mild inconvenience

31

Boundaries for self Care

- It is up to you to set self care boundaries-limiting the amount or volume of work-limiting the kind of clients you will work with
- Setting boundaries with clients-appointment times and their behavior in your presence
- If you are burnt out you are of no use to other people and may even be harmful to them
- If get to the point you don't care any more-you need a break
- If your schedule is very heavy you need to build in self care during the day-waking on coffee breaks-doing something physical at lunch etc.

32

Boundaries in a Power Imbalance

- Many people believe that they can't set boundaries with employers or they will get fired
- Few people actually get fired for setting healthy boundaries
- If you set reasonable, healthy boundaries and this results in firing-Congratulations you just escaped a very unhealthy situation!
- Why would you want to work in a place that doesn't respect your boundaries?
- The next section is about conquering your inner people pleaser-how to say no

33

Workplace Boundaries-Power of No

- When you were 2 years old you had no problem saying no, but in this culture it is drilled out of you by teachers parents and friends-so by the time people are adults many have trouble saying no to anyone
- **Axiom: The damage done by saying yes indiscriminately will exceed any damage done to your relationships by saying no**

34

The Power of No

- "Yes people" quickly become weighted down, feel torn or trapped, are overcommitted and overworked and feel taken advantage of
- "Yes people" can become **passive aggressive** this means the anger or resentment goes underground and shows up as not returning calls, being distant, being late or bailing out of the commitment with weak excuses
- Having a "giver" type of personality works against you here-the world is full of "takers"

35

The Power of No

- **It is not the job of the "takers" to set your boundaries- <u>it is your job and your issue</u>**
- **<u>If you don't set your own boundaries other people always will</u>**-<u>nature abhors a vacuum!!</u>
- My definition of Passive aggressiveness is "torturing myself and others for my unwillingness to set healthy boundaries"

36

The Power of No

- Blaming others or anger is often a tip off that boundaries need to be set by you
- Why is saying no so hard for many people?
- "**Terminal Niceness**" these people believe it will ruin the relationship if they say no-in fact the inevitable passive aggressiveness is the real danger to the relationship
- Lets look at the No credo
- Think /pair/share-Where in your life do you have problems saying no?

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The Power of No

- **Poor sense of priorities**: some people are unwilling or unable to live their lives consistent with their values because they are unclear about their values
- People who are clear about their values find it much easier to make tough decisions-if you value time with your children you will not give this time away to clients, other lawyers partners etc.

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People Pleasing

- Another reason people have trouble saying no is that they are obsessed about what other people are thinking about them
- In my self esteem workshops we call this other-esteem which is a poor substitute for genuine self esteem
- Other-esteem is giving your power away on the false belief other people are thinking about you-in other words you have a story you are telling yourself about the story you believe other people have of you (thus you worry about your image)

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People Pleasing

- If you believe this delusion you will spend the rest of your life on a fruitless search to increase your esteem from the outside
- I always say to lawyers: in your 20's you are very concerned about what other people think of you, in your 30's and 40's you start to say I don't care what other people are thinking about me, in your 50's and 60's you realize they weren't thinking about you!!
- It is folly to govern your life to try and please others

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Boundary Setting is a Career Advantage

- If you don't set boundaries you will burn out, stretch yourself too thin, or do a mediocre job
- If you become the office go-to person because you never say no you invite your own boundary crashing party!!
- You need to teach some people how to treat you by setting good boundaries-i.e... teach them how you need to be treated
- Ask "what is the advantage of saying yes here?

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Field Inter-dependence

- This does not mean you go the opposite extreme and become a psychopath
- Field dependence, field independence , field interdependence, field awareness explained
- Good relationships are dependent on good boundaries
- People with good boundaries are admired and trusted - you can be assured their yes means yes and their no means no-they don't need hidden agenda

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Boundary Behaviors- Problems saying no

- There is a boundary problem wherever there is a problem setting limits or where there is a failure to respect other people's limits
- **Compliant behavior** -this where people have fuzzy or indistinct boundaries-they melt into the demands and needs of other people. They are like chameleons. They are unwilling or unable to say no, like a ship with broken radar.

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Boundary Behaviors- Problems saying no

- When people are compliant they don't say no due to fears like: hurting the others feelings fear of abandonment and separateness, fear of another's anger, fear of punishment, fear of being shamed, being seen as bad or selfish, fear of being unspiritual etc.
- **Avoidant behavior** -inability to ask for help or recognize our own needs or let others in. Avoidants withdraw when they are in need. Boundaries are not walls but rather like fences with a gate allowing in the good while keeping out the bad

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Boundary Behaviors

- **Controlling behavior-** Controllers don't respect other peoples limits- they are likely to see other peoples boundaries as a challenge to try and change their minds or simply ignore their boundaries. They resist taking responsibility for their own lives so they need to control the lives of others. In extreme cases they become manipulative and aggressive bullies
- Controllers can be quite dangerous to themselves and others

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Boundary Behaviors

- Controllers cannot delay gratification so they are unwilling or unable to hear another persons no-also they are usually isolated and alone since the people around them are there due to fear, guilt or dependency
- If this occurs in a relationship it requires a compliant partner who has an unconscious agreement to allow themselves to be controlled

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Boundary Behaviors

- **Nonresponsive Behavior-** these people are either insensitive or oblivious to the needs of others. They can take the form of supercritical people or narcissistic people obsessed with their own self importance
- Most people fall into these categories from time to time or in certain situations or with certain people-some do it more often at work than at home or vice versa. For some people these behaviors are a dominant force in their lives and have catastrophic consequences

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Workplace Boundaries

- Many boundary issues, predictably, have very unhappy endings-sexual harassment still occurs, office affairs or romances are still common, the impromptu strip tease or telling off the boss, or wearing a lampshade on your head all still occur at the office Christmas party
- Parties, retreats and (Fri pm) after hours office events with alcohol, or cocaine or marijuana are gold mines for boundary problems.
- Poor office boundaries around sex are a large problem and can cause tremendous grief, but it can pale in comparison to general psychological abuse in some offices

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Boundary Setting Improves With Awareness-Followed by Practice

- As you set more boundaries (and begin to see where you are not setting good boundaries) your skills will improve
- **Generally the closer the relationship the harder it is to set good boundaries**
- Allow yourself to try and fail until you get better at it
- Practice and patience will allow progress
- Closing exercise

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Boundary Workbook

Lawyers Assistance Program
Facilitated by
Robert Bircher

Table 1.1. Some Factors in Boundaries in Relationships

Type of Boundary		
Physical	**Mental/Emotional**	**Spiritual**
Physical closeness	Beliefs	Personal experiences
Touching	Thoughts and ideas	Relationship with
Sexual behavior	Feelings	True Self, Higher
Eye contact	Decisions	Self and Higher
Privacy — mail,	Choices	Power
diary, doors, nudity,	Unfinished business	Spirituality
bathroom, telephone,	Projections	Religion
private spaces, etc.	Energy	Spiritual path
Clothes	Sexuality	Spiritual preferences
Shelter	Needs	Spiritual practices
Property	Time alone	
Money	Intuitions	
Physical	Individual differences	
differences	Love	
Gifts	Interests	
Food	Relationships	
Pollution —	Responsibilities	
e.g., noise	Confidences	
and smoke	Secrets	
Time and energy	Participation	
	Roles	
	Rules	
	Messenger function	

Boundary Dilemma

We cannot simultaneously set a boundary and take care of other persons feelings. These acts are mutually exclusive.
While it is a tremendous asset to have compassion for others, this quality can make it difficult to set boundaries.
It's good to care about other people and their feelings; it's essential to take care of ourselves as well. Sometimes, to take good care of ourselves we need to make a choice.
Some of us live with a deeply ingrained message from our family, or from church, about never hurting other people's feelings. We can replace that message with a new one, one that **says it's not okay to hurt ourselves**.
Sometimes, when we take care of ourselves, others will react with hurt feelings.
That's okay. We will learn, grow, and benefit by the experience; they will too. The most powerful and positive impact we can have on other people is accomplished by taking responsibility for ourselves, and allowing others to be responsible for themselves.
Caring works. Caretaking doesn't. We can learn to walk the line between the two

Today, I will set the limits I need to set. I will let go of my need to take care of other peoples feelings and instead take care of my own. I will give myself permission to take care of myself, knowing it's the best thing I can do for myself and others.

Adapted from The Language of Letting Go-by Melody Beattie

Boundary Setting Tips

1. If you are feeling resentful or angry with someone or silently fuming; it often means a boundary needs to be set. Determine whether the considerable effort required in boundary setting is worth it, in this situation, before you start.
2. Your boundary will often not be welcomed with warmth and grace-if people choose to hurt themselves with your boundary; it is their issue not yours.
3. People will test your boundary, sometimes within minutes, sometimes more than once. Setting a boundary that is not tested is the exception not the rule.
4. It is best that the consequences of not honoring the boundary, involve your behavior not theirs. For example: If you do that again I will leave the room, I won't drive with you if speed again. Boundary setting is not about controlling others or manipulating them.
5. Complaining to others is not boundary setting.
6. Do not justify or rationalize, "No" is a complete sentence.
7. The more reasons you give the more likely you are likely to end up with a debate instead of a boundary.
8. Be prepared to accept the consequences of your boundary setting. There will be a consequence: a)if you set a boundary b) if you don't set a boundary and c)no matter what boundary you set
9. Setting easy boundaries is a good place to start. Boundary setting is progressive, start out with easy ones (like telemarketers) and work up to tough ones(like your mom)
10. Get counseling, support or advice if you need it. This particularly true for difficult or very important boundaries, where you should get several opinions

LAP

LAWYERS
ASSISTANCE
PROGRAM

Compassion doesn't mean taking care of people.

Feeling compassion for a friend in pain is a loving way to respond. It softens the harsh edges of reality for the sufferer as well as for ourselves. Trying to take away the pain, however, is not appropriate. Each of us is on a journey of experiences and opportunities that will help us grow and fulfill God's plan for our lives. What we learn from the difficult steps we have to take is part of the plan.

It's not always easy to draw the line between showing compassion and trying to solve a friend's problem. Some of us have made it a practice to intrude on other people's lives. Neither they nor we have been helped by it. Learning how to maintain healthy boundaries between ourselves and others is part of our journey today. Practicing this kind of compassion will give us growth.

I will show compassion today by maintaining healthy boundaries and not intruding on other people's lives.

The No Credo

As you become proficient at saying no, these rights will become standard operating procedure. This credo significantly reduces any trouble you might have. It is your bill of rights to the freedom and life you deserve.

You have the right to:

- **Make your feelings and desires known.**
- **Establish and guard your personal boundaries.**
- **Keep your needs in the forefront so saying no is possible.**
- **Exercise your power and choice to say no.**
- **Repeat *no* until you are heard.**
- **Use *no* to get your life in control and to be in control of it.**
- **Weigh the fallout of saying no.**
- **Request the details before committing.**
- **Postpone an answer; stalling for time is your prerogative.**
- **Refuse anyone who insists on an immediate answer.**
- **Turn down those who flatter or attempt to con you into a yes.**
- **Withhold explanations in an attempt to soften your *no*.**
- **Avoid tasks beyond your ability or expertise.**
- **Alter a request to make it – or part of it – manageable.**
- **Suggest someone else or offer an alternative solution.**
- **Say no initially and change your mind later if you wish.**

Where in your life do you have difficulty saying no?_____
_____
_____
_____

Who are the most difficult people in your life to say no to?_____
_____
_____

BC CENTRE FOR ELDER ADVOCACY SUPPORT






BC CENTRE FOR ELDER ADVOCACY SUPPORT

- Non-profit
- Raise awareness of elder abuse issues
- Legal services
- Victim support, awareness & education



BC CEAS Vision

Older adults in BC can live with dignity, free from abuse of any kind.



History

- Began as a grassroots advisory committee in 1986
- Incorporated as a society in 1994
- In 2000, received funding from the Law Foundation of BC for its Legal Advocacy Program
- In 2008, BC CEAS opened its Elder Law Clinic
- Began its Seniors Reaching Out To Seniors Program in 2010

BC CEAS Programs

- Victim Services Program
- Legal Programs
- Education and Outreach Program



Uniqueness of BCCEAS Programs

- Internal Referral to appropriate program
- Confidentiality in each program



Victim Services

- Genevieve Smith - Victim Services and SAIL Coordinator plus team of volunteers
    - Funded by the Ministry of Justice



Access to Services at BCCEAS

SENIORS ADVOCACY INFORMATION LINE

604-437-1940
1-866-437-1940
Mon-Fri 9am-1pm

Seniors Advocacy and Information Line

- Provide emotional support
- If appropriate make a referral to Legal program
- Provide outside referrals and resources
- Take a holistic approach when determining what supports are required by the older adult
- Be guided by the older adult when providing services

Eligibility

- Provide Victim Services support to older adults 50+ who have been a victim of a crime or have witnessed a crime
- Provide legal Services to older adults 55+
- If caller presents with significant barriers and a shorter life expectancy, service may be provided at the discretion of BCCEAS on a case by case basis.

Callers to BCCEAS

- Older Adult
- Third Party
- Agencies

Elder Abuse

- Abuse means an action, or deliberate behaviour, by a person(s) in a position of trust, such as an adult child, family member, friend or caregiver, that causes and adult physical or emotional harm or damage to, or loss of, assets or property.

Elder Abuse

- The main reason for abuse is the use of power and control by one person over another.
- A relationship is abusive when a set of behaviours is used by a person(s) to establish dominance and control over another person.

Barriers faced by Older Adults

- Hearing , Mobility etc, Language
- Focusing on what the issue is
- Abuser may be support person
- Self esteem and perception of their abilities
- Different ways of talking about issue-linear etc
- Interrupting to focus the conversation –lose train of thought

Risk Factors For Older Adults

- Poverty
- Immigrant /culture/language
- Isolation
- Housing
- Mental Health
- Physical /Cognitive barriers

Risks for Disclosing Abuse

- Loss of support system
- Loss of relationships
- Escalation of abuse and diminished safety
- May be blamed for the abuse
- Loss of income
- May be blamed for abuse
- Heightened complexity of relationship with the abuser.

Victim Services

- Emotional support-volunteers and extended service
- Information about the Justice System
- Crime Victim Assistance Program

Your Rights as A Victim of Crime

- Right to information:
- Victim services
- Benefits and financial assistance
- Criminal justice system, status of police investigation and court case
- Administration of the offenders sentence
- Right to privacy

Role of the Victim Service Worker

- Respond to immediate crisis by helping the victim deal with emotions, health, safety and practical issues.
- Assist with safety plans and crime prevention strategies.
- Assist with Victim impact Statement and Crime Victim Assistance Program
- Help victim register with Victim Safety unit.

Role of the Victim Service Worker

- Keep victim informed about progress of case
- Accompany victim to court
- Communicate with other community and police based victim service providers.

Emotional, Practical Support

- Listen
- Talk about reactions
- Reduce anxiety by giving information
- Assist with accessing support systems
- Identify strengths and coping mechanisms
- Tasks to regain control of life
- Discuss needs- health etc

Safety Plan

- Unique to each individual- health, mobility, access to resources
- Develop strategies to remain safe
- Gather important documents and information

Victim Impact Statement

- A written description of how a crime has affected you.
- The victim or a family member who has suffered mental injury, emotional trauma or significant economic loss because of an offence, can complete a Victim Impact Statement.

Victim Impact Statement

- The Victim Impact Statement is delivered to the local Crown counsel office.
- The Victim Impact Statement may be given to the Judge at the time of sentencing.
- Is optional.

Crime Victim Assistance Program

- A financial benefits program to assist victims, family members and certain witnesses in dealing with the effects of crime.
- It helps offset financial loss and assists in recovery from injury.
- Is available whether or not a perpetrator is charged.

Crime Victim Assistance Program

- Possible benefits are:
- Medical, dental and prescription drugs
- Counseling
- Protective measures
- Replacement of damaged items
- Income support or lost earning capacity
- Transportation and related expenses

Victim Safety Unit

- The Victim Safety Unit provides information to victims when the accused or offender is supervised by BC Corrections.
- Register as soon as BC Corrections becomes involved.
- If you are a victim of domestic violence, BC Corrections has to notify you.

Victim Safety Unit

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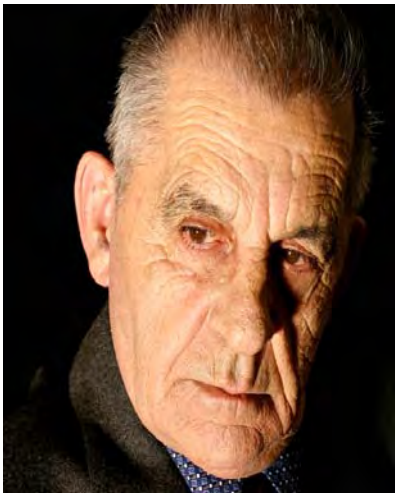
Legal Programs

Elder Law Clinic and Legal Advocacy Program, with funding from:

THE LAW FOUNDATION OF BRITISH COLUMBIA

Why the Need?

- Aging population
- One in 12 older adults in BC abused/neglected
- Access to legal aid is difficult



Referral & Eligibility Requirements

- 55 +
- Low income
- Barriers to access



Legal Services

- Legal problems
- Not drafting wills or advanced planning documents



Legal Advocate

- Residential Tenancy/Housing
- Debt
- Pensions and Appeals



Legal Advocacy Program

Territorial Jurisdiction

- Provide services throughout BC
- Services are delivered by phone and in person
- In person service is available throughout Lower Mainland

Services

- Information, advice and representation
- Invite older adults to office for in person appointment
- Visit to older adult if unable to come to office due to mobility or health issues

Pensions and Appeals



- Canada Pension Plan
- Old Age Security
- Survivors Pension
- Canada Pension Plan Disability
- Survivors Allowance
- Death Benefits

Services in Pensions

- Information, advice and representation at all levels of tribunals (includes services dealing with Service Canada at the initial stage of application for CPP, OAS and Survivor Pension)
- Assist older adults gathering/collecting information and evidence to access OAS
- Deal with third party/parties in the process of gathering information

Housing

- If able to represent, provide advise and resources for self representation
- Negotiate with Landlord before initiating a formal process of Dispute Resolution





- Provide services dealing with government and non government agencies if the pension is the subject of garnishment

Common Issues

- Lack of legal information
- Language barriers
- Financial exploitation from close family members

Success Stories

James Smith applied for OAS six months before he turned 65.Due to lack of evidence, his OAS was not approved BY HRDSC. James was asked by HRDSC to provide the information and evidence about his last 10 years residency in Canada. James was resident in different provinces in the last ten years and did not remember his previous address. James lost his passports and record of his landing. James did not have any documents requested by HRDSC. For six years, he could not gather the information and his OAS application remained pending. James called our agency in 2012 and we helped him collect the evidence (different provinces and from CIC). His OAS was approved within three months and he received $26,000 from HRDSC.

Success Stories

- Robert Smith signed a fixed term tenancy for four years. LL allowed him to make necessary repairs and asked him to keep the receipts. This condition was entered in tenancy agreement. LL sold the property and the new LL served a notice of eviction under personal use.
- We assisted Robert. RTB set aside the NET and awarded him $8000.00 as a cost of repairs.

Success Stories

- Margaret left Canada without informing the Ministry of Health of her departure. Upon her return, CRA started garnishing her entire pension (OAS) as arrears of MSP. She had an arrears of $7000. We communicated in writing with CRA. Margaret's 75% OAS was exempted from garnishment.

Elder Law Clinic

- Financial Exploitation
- Physical Abuse
- Consumer Complaints
- Discrimination
- Guardianship & Capacity

Financial Abuse – Miriam's story

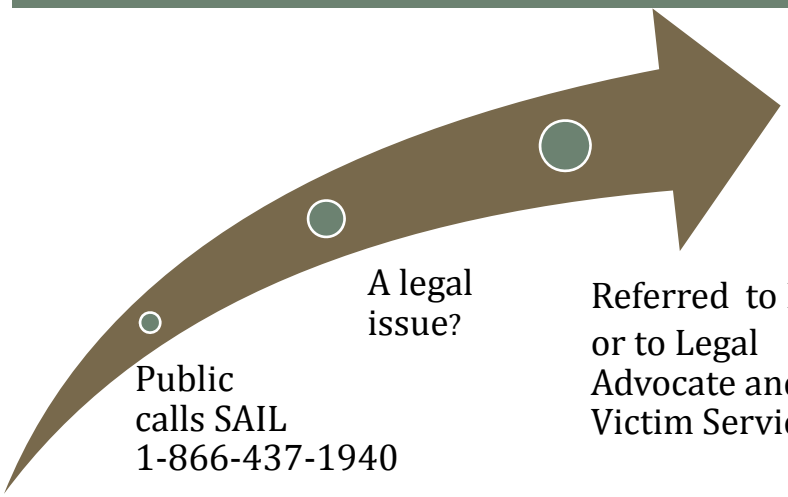
- Miriam is 67 years old and lives alone. Miriam appreciated her grandson helping her to run errands. Since her husband's death, simple things like getting groceries or getting to the bank had become difficult for her. Her grandson, Jonathan, had offered to help and for awhile it seemed like the perfect arrangement. He would take her to the bank and wait while she deposited her cheque and withdrew the cash she needed. Jonathan then drove her wherever she needed to do her shopping.
- As winter approached Jonathan told Miriam it would probably be much easier on her if he just did the errands for her while she stayed warm and cozy at home. Because he had been so helpful for so many months, Miriam thought nothing of signing her pension cheque over to her grandson, who would make her purchases and deposit the rest in her account.
- It took several months to realize that Jonathan had not, in fact, been depositing the balance in her account. He did her shopping as needed, but pocketed the difference, causing Miriam's account to dwindle. It wasn't until a cheque she had written to cover her insurance had bounced that Janet realized her grandson had been helping himself to her pension.

[*Taken from the following: Stories of Abuse - website:http://www.albertaelderabuse.ca/page.cfm?pgID=7].*

Challenges

- Cultural
- Capacity issues
- Language and other barriers
- Unaware of their rights
- No legal remedy

Calls from the Public



Outreach Program

- Workshops
- Public Events
- Partnerships and Connections with agencies and community groups



- For workshops, contact Sue Tench, Educational Program Coordinator at 604 -688 -1927 ext. 225 or Grace Balboutin, Director of Community and Outreach Programs at 604-688-1927 ext. 226

Resources

•Public Guardian and Trustee's Office

•**www.trustee.bc.ca**

• **Toll Free: 1-800-663-7867**

local Phone (604.660.4444)

- Regional Health Authorities

1. Vancouver Coastal Health Authority
Toll Free 1-866-884-0888, Vancouver Local (604) 736-2033

2. Fraser Health Authority
Toll Free: 1-877-935-5669 local (604-587-4600)

3. Vancouver Island Health Authority
Toll Free 1-877-370-8699
local (250-370-8699)

4. Northern Health Authority
Phone: 250-565-2322

5. Interior Health Authority:
Phone: (250) 862-4200

Resources

- Access Pro Bono
  - www.accessprobono.ca
  - 1-877-762-6664 or 604-878-7400
- Law Students' Legal Advice Program (LSLAP)
  - www.lslap.bc.ca
  - (604) 822-5791.
- Community Legal Assistance (CLAS)
  - www.clasbc.net
  - (604) 685-3425

Information on Elder Abuse

- Canadian Network for the Prevention of Elder Abuse www.cnpea.ca
- Seniors Canada www.seniors.gc.ca
- National Initiative for the Care of the Elderly www.nicenet.ca



BC CENTRE FOR ELDER
ADVOCACY
SUPPORT

Thank you!

9. Other Issues and Resources

- **Working Effectively with Clients with Mental Health Issues**
  - Working Effectively with Clients with Mental Health Issues PowerPoint presentation
  - Values Sheet

THE LAW FOUNDATION OF BRITISH COLUMBIA

Legal Services Society

Working Effectively with Clients Who Have Mental Health Issues

Provincial Advocates Conference
November 22, 2012

Anna Cooper, RN(C).

Working Effectively with Clients Who Have Mental Health Issues

Workshop Overview:

- Self-reflection exercise
- An overview of mental health conditions and related symptoms
- Barriers to Service in Agency Practice
- Working with Challenging Behaviours
- Case Scenarios

Working Effectively with Clients Who Have Mental Health Issues

Workshop Objectives:

1. To increase our understanding of mental illness and its affect on behavior
2. To discuss barriers to service faced by mental health consumers
3. To address the challenging behavoirs we see in practice

What is Mental Illness?

"Mental illnesses are characterized by **alterations in thinking, mood or behavior (or some combination thereof) associated with significant distress and impaired functioning over an extended period of time.** The symptoms of mental illness vary from mild to severe, depending on the type of mental illness, the individual, the family and the socio-economic environment"

(definition from *A Report on Mental Illness in Canada*, Health Canada 2002)

How are mental health conditions diagnosed

- DSM: the diagnostic and statistical manual published by the American Psychiatric Association. New version coming out in May 2013
- The diagnostic manual contains over 450 diagnosis which include personality disorders and developmental disorders

The DSM

5 Axis to the diagnosis:

I. Clinical Syndromes
II. Developmental and personality disorders
III. Physical health conditions
IV. Psychosocial factors
V. Global Assessment of Functioning (out of 100)

Mary Jane Doe

I. Major depression with psychotic features
II. Borderline Personality Disorder
III. Diabetes, hypertension
IV. Single parent of 4 children under 10. Conflict with family of origin
V. 40

Common behaviors

- Sadness
- Anxiety
- Irritability
- Paranoia/suspiciousness
- Lack of concentration and follow up
- Anger
- Dependency
- Manipulative

Identifying and addressing barriers to service

Common barriers:

1. Stigma
2. Fragmented service
3. Communication

Addressing barriers to service

1. STIGMA

People experience prejudice and discrimination (in medical care, housing etc.) and thus avoid asking for services

They have negative feelings about themselves, have low self-esteem and can be prey to believing negative stereotypes generated by society and media

Addressing barriers to service

1. STIGMA

Clients tend to avoid seeking help and to keep symptoms and substance use secret

Clients tend to minimize the impact of their illness on their functioning

Clients experience social isolation or limited support networks

Depression and loss of hope for recovery or that taking action will result in positive, efficacious outcomes

Addressing barriers to service

Reducing stigma in service provision

Understand why stigma exists and make efforts to challenge & counteract it in your own lives and working practice.

Practice accessible and inclusive service provision. Services provided must be non-judgmental and empathic and client centered. An advocate must always see the service user as a person first.

Addressing barriers to service

Reducing stigma

- Adequate time must be devoted to working individually with your client to build trust and to facilitate honesty about stigma and how it may be affecting disclosure.
- Self-empowering clients to act on their own behalf and to take steps to assist in the resolution of their case/issue is also important in addressing stigma.

Addressing barriers to service

Fragmented Service

- Services should be immediate, accessible and client centered
- Drop-In services mean that help is more readily available
- People are informed as soon as possible if there are not eligible for services and provided accurate information about other relevant services.
- People should be treated as individuals first

Addressing barriers to service

Fragmented Service

Nonjudgmental and unconditional services

Accessible intake and informed consent forms

Additional time is allowed for face to face service delivery

Be familiar with other agencies that offer services to persons with mental illness.

Addressing Barriers to service

Communication Difficulties

Due to symptoms of the mental illness

Due to past experience with service providers

Due to anxiety around the reason for seeking service

Addressing Barriers to service

Strategies to assist with communication

- Take time to learn about various mental illnesses so that you know what to expect and can put communication barriers in context.
- build in extra time to work with clients
- Discuss strategies to building a trusting relationship

Working Effectively with Clients Who Have Mental Health Issues

- Do not make unrealistic promises
- Deal with emotional response by modeling calm. "Let's look at your goals. What will achieving this outcome get for you?"
- Demonstrate empathy when cannot assist. "I can see you are upset, stressed by your experience"
- Echo/paraphrase person's concerns.. Use the language of cooperation-"we could look at it this way". "How can we resolve this".

Working Effectively with Clients Who Have Mental Health Issues

- Define key issues at the outset and stay focused on them.
- Treat any complaints seriously. Try and focus on the issue being presented rather than just the behaviour or emotions.
- Communicate clearly. Ask the person if they understand what you are saying.

Working Effectively with Clients Who Have Mental Health Issues

- Use direct language. Tell them clearly what you can or cannot do.
- Be consistent in your approach to the person.
- Use a neutral tone and pitch. Be non reactive. Try to remain calm.
- Always be conscious of your own emotional and physical safety.

Working Effectively with Clients Who Have Mental Health Issues

- Be clear at the outset about what services you do and do not offer.
- Set out each persons' tasks clearly.
- Articulate and keep to time limitations.
- Use your team for continuity of care & to avoid burnout.
- Learn how to tolerate hostility without retaliating or withdrawing. Start with & maintain positive tone. Say nothing. Model expected behaviour.

Working Effectively with Clients Who Have Mental Health Issues

Clients with depression:

- Maintain a positive attitude. Maintain morale and sense of hope.
- Break information and next steps down into basic, simple instructions.
- Use genuine, heartfelt admiring statements to empower.
- Follow a self-empowerment model. Give clients tasks to take on that are achievable. Good for self-esteem.

Working Effectively with Clients Who Have Mental Health Issues

Clients Who Regularly Miss Appointments:

- Identify barriers to meeting
- If client cannot make appointments, identify file will be closed and that it can be re-opened when client is ready
- Set a specific time (once a week/once every two weeks) and advise client you will be available for a specific amount of time. You will be there regardless and if they show up, great. If not, you will attend to other work. No judgment.

Hostile/aggressive behaviors

- **Follow any existing protocols regarding safety and potential threats in the workplace-two staff, meeting place, duress alarms etc.**
- Determine if the anger is constructive/ reasonable and appropriately directed. If so, allow venting for a specific period of time.
- If anger is abusive, advise of need for respect and consequences if continues.

Hostile behaviors

- Do not try and reason with a person who is extremely angry. Do not react or verbally defend yourself. Adopt a non-threatening, but firm physical stance. Hold arms at the side of your body, with palms open. Stand at a distance. Breathe deeply and speak slowly in a moderate voice.
- Use name frequently. Focus on them with empathy, acknowledging feelings and needs. Ask open ended questions. Agree where you can. Reassure concerns are important.

Psychosis & paranoia

- Important to understand and acknowledge distress and likely feelings of terror.
- Reduce stimuli in the environment.
- Identify with, rather than argue with the person. It is unhelpful to challenge delusions directly. Delusions are usually extremely fixed and difficult to change.
- Don't agree. Provide alternate explanations

Psychosis and Paranoia

- Ask for documentary or other evidence to support allegations. Indicate advice/follow up limited if no back up to support claims.
- Encourage person to seek help, not because of paranoia but because of specific circumstances they are experiencing and their named distress.

Working Effectively with Clients Who Have Mental Health Issues: Summary

a) Keep stimulation levels as low as possible.
b) Be compassionate and empathetic in your approach.
c) document and write down everything in simple steps.
d) Ensure follow up. Calling, writing letters. Sending documentation directly to third party.
e) Maintain a positive attitude.
f) Work as a team.

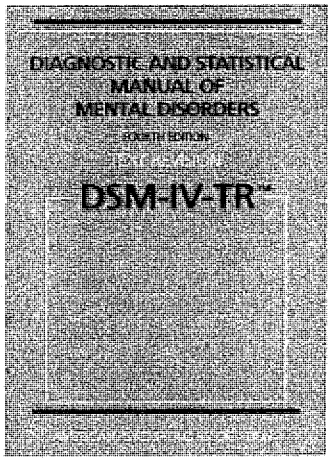
Working Effectively with Clients Who Have Mental Health IssuesCase Scenario #1

You are working with a client who has a history of anger management problems, anxiety, depression and substance abuse. He has been banned from his local grocery store for alleged threatening behavior. He has requested your help in pursuing a human rights complaint. In the course of your work together, he has become increasingly frustrated in his interactions with you. He frequently swears and interrupts you and at your last appointment, he threw his paperwork across your desk and told you to shut up when you tried to explain the reasoning behind your questions and decisions. You and the client have not been successful in resolving his concerns and no other agency/individual will take on his human rights complaint. He is now demanding you represent him.

Working Effectively with Clients Who Have Mental Health Issues Case scenario #2

You are helping a person with a PWD application. He have been diagnosed with schizophrenia but does not agree with the diagnosis. He is not sure he wants any mental health information added to the application. He also believes that he has a serious medical condition the physician is ignoring and has stated that the physician refuses to provide a proper referral for treatment because he is closely related to a former service provider who "has it out for him and has been trying to get him for years". He says he won't complete the PWD form until his medical condition is acknowledged. He wants to make a complaint about the physician.

How are Psychiatric conditions diagnosed? An Introduction to the DSM



The Diagnostic and Statistical Manual of Mental Disorders (DSM), long the master reference work in psychiatry, is seriously flawed and needs radical change from its current "field guide" form, according to an essay by two Johns Hopkins psychiatrists published in the May 17, 2012 issue of the *New England Journal of Medicine*.

"A generation ago it served useful purposes, but now it needs clear alterations," says Paul R. McHugh, M.D., a professor of psychiatry and behavioral sciences at the Johns Hopkins University School of Medicine and co-author of the paper with Phillip R. Slavney, M.D., a professor emeritus in the same department. "They say they can't do any better. We disagree and can show how."

The original DSM, published in the 1950s, was intended as a public health service documenting the incidence and prevalence of mental illnesses. By its third edition in 1980 (DSM-III), however, it had evolved into a reference book prescribing how clinicians should identify and classify psychiatric disorders.

Today, the Johns Hopkins psychiatrists say, DSM provides checklists of symptoms, offering few clues to the underlying causes of mental disease and making it difficult to direct treatment or investigate the disorders it details. A new edition, DSM-5, is due out in 2013.

The manual, put together by the American Psychiatric Association, currently identifies hundreds of conditions via lists of diagnostic criteria and symptoms, functioning exactly as does a naturalist's field guide but for mental illness. It offers no way to make sense of mental disorders and no way to distinguish illnesses that appear to be similar but actually are quite different and require different treatments, the psychiatrists argue.

"If you just name things and don't explain what the causes are, you do not know how to rationally treat or study the diseases," says McHugh, former director of Hopkins' psychiatry department. "The DSM gives everything a name but not a nature."

Before DSM-III, McHugh and Slavney say, psychiatrists typically used a "bottom-up" method of diagnosis, based on a detailed life history, painstaking examination of mental status and corroboration from third parties. The new emphasis on symptoms, they say, has unfortunately encouraged a cursory "top-down" method that relies on checklists and ignores much of the narrative of the patients' lives.

The causes of psychiatric disorders derive from four interrelated but separable categories: brain diseases, personality dimensions, motivated behaviors and life encounters, write McHugh and Slavney. The two physicians suggest that organizing mental illnesses based on these four causalities would "promote fruitful thought and, consequently, progress."

"Psychiatrists would start moving toward the day when they address psychiatric disorders in the same way that internists address physical disorders, explaining the clinical manifestations as products of nature to be comprehended not simply by their outward show but by the causal processes and generative mechanisms that provoke them," they write. "Only then will psychiatry come of age as a medical discipline and a field guide cease to be its master work."

Source: This story is reproduced with editorial adaptations from News Release by Johns Hopkins University School of Medicine.

http://www.mdhealthguide.com/general-health/featured/expert-psychiatrist-current-psychiatry-treatments-flawed/

Commonly diagnosed conditions (diseases) (from the DSM)

Depression:

Is a mood disorder characterized by impaired behaviour and cognition and changes in mood.

Symptoms:

- *Feelings of worthlessness and hopelessness*
- *Sleep Problems: Falling or staying asleep/Oversleeping*
- *Trouble concentrating or making decisions*
- *Loss of interest in activities*
- *Overwhelming feelings of sadness*
- *Changes in weight or appetite*
- *Social avoidance/isolation*
- *Irritability*
- *Loss of energy/fatigue*
- *Hallucinations/Delusions: in extreme cases*
- *Thoughts of death or suicide*

Bipolar Disorder:

Bipolar disorders is a diagnostic category describing a class of mood disorders characterized by episodes of mania (elevated mood) and depression or mixed states (depression/mania simultaneously) with periods free of symptoms.

Bipolar I (at least 1 manic episode & one or more depressive episodes

Bipolar II: (Predominantly depressive episodes with milder hypomanic episodes)

Cyclothymic Disorder: Chronic fluctuating moods-hypomania & depression

Symptoms:

- *Excessively high or elevated mood*
- *Extreme irritability or anger*
- *Impulsive decision making*
- *Racing thoughts*
- *Rapid speech*
- *Restlessness/High levels of energy*
- *Feeling little need for sleep*
- *Extremely short attention span*
- *Auditory and visual hallucinations*

Anxiety Disorders:

An excessive, irrational dread of everyday situations. Categorized as the following:

- **Generalized Anxiety Disorder (GAD)** :

exaggerated worry and tension, even when there is no apparent reason for concern

- **Obsessive-Compulsive Disorder (OCD)**

unwanted and intrusive thoughts (obsessions) that compel repeated performance of ritualistic behaviors and routines (compulsions) to try and ease anxiety

- **Panic Disorder/Agoraphobia**

the abrupt onset of intense fear that reaches a peak within a few minutes and includes some of the following symptoms: feeling of imminent danger & doom, need to escape, heart palpitations, shortness of breath, nausea, fear of dying or going crazy

- **Post Traumatic Stress Disorder**:

Occurs in people who have experienced a traumatic event. Symptoms include:

a. *Re-experiencing the traumatic event through flashbacks, nightmares and distressing recollections*

b. *Emotional numbness*

c. *Avoidance of places, activities and people associated with the event*

d. *Difficulty sleeping, concentrating*

e. *Feeling jumpy, easily irritated or angered*

- **Social Anxiety Disorder**

Extreme fear of being scrutinized and judged by others in social or performance situations leading to extreme distress and isolation

Schizophrenia & psychotic disorders:

- **Schizophrenia:**

Positive symptoms:

Hallucinations: seeing, hearing, feeling things others do not see, hear or feel

Delusions: false beliefs that are not part of the person's culture and do not change regardless of truth or logic

Thought disorders: unusual or dysfunctional ways of thinking. Disorganized thinking. .

Negative symptoms:

Flat affect: where a person's face does not move or he or she talks in a dull or monotonous voice

Lack of pleasure in everyday life

Lack of ability to begin and sustain planned activities

Cognitive symptoms:

Poor "executive functioning" (the ability to understand information and use it to make decisions)

Trouble focusing or paying attention

Problems with "working memory" (the ability to use information immediately after learning it)

Personality Disorders:

A group of psychiatric conditions in which a person's chronic behaviors, emotions, and thoughts are very different from their culture's expectations and cause serious problems with social and occupational functioning. There are currently 10 diagnosis divided into 3 clusters. This will be changing next year with the DSM5.

- ***Anti-social personality disorder**: persistent social rule□breaking, deceitfulness, offending behaviour, irresponsibility, lack of remorse and failure to plan ahead*
- ***Avoidant personality disorder**: lifelong pattern of feeling very shy, inadequate, and sensitive to rejection*
- ***Dependant personality disorder**: a chronic condition in which people depend too much on others to meet their emotional and physical needs*
- ***Histrionic personality disorder**: act in a very emotional and dramatic way that draws attention to themselves*
- ***Narcissistic personality disorder**: an inflated sense of self-importance and an extreme preoccupation with self*
- ***Obsessive-compulsive personality disorder**: preoccupation with rules, orderliness, and control*
- ***Paranoid personality disorder**: long-term distrust and suspicion of others, but does not have a full-blown psychotic disorder such as schizophrenia*
- ***Schizoid personality disorder**: person has a lifelong pattern of indifference to others and social isolation. It does not cause hallucinations, delusions, or complete disconnection from reality.*
- ***Schizotypal personality disorder**: trouble with relationships and disturbances in thought patterns, appearance, and behavior. Odd beliefs and behaviours but no positive symptoms found in schizophrenia.*
- ***Borderline Personality Disorder:** characterized by unstable relationships, unstable emotions, unstable behaviour, unstable sense of identity and awareness problems.*

Values clarification

1. Three things I believe to be true about people with a mental illness are ...

2. Adults who develop a mental illness will never fully recover. Explain why you agree or disagree.

3. People who exhibit signs of a mental illness have experienced an unresolved traumatic situation in their life. Explain why you agree or disagree.

4. To best help clients, advocates should know about a client's mental illness and treatment. Explain why you agree or disagree.

5. One can only successfully advocate for a highly motivated client. Explain why you agree or disagree.

6. The most important skill needed by someone working with clients with a mental illness is...

7. If you were a house, describe what you would look like.