Provincial Training Conference

Law Foundation of BC and Legal Services Society

THE LAW FOUNDATION OF BRITISH COLUMBIA

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

Agenda

TUESDAY OCTOBER 6, 2015

8:00 am - 5:00 pm and Dinner at 6 pm

TIME	WORKSHOPS	
8:00 - 8:30	Registration and materials pick-up	
8:30 - 9:00	Opening, welcome (Warren Milman, Board Chair; Wayne Robertson QC, Executive Director, Law Foundation of BC; and, Mark Benton QC, Executive Director, Legal Services Society), and announcements	
9:00 - 10:30	*PLENARY* SYSTEMIC POVERTY ADVOCACY: UPDATES Ballroom AB	
BREAK		
10:45 - 12:15	SOCIAL SECURITY TRIBUNAL: WHERE ARE WE NOW? Ballroom AB	
12:15 - 1:45	PovNet Lunch Nicky Dunlop, Executive Co-ordinator, PovNet Audrey Jun, Clicklaw Program Coordinator, BC Courthouse Libraries	
1:45 - 3:15	TENANTS AND FORECLOSURE Ballroom AB	PARENTING RIGHTS OF WOMEN LEAVING ABUSIVE RELATIONSHIPS Ballroom C
BREAK		
3:30 - 5:00	WORKING WITH MUNICIPALITIES ON TENANCY ISSUES Ballroom AB	PARENTING RIGHTS CONTINUED Ballroom C
6:00	DINNER and entertainment	

PROVINCIAL TRAINING CONFERENCE 2015 - Radisson Hotel, 8181 Cambie Road, Richmond, BC V6X 3X9 (Aberdeen skytrain)

WORKSHOPS

FAMILY LAW UPDATE Ballroom C	HUMAN RIGHTS Bridgeport Room
SYSTEMIC APPROACHES TO WELFARE SERVICE DELIVERY ISSUES Bridgeport Room	WORKING WITH HIGH CONFLICT CLIENTS (maximum 30 participants - register at front desk) Cambie Room
DEBT:BANKRUPTCY AND FORECLOSURE Bridgeport Room	WORKING WITH A LAWYER ON JUDICIAL REVIEW Cambie Room

Agenda

WEDNESDAY, OCTOBER 7, 2015

8:30 am - 5 pm

TIME	WORKSHOPS	
8:30 - 10:00	*PLENARY* RESOURCES UPDATE PANEL Ballroom AB	
BREAK		
10:15- 11:45	RESIDENTIAL TENANCY UPDATE Ballroom AB	
11:45 - 1:45	LUNCH Law Foundation Advocates Lunch	
1:45 - 3:15	WELFARE: LUMP SUMS, TRUSTS AND RDSPS Ballroom AB	MATRIMONIAL PROPERTY ON RESERVE Ballroom C
BREAK		
3:30 - 5:00	MANUFACTURED HOME PARKS Ballroom AB	PROTECTION ORDERS Ballroom C
6:00	PovNet AGM, Bridgeport Room - updates on the past year, sharing stories, refreshments and visiting	

PROVINCIAL TRAINING CONFERENCE 2015 - Radisson Hotel, 8181 Cambie Road, Richmond, BC V6X 3X9 (Aberdeen skytrain)

WORKSHOPS

CHILD PROTECTION: BEST PRACTICES WORKING WITH ABORIGINAL COMMUNITIES Ballroom C	STATUTORY INTERPRETATION Bridgeport Room
LSS SERVICES AND RESOURCES Bridgeport Room	PREPARING YOUR CASE Cambie Room
STUDENT LOANS Bridgeport Room	PREPARING YOUR CASE CONTINUED

Agenda

THURSDAY, OCTOBER 8, 2015

8:30 am - 3:45 pm

TIME	WORKSHOPS	
8:30 - 9:00	*PLENARY* CLEAR SKIES A preview of the LSS video Clear Skies which looks at responses to family violence, Sean Muir	
9:00 - 10:30	STRATEGIES FOR WELFARE APPEALS Ballroom AB	WORKING WITH SELF-REPRESENTED FAMILY CLIENTS Ballroom C
BREAK		
10:45 - 12:15	STRATEGIES FOR WELFARE APPEALS CONTINUED	ISSUES IN CHILD AND SPOUSAL SUPPORT Ballroom C
12:15 - 1:15	LUNCH	
1:15- 2:45	CPP APPLICATIONS AND APPEALS: AN OVERVIEW Ballroom AB	IMMIGRATION ISSUES THAT AFFECT FAMILY LAW CLIENTS Ballroom C
CLOSING **3:00 - 3:30**	*PLENARY* Memories of Jim Sayre and thanks to other advocates	

PROVINCIAL TRAINING CONFERENCE 2015 - Radisson Hotel, 8181 Cambie Road, Richmond, BC V6X 3X9 (Aberdeen skytrain)

WORKSHOPS

ABORIGINAL JUSTICE DIALOGUE SESSION
Bridgeport Room

HUMAN RIGHTS (REPEAT)
Cambie Room

WILLS AND ESTATES, ON AND OFF RESERVE
Bridgeport Room

POLICE ACCOUNTABILITY
Bridgeport Room

Workshops

PLENARY SYSTEMIC POVERTY ADVOCACY: UPDATES

TUE

Ballroom AB (9:00 - 10:30)

A comprehensive update for all advocates helping low-income clients with welfare and related issues. Changes to legislation, regulations and policy will be reviewed and analyzed: lifetime bans and issues affecting family law clients will be included in this review. Other issues to be addressed will include the complaint to the Ombudsperson; work with BC Hydro on behalf of low income clients; approaches to disability trusts; child support for people on welfare; ID issues; and, support that groups such as CLAS and BCPIAC can provide advocates. Even if welfare advocacy is not the focus of your work, this session will provide you with important information about how the current system could affect your clients.

SPEAKERS

Sarah Khan and Lobat Sadrehashemi, BC Public Interest Advocacy Centre

Alison Ward, staff lawyers from Community Legal Assistance Society

Kendra Milne, Director of Law Reform, West Coast LEAF

SOCIAL SECURITY TRIBUNAL: WHERE ARE WE NOW?

TUE

Ballroom AB (10:45 - 12:15)

An update on how the Social Security Tribunal is working now - a year or so after it came into operation. The session will consider the impact of the SST in both CPP Disability and Employment Insurance cases. The session will also provide advocates with an opportunity to share information about their experiences on the ground with the Tribunal.

SPEAKERS

Kevin Love, staff lawyer, Community Legal Assistance Society

Ashley Silcock, advocate, Disability Alliance BC

FAMILY LAW UPDATE

TUE

Ballroom C (10:45 - 12:15)

An update on changes in family law in BC over the past year.

SPEAKER Assunta Deciantis

HUMAN RIGHTS

TUE THUR

Bridgeport Room (10:45 - 12:15)—Repeat Oct 8 (9:00 - 10:30)

A workshop that will provide substantive information about human rights law as well as an update on the current procedure for making human rights complaints in BC. Family status, accomodation, and other current issues will be discussed.

SPEAKER Robyn Durling, Co-Director and Communications Director, BC Human Rights Clinic

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TENANTS AND FORECLOSURE

TUE

Ballroom AB (1:45 - 3:15)

Information about how foreclosure can affect tenants when the property they are renting is foreclosed against.

SPEAKERS Laura Johnston, Kevin Love, staff lawyers, Community Legal Assistance Society

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PARENTING RIGHTS OF WOMEN LEAVING ABUSIVE RELATIONSHIPS

TUE

Ballroom C (1:45 - 3:15)

Recent changes in family law impact the parenting rights of women with abusive or harassing ex-spouses. This interactive training explores common legal challenges facing these women and highlights aspects of family law they may use to further their safety and rights.

SPEAKERS Alana Prochuk, Shahnaz Rahman, West Coast LEAF

PARENTING RIGHTS OF WOMEN LEAVING ABUSIVE RELATIONSHIPS

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Workshops

SYSTEMIC APPROACHES TO WELFARE SERVICE DELIVERY ISSUES

TUE

Bridgeport Room (1:45 - 3:15)

An opportunity to discuss possible systemic approaches to welfare service delivery issues. BCPIAC will report on work they have been doing in this area and look to advocates for information and ideas to help move forward on these issues.

SPEAKERS

Lobat Sadrehashemi, staff lawyer, BCPIAC

Erin Pritchard, staff lawyer, BCPIAC

WORKING WITH HIGH CONFLICT CLIENTS

TUE

(maximum 30 participants - register at front desk)

Cambie Room (1:45 - 3:15)

Information about how issues that might arise with high conflict clients and how to deal with them.

SPEAKER Michael Lomax, mediator

WORKING WITH MUNICIPALITIES ON TENANCY ISSUES

TUE

Ballroom AB (3:30 - 5:00)

An information and discussion session on how advocates can work with municipalities to address tenancy issues. Learn about Vancouver's standards of maintenance and tenant relocation policies, hear from advocates in other communities, and strategize how to develop similar approaches in your community.

SPEAKERS

Celine Mauboules, City of Vancouver

Jane Mayfield, TRAC

Yuka Kurokawa, TAPS

DEBT:BANKRUPTCY AND FORECLOSURE

TUE

Bridgeport Room (3:30 - 5:00)

An overview of bankruptcy and foreclosure from the debtor/homeowner's perspective. It will review the procedures involved in bankruptcy and foreclosure; what the debtor/homeowner can expect; the impact bankruptcy and/or foreclosure have on a person's future debt or credit rating; what a debtor/homeowner can keep after a bankruptcy or foreclosure; and what resources are available

SPEAKER Alison Ward, staff lawyer, CLAS

WORKING WITH A LAWYER ON JUDICIAL REVIEW

TUE

Cambie Room (3:30 - 5:00)

Do your clients want to challenge Res Ten and EAAT decisions via judicial review? This workshop will help you spot cases where JR may be an option, and give tips for working effectively with a lawyer on a JR. We will focus on JR's based on procedural unfairness and breaches of natural justice

SPEAKERS

Sarah Khan, staff lawyer, BCPIAC

Amita Vulimiri, staff lawyer, CLAS

PLENARY RESOURCES UPDATE PANEL

WED

Ballroom AB (8:30 - 10:00)

An overview of resources available to advocates and their clients.There will be information about PLEI and self help resources from BC Courthouse Libraries, Disability Alliance BC, Justice Education Society, Legal Services Society, Peoples' Law School, PovNet, and TRAC. The Civil Resolution Tribunal will provide an update about online resources.

SPEAKERS

Kevin Love, staff lawyer, Community Legal Assistance Society (CLAS)

Shannon Salter, Chair, Civil Resolution Tribunal

Dave Nolette, Justice Education Society

Patricia Lim, Publications Development Co-ordinator, Legal Services Society

Olga Volpe, Manager, Family Law Services

Drew Jackson, Executive Director, Peoples' Law School

Andrew Sakamato, Executive Director, TRAC

Workshops

RESIDENTIAL TENANCY UPDATE

WED

Ballroom AB (10:15 - 11:45)

An update from RTB staff and advocates and lawyers working on residential tenancy issues. Some of the topics that will be addressed are: amendments to the legislation; changes to the RTB Rules of Procedure; new case law; systemic reforms; and, new online tools at the RTB

SPEAKERS

Janet Donald, Gregory Steves, Residential Tenancy Branch

Josh Prowse, staff lawyer, CLAS

Andrew Sakamoto, Executive Director, TRAC

CHILD PROTECTION: BEST PRACTICES WORKING WITH ABORIGINAL COMMUNITIES

WED

Ballroom C (10:15 - 11:45)

A discussion about the options for, and benefits of, the involvment of Aboriginal Communities as legal parties in matters under the CFCSA involving their child members.

SPEAKER Ardith Walkem, lawyer

STATUTORY INTERPRETATION

WED

Bridgeport Room (10:15 - 11:45)

A workshop that will provide hands-on experience interpreting legislation. Review the tools and approaches that will help you to effectively analyze legislation, regulation and policy.

SPEAKERS

Amita Vulimiri, Juliana Dalley, staff lawyers, CLAS

Erin Pritchard, staff lawyer, BCPIAC

WELFARE: LUMP SUMS, TRUSTS AND RDSPS

WED

Ballroom AB (1:45 - 3:15)

A review of what approaches clients with disabilities can do if they receive a lump sum of money that could otherwise jeopardize their disability benefits. Options such as RDSPs, Tax Free Savings Plans and other approaches to dealing with lump sum payments will be considered.

SPEAKERS

Thea McDonaugh, advocate, TAPS

Alison Ward, staff lawyer, CLAS

Ashley Silcock, advocate, Disability Alliance BC

MATRIMONIAL PROPERTY ON RESERVE

WED

Ballroom C (1:45 - 3:15)

Update on the Federal Matrimonial Property on Reserve legislation which will impact division of matrimonial property or interests on reserve upon divorce, separation or death of a spouse (where at least one spouse is an Indian or member of a First Nation, and the property is on reserve)

SPEAKER Halie Bruce, lawyer

LSS SERVICES AND RESOURCES

WED

Bridgeport Room (1:45 - 3:15)

Find out about the new resources and initiatives LSS has available for family clients

SPEAKERS Sherilyn Thompson, Silvia Tobler

PREPARING YOUR CASE

WED

Cambie Room (1:45 - 3:15 and 3:30 - 5:00)

A session that will give advocates a chance to work advocacy skills needed to effectively prepare their case.

SPEAKER Kendra Milne, Director of Law Reform, West Coast LEAF

Workshops

MANUFACTURED HOME PARKS

WED

Ballroom AB (3:30 - 5:00)

Repeat of a session at last year's conference for those who missed it. The workshop will clarify the differences between the Manufactured Home Park Tenancy Act (MHPTA) and the Residential Tenancy Act, and set out practical steps for dealing with evictions at a manufactured home park. It will cover potential sales of manufactured homes, what landlords can or cannot do with a tenant's belongings, and when a campground may be covered by the MHPTA.

SPEAKER Amita Vulimiri and Joshua Prowse, staff lawyers, CLAS

PROTECTION ORDERS

WED

Ballroom C (3:30 - 5:00)

An update on the law in this area and a discussion of how to help clients construct appropriate affidavits.

SPEAKER Uphar Dhaliwal, lawyer

STUDENT LOANS

WED

Bridgeport Room (3:30 - 5:00)

An opportunity to talk with staff from student loans

SPEAKER Janette Demianchuk, Policy Analyst, Ministry of Finance

STRATEGIES FOR WELFARE APPEALS

THUR

Ballroom AB (9:00 - 10:30 and 10:45 - 12:15)

An opportunity to share thoughts with other advocates and lawyers working on poverty law issues about strategies for helping clients whose application is turned down.

SPEAKERS	Brenda Kobzey, advocate
Alison Ward, CLAS	Robin Loxton, DABC
Sarah Khan, Erin Pritchard BCPIAC	Lisa Cowan, Thea McDonaugh, TAPS

WORKING WITH SELF-REPRESENTED FAMILY CLIENTS

THUR

Ballroom C (9:00 - 10:30)

A session that will consider how to best support self-represented clients with family law issues. Preparing for Section 211 reports and examination for discovery will be two of the issues considered.

SPEAKERS

Denice Barrie, lawyer

Rhona M. Lichtenwald, Lawyer & Mediator, Hillcrest Law & Mediation

ABORIGINAL JUSTICE DIALOGUE SESSION

THUR

Bridgeport Room (9:00 - 10:30)

A top priority for Legal Aid BC this year is to get community input about access to justice and improving services for Aboriginal peoples in BC. We are conducting a series of Aboriginal Justice Dialogue Sessions to obtain an informed view of the issues related to Aboriginal peoples and access to justice. We invite advocates who provide services to Aboriginal peoples to join us for this dialogue session.

SPEAKERS

Lynn McBride, Community Engagement Coordinator, Legal Services Society (LSS)

Trish Kumpf, Manager, Aboriginal Services, LSS

ISSUES IN CHILD AND SPOUSAL SUPPORT

THUR

Ballroom C (10:45 - 12:15)

An information and discussion session about child and spousal support. Some of the topics to be addressed are: retroactive child and spousal support,and imputing income.

SPEAKER Rhona M. Lichtenwald, Lawyer & Mediator, Hillcrest Law & Mediation

WILLS AND ESTATES, ON AND OFF RESERVE

THUR

Bridgeport Room (10:45 - 12:15)

An opportunity to learn more about new developments in an important area.

SPEAKER Raymond Phillips, lawyer

Workshops

CPP APPLICATIONS AND APPEALS: AN OVERVIEW

THUR

Ballroom AB (1:15 - 2:45)

An overview of how to make the best application for CPP and how to effectively appeal a decision against your client

SPEAKER Ashley Silcock, Disability Alliance BC

IMMIGRATION ISSUES THAT AFFECT FAMILY LAW CLIENTS

THUR

Ballroom C (1:15 - 2:45)

A panel will consider issues such as conditional permanent residence, forced marriages, mothers without status, sponsorship breakdown, and citizenship issues that affect family law clients.

SPEAKERS

Harjit Kaur, PhD candidate

Lobat Sadrehashemi, staff lawyer, BCPIAC

Andrea Vollans, advocate, YWCA

POLICE ACCOUNTABILITY

THUR

Bridgeport Room (1:15 - 2:45)

The Independent Investigations Office, provincial Office of the Police Complaints Commissioner, and Commission for Public Complaints Against the RCMP have different functions within the police accountability system, as do the courts and the provincial coroner. We will provide information on the system, how the pieces work together, and what clients can expect when they interact with the police accountability system.

SPEAKER Josh Paterson, Executive Director, BC Civil Liberties Association (BCCLA)

WRAPPING OUR WAYS AROUND THEM

Aboriginal Communities and the CFCSA Guidebook

Invitation to a Transformative Approach

WRAPPING OUR WAYS AROUND THEM
Aboriginal Communities and the CFCSA Guidebook

Colonial Past disconnected Aboriginal Communities and Laws from Aboriginal Children and Families

1) Denial of Title and Laws
2) *Indian Act* denies status to Indian women and their children (generations of cultural and geographic dislocation and loss)
3) Residential Schools
4) Child Welfare system

Intergenerational harm carried forward

Contested Legal Ground

- Federal vs. Provincial jurisdiction
- s. 88
- *Indian Act* [Aboriginal peoples did not consent to the application of provincial child welfare laws]
- Inequitable funding

Contested Legal Ground

Aboriginal Laws and Legal Orders for the care of children

- Connolly v. Woolrich
- Casimel v. ICBC
- Section 35

Recognition of Aboriginal Laws – on paper

Difficulty – aboriginal rights, CFCSA statutory process

Few cases where aboriginal groups have sought to establish a s. 35 right

Not successful:

(1) insufficient evidence;

(2) the lateness of aboriginal community involvement; or,

(3) where courts have suggested that the concerns of communities are political rather than directed toward the interests of the child.

Does not mean that a right does not exist

Today = Children and Parents Face the Child Welfare system radically isolated

Currently in BC about 54% of all children in care are aboriginal (regionally in some areas those numbers are higher); numbers constantly increasing

Proposed solution = to reconnect and re-involve aboriginal communities using existing tools under CFCSA

WRAPPING OUR WAYS AROUND THEM
Aboriginal Communities and the CFCSA Guidebook

Child Welfare is not working for Aboriginal children

- children and families are isolated from Aboriginal culture, laws and ways of making decisions about, and taking action to ensure, that children are protected

The long-term outcomes of children raised in care continue to be very poor, including

- the risk of low education attainment
- higher risks of:
  - street involvement
  - drug use, and
  - contact with the criminal justice system
- more likely to age out of care

Aboriginal children have inherited the legacy of colonial history and jurisdictional wrangling

Ground we are standing on

- Aboriginal peoples need to know, and work with, the systems that impact children and families today

1913 Hell's Gate slide – Early Stuart Run

WRAPPING OUR WAYS AROUND THEM
Aboriginal Communities and the CFCSA Guidebook

CFCSA contains provisions to involve aboriginal communities

Amended approximately 1996 – rarely used

WRAPPING OUR WAYS AROUND THEM
Aboriginal Communities and the CFCSA Guidebook

CFCSA Provisions Protecting Aboriginal Identity and Heritage

s. 2 Guiding Principles – decisions made about a child should consider

- the child's views; kinship ties and attachment to extended family
- cultural identity of aboriginal children

s. 3 Service delivery principles

- aboriginal people should be involved in the planning and delivery of services
- services sensitive to cultural, racial and religious heritage

s. 4 Best interests of child

- must include a consideration of the child's views, and cultural, racial, linguistic and religious heritage
- importance of preserving an aboriginal child's cultural identity

Presentation and protection hearings:

- **Directors must show how they plan to preserve a child's aboriginal identity**

WRAPPING OUR WAYS AROUND THEM
Aboriginal Communities and the CFCSA Guidebook

- Children in care have the right to receive guidance and encouragement to maintain their cultural heritage (s.70)

Placement Preferences (s.71)

Priority placement for an Aboriginal child:

- (a) with the child's extended family or within the child's aboriginal cultural community;
- (b) with another aboriginal family, if the child cannot be safely placed within their extended family or community

CFCSA Regulation (s. 8) a child's plan of care:

- Involvement of the child's aboriginal community in the development of the plan of care and their views;
- a description of how the Director proposes to meet the child's need for continuity of the child's cultural heritage, religion, language, and social and recreational activities;
- steps taken to preserve an aboriginal child's cultural identity.

Remedial approach to interpreting provisions requires

- Choose option to best preserve child's Aboriginal identity
- Indian Child Welfare Act (USA) example of remedial legislation

International Law being used increasingly in area of Lands and Resources

Presume that domestic law (such as CFCSA) complies with International Law absent clear intent otherwise

“child’s right to be heard” read into domestic law

What could recognition of UNDRIP/UNCRC mean for aboriginal children in CFCSA matters?

United Nations Declaration on the Rights of Indigenous Peoples

Article 7

Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group

Article 8

Indigenous Peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. States shall provide effective mechanisms for prevention of, and redress for:

Any form of forced assimilation or integration…

Who is an Aboriginal Community?

- Bands / First Nations
- Treaty Nations
- Certain communities have negotiated separate agreements
- Aboriginal Organizations such as Friendship Centres or Metis organizations may be identified by parents

Delegated Agency involvement does not lessen the obligation to actively involve Aboriginal communities

Who is an Aboriginal Child?

Parent or Child Registered, or Entitled to be Registered, Under the Indian Act

- Not automatic; does not exclude other aboriginal identities; child can be a member of more than one aboriginal community

Modern treaty or self-government agreements

As identified in their own laws

Splatsin Aboriginal Children and Families

Own laws and traditions (need for parents/children to do this with increasing numbers of non-status children)

What events or actions would you anticipate might be required to protect a child's Aboriginal Identity, Culture and Heritage?

(Including what should be included in a child's plan of care)

Activities that have been proposed to protect Aboriginal Identity, Culture and Heritage include:

- attendance at powwows or activities at a friendship centre
- Internet searches
- age-appropriate reading materials;
- aboriginal artwork
- attendance at aboriginal day care
- providing the child with aboriginal foods
- Stating a child is too young to require a cultural plan

Stages of the Child Protection Process

Report, Assessment, Investigation

(Perhaps) Voluntary Agreements

Presentation Hearing

Protection Hearing

Post-Continuing Custody Order Applications

Report and Investigation

- An aboriginal parent or child could request that their aboriginal community become involved at this stage
- Temporary Solutions, often => Permanent

Aboriginal Communities could help to:

a) assess any child protection concerns in a culturally sensitive way;

b) identify culturally appropriate interventions, programs and services;

c) provide supports to the child and the child's family to keep the child in the home or within the family or community.

POTENTIAL TYPES OF VOLUNTARY AGREEMENTS

[can be made with or without a protection concern having been investigated]

- Support Services Agreements
- Voluntary Care Agreements
- Special Needs Agreements
- Extended Family Program (Formerly Kith and Kin Agreements)
- Agreements with Youth or Young Adults

Voluntary Agreements

- Aboriginal communities are not usually involved when an aboriginal parent or child enters a voluntary agreement with the Director.
- Involvement of the aboriginal community at this stage could be helpful in avoiding potential escalations or problems.

Temporary orders or arrangements often become permanent.

Aboriginal communities should become involved as early as possible in decision making about other child members.

The longer an aboriginal community remains uninvolved = less likely involvement will transform the outcome.

WRAPPING OUR WAYS AROUND THEM
Aboriginal Communities and the CFCSA Guidebook

Temporary Custody Orders (time limits)

- 12 months if the child or youngest child under 5
- 18 months if the child or youngest child 5 or over, but under 12 years of age on the date of that order
- 24 months, if the child or the youngest child was 12 years or over on the date of that order
- Can be extended if court considers in best interest of child

Notice Provisions

If an Aboriginal Community Appears they are entitled to Party Status: To be involved in court proceedings, to make arguments, disclosure of information (must be requested), to call witnesses, to make applications

- In practice: Not in use, few aboriginal communities become involved
- Appearance vs. attending court
- Comprehensive scheme which is under utilized

- **Notice**
- **Appearance / Non-appearance**

Tools within the CFCSA to help Aboriginal communities become involved

- Transferring Registries
- Participation by teleconference
- Informal process (oral applications for example)

Disclosure and Confidentiality

- ss. 64 and 79
- Disclosure can allow the Aboriginal community to participate effectively in planning for the safety of Aboriginal children
- May be necessary to keep children safe

Presentation Stage (Presentation Hearing)

There is <u>some</u> evidence that a child is in need of protection?

Consent, contest, or adjourn hearing

Access to Child (could include for parents, family members, others culturally important to the child)

Protection Stage (hearing)

Does the child need protection?

Determining whether a child is in need of protection

- Culturally appropriate considerations: Biases about Aboriginal Peoples' or Parenting | Biases Aboriginal Peoples must address

- Questioning whether a child is “truly aboriginal”
- Applying a “frozen in time” concept of what is aboriginal culture – families found to be “not traditional enough”

- Belief in a Conflict Between the Interests of Aboriginal Children and Communities OR that the interest of the community is “political”

- Aboriginal Distrust of the Child Welfare Process

- Belief – bonding more important than culture (culture abates over time) [Racine v. Woods]

- Weight of past history

- “Disabling” aboriginal care

Biases that Aboriginal Communities must Address to Protect Children

- Not asking whether a child protection concern may be valid
- Shame – not knowing how to address some issues, so ignoring them
- Fear of creating divisions within the community
- TIME – not getting involved sooner, giving the family a chance to “work it out”

Determining whether a child is in need of protection

Avoid “ parent-shopping”:

"[T]he issue is not whether the children might be better off, or happier, or obtain a better upbringing in the care of other 'parents' than with their natural parents. If that were the criterion for a protection order, not many children would remain with their natural parents.”

Defining the risks that a child faces with regard to cultural factors, requires asking:

1) how removing a child from their cultural connections may endanger them over the long term; and
2) how cultural factors may insulate a child against identified risks.

- **Defining best interests of aboriginal children to incorporate aboriginal culture**

- **Ensuring Both Attachments and Cultural Continuity over a lifetime**

Judicial Notice

Long-term impact on children of actions to address immediate protection concerns:

- risk of low education attainment
- higher risks of street involvement and drug use,
- more likely to age out of system (no permanent adoption or other solution)
- higher contact with the criminal justice system

Isolation, not permanency and bonding is the norm for aboriginal children in care

Plan of Care

Director must provide plans of care MUST show:

- involvement of aboriginal community in developing the plan or their views of it;
- description of how the Director will meet the child's need for continuity of their cultural heritage, language, and social and recreational activities; and
- steps taken to preserve an aboriginal child's cultural identity.

How to protect Aboriginal Identity, Culture or Heritage? Ask Aboriginal Communities

Aboriginal identity is

- not interchangeable
- a sense of belonging with cultural, social and historical roots,
- reflects membership and affiliations with a particular historic cultural and linguistic group and territory

Culture is about participation, belonging to a particular people

A child's aboriginal identity and heritage can be protected by actively involving the child's aboriginal community.

Proposing an Aboriginal Cultural Preservation Plan

1) Cultural factors (including identifying specific steps that could be taken, or resources available);

2) Cultural supports or programs to assist the family;

3) Less disruptive means than removal to keep families together (including culturally-based and appropriate resources within the community);

Proposing an Aboriginal Cultural Preservation Plan Cont'd

4) Other family or community members that could take care of the children on a temporary basis while the child protection matter was addressed;

5) Other family or community members that could take care of the children on a permanently to keep children within their community, or nation the parent(s) if unable to address the child protection concern;

Proposing an Aboriginal Cultural Preservation Plan Cont'd

7) Family or community members that play an important role in the child's life (such as elders or extended family members), and a proposal for how to maintain those relationships;
8) Opportunities for a child to participate in cultural activities that maintain or may establish their connection to the land and culture, such as language classes, fishing, drying fish, picking berries, community dinners or sporting events, lahal or other activities;

Proposing an Aboriginal Cultural Preservation Plan Cont'd

9) Elders, cultural or spiritual supports from within the nation who can work with the family within a traditional wellness model;

10) Problems with any supervision terms that the Director suggests and offer alternatives. [For example, requiring parenting courses where none are available locally sets a parent up to fail – proposing alternatives that are culturally appropriate, including traditional parenting classes or elders counseling or mentoring];

Proposing an Aboriginal Cultural Preservation Plan Cont'd

11) Barriers to the aboriginal community attending the proceedings (e.g. resources, personnel, travel) and how these challenges can be overcome (e.g. video- or tele-conferencing, cost coverage for ADR processes). Proposals to move the hearing (usually – registry nearest to where child comes into care)

Protection Hearings

Aboriginal communities could:

- make interventions aimed at ensuring that families remain together;
- identify supports to help heal problems that have led to the child protection concern; or

where the parents are unable to safely parent, identify options that can keep a child safely within their extended family, aboriginal community or nation.

- Identify options that allow for a longer-term permanency outside of a CCO or adoption. For example, if an aboriginal-specific process is operating and keeping a child protected and within their family/community or nation then that is a form of permanency which does not need to be reflected in a CCO or other order.

Exploring options that would allow for permanency without severing the aboriginal cultural connections that a child will need to sustain them through their lifetime – traditional adoptions (open); co-parenting arrangements; generous access

OPTIONS FOR ABORIGINAL COMMUNITIES AND FAMILIES TO EXPLORE PERMANENCY OPTIONS WHERE THERE IS A (LIKELY) FINDING OF PROTECTION:

- Prior to a CCO – transfer custody to another person (s.54.01)

- After a CCO – transfer custody to another person (s. 54.1)

Alternative and Traditional Dispute Resolution Options

WRAPPING OUR WAYS AROUND THEM
Aboriginal Communities and the CFCSA Guidebook

ShchEma-mee.tkt

WRAPPING OUR WAYS AROUND THEM
Aboriginal Communities and the CFCSA Guidebook

Opikinawasowin

WRAPPING OUR WAYS AROUND THEM
Aboriginal Communities and the CFCSA Guidebook

- Healing Courts (CFCSA Courts)
- S. 104 Tribunals

Wrapping Our Ways Around Them: Aboriginal Communities and the CFCSA Guidebook [

http://www.nntc.ca/docs/aboriginalcommunitiesandthecfcsaguidebook.pdf

Family Homes on Reserve and Matrimonial Interests or Rights Act

In force December 16, 2014

by Ardith Walkem and Halie Bruce

(Cedar and Sage Law)

Prior to the Act:

- Indigenous laws regarding matrimonial property were not recognized.
- Provincial laws regarding matrimonial property did not apply on reserve.
- Exclusion intended to preserve a land base for the use and benefit of Indigenous Peoples.

Result:

- No recognized law that applied to determine rights to, or in, matrimonial property on reserve upon the breakdown of a relationship, or rights of non-members upon death or relationship breakdown.
- Considerable hardship - primarily to Indigenous women and children.

The Act applies:

- In the event of a relationship breakdown or death of one of the partners in a marriage or common law relationship,
- Where at least one of the spouses is a status Indian or member of a First Nation,
- To the matrimonial home, and other real property interests on reserve, acquired during the course of (or in contemplation of) their relationship.

- The Act is not retroactive and does not impact situations where the relationship breakdown or death occurred before the Act.
- At least ONE of the spouses or common-law partners must be a First Nation member or an Indian in order for the Act to apply.

Under the Act, First Nations can:

1) Pass their own matrimonial property law; or
2) Provisional federal rules will apply.

First Nations under the *First Nations Land Management Act* or with separate self-government agreements may be subject to different rules or timelines.

Provisional Federal Rules

Apply unless or until a First Nation passes its own law

General

1) A spouse or common law partner will not be able to sell or otherwise encumber (for example: mortgage) an on-reserve family home without the written consent of the other spouse or common law partner {note: protection of third party purchasers};
2) One spouse or common law partner will not be able to block the other spouse or common law partner from their on-reserve family home – it does not matter if the other spouse is not a status Indian or member of the First Nation;

3) Each spouse is entitled to one-half the value of the family home, and the value of the other structures and lands the couple hold on reserve lands;
4) After death, the surviving spouse (even with no interest in the property, and if not a member of the First Nation) may stay for up to 180 days in the matrimonial home;

5) The Act requires that these factors be considered in making decisions:
   a. “[C]ultural, social and legal context” of the First Nation – essentially the collective impact on the reserve community of the order being granted over the long term;
   b. Interests of child members of First Nations to maintain their connection to their First Nation; and
   c. Interests of other persons with a right in the home or who live in a home, including elderly or disabled residents.

There is no mechanism or resources to ensure that these interests are brought before the Courts.

Emergency Protection Order (EPO)

An **Emergency Protection Order (EPO)** allows a court to order the exclusive occupation of the family home for up to 90 days (time can be extended) to either spouse, whether or not they are a member of the First Nation.

A party can make an application for an EPO, without other spouse knowing or making submissions.

Emergency Protection Order (EPO) can:

1) Grant the applicant exclusive occupation and access to the home
2) Require spouse and others specified to vacate at a time the judge orders, and prohibiting re-entry
3) Give instructions for a Peace Officer to remove a person and keep the person away from the home
4) Any other necessary provisions to protect the family at risk

In deciding whether to grant an EPO, the judge should consider:

- History and nature of family violence, and risk of immediate danger;
- Best interests of any children involved (including their right to maintain their connection to the First Nation that they are part of);
- Interests of any elderly or disabled persons who reside in the family home, or others who have an interest in the home;
- Period of residence on the reserve; and
- Exceptional circumstances that require removing a person other than the applicant's spouse.

Any person named in the EPO can appeal. An order can extend beyond the initial 90-day period. The Court decides confidentiality issues and whether the information on which the order was granted will be made public.

Follow-on Matters:

- A judge from the appropriate level of court must review within 3 days, and can confirm, re-hear, or revoke the order
- A person named in EPO may appeal, and a court can confirm, re-hear or revoke the order, or extend it beyond the initial 90- day period
- Court decides confidentiality issues, and whether the information on which the order was granted will be made public or not

Exclusive Occupation Order (EOO)

A court can make an **exclusive occupation order (EOO)** for the family home to one spouse upon the death of a spouse or breakdown of a relationship.

An EOO could:

- Require a spouse and other persons to vacate the matrimonial home;
- order a spouse to make payments to the other spouse toward the cost of accommodation;
- require one spouse to preserve the condition of the home (or contribute toward repairs and maintenance); or,
- order a spouse to make payment of all or part of the repair and maintenance of the home.

- A court order to allow exclusive occupation of the family home for up to 90 days to either spouse, without regard to whether or not they are a member of the First Nation
- A party can make ex-parte applications about the matrimonial home (ie, without other spouse knowing or making submissions)
- Who can issue such an order: Designated judge (Generally: BC Supreme Court, Appeals to BCCA). Designated judge in some instances for quick decisions: could be a JP, or a "judge of the court of the province"

While an EOO does not transfer title it does transfer rights that are very close to title: the rights to occupy - potentially for a lifetime – homes on reserve.

Exclusive Occupation Order:

A court can order exclusive occupation of, and access to the family home to one spouse.

When can this judge make such an order?

- Death of a spouse [An Exclusive Occupation Order does NOT change who holds an interest or right in the home or prevent an Executor/Administrator from transferring this interest.]
- Break-up of a conjugal relationship
- For removal of disruptive person(s)

What does the judge consider in deciding to grant an EOO?

- Best interests of any children involved
- Terms of any agreement between the spouses
- Terms of any wills
- Medical condition of the survivor
- Financial situation and/or medical issues of spouses
- Any existing orders made on the matter
- History of any family violence or psychological abuse
- Any exceptional circumstances
- Collective interests of the First Nation (it is not clear how this will get before the Court in every instance though a First Nation has a right to be notified of the proceeding)
- Interests of other persons with a right in the home or who live in the home, including elderly or disabled occupants (again it is not clear how this information will get before the Court in each instance)

An Exclusive Occupation Order could:

1) Require spouse and others specified to vacate at a time the judge orders, and prohibiting re-entry
2) Preserve the condition of the home
3) Make payments to the other spouse toward the cost of other accommodation
4) Payment of all or part of the repair and maintenance of the home

Revoking an Exclusive Occupation Order:

On Application an EOO can be revoked or varied, only if there are changes in circumstances, and the other party must be given notice of the application.

Exclusive Occupation Order could include:

- Conditions to preserving the condition of the home;
- Requiring someone to vacate the home and not re-enter it;
- Having a Peace Officer deliver notice to certain persons; or
- Having the executor of the will or the administrator of the estate pay for repairs and maintenance.

Notice to First Nation Council

- For any order other than an EPO, or order where a Court has granted a Confidentiality Order, an applicant must send a copy to the First Nation.
- The Court must allow the First Nation to make representation at the hearing about the cultural, social and legal context surrounding the application and to present the community's views about whether the order should be made.
- There is no direction in the Act for how these submissions must be considered or weighed in decision making
- If the First Nation does not appear, there is no process or factors set out for how the Court must consider the collective interests of the First Nation.

Notice to First Nation Council required:

- No notice: where there is an Emergency Protection Order or there is a Confidentiality Order [Section 19: The Court will weigh the balance between making the information public and the need to protect affected parties, especially children.]
- The successful applicant must send a copy of the Court Order to the First Nation Council

Division of Value on Breakdown:

- Each spouse is entitled to one half of the value of the family home; and, the evaluation of other structures and lands they hold on reserve, considering the appreciation in value during the time of the relationship, and the difference in payments each made for maintenance/improvements.
- Assessed according to what a buyer would reasonably pay minus debts/liabilities or any agreement between the parties.

Division of Value – Relationship Breakdown

Courts may make changes…

…if it is considered unconscionable, given:

1) needs of caring for children
2) the debts or liabilities of each spouse
3) a significant change in value of the interests
4) other pertinent factors

Division of Value – Relationship Breakdown

Can the Order be revoked?

On Application it can be revoked or varied...

- ... only if there are changes in circumstances, and
- ... the other party must be given notice

Division of Value – Death of a Spouse

Surviving **First Nation member spouse** is entitled, on application, to:

- 1⁄2 of the value of the interest of the deceased in the family home, plus
- 1⁄2 of the value of the interest of the deceased in the land on which the family home is situated, plus
- Amount = 1⁄2 of the value of interest of the deceased of other on-reserve structures and lands

Division of Value – Death of a Spouse

Surviving **non-First Nation member spouse** is entitled, on application, to:

- 1⁄2 of the value of the interest of the deceased in the family home, plus
- Amount = 1⁄2 of the value of interest of the deceased of other on-reserve structures (NOT land), plus
- The greater of: 1⁄2 appreciation, or, the difference between survivor payments minus debts

Division of Value – Death of a Spouse

Can the amounts be changed?

On application by the survivor, the Court may vary the amount owed if it is considered unconscionable

- ... given the needs of caring for children, and
- ... if the spouses had previously resolved the consequences of a breakdown

Division of Value – Death of a Spouse

If survivor makes an application within 10 months of the death of the spouse…

The court may make changes with respect to…

- The amount payable to the survivor
- The method of payment (lump sum, installments)
- If the survivor is an FN member, the transfer of any interests or rights in any structure or land situated on the reserve
- Extension of the 10-month period due to special circumstances
- Permitting the executor of a will to vary the terms under the will to allow for the amounts due to be paid to the survivor
- Ensuring that proper notice is given

Centre of Excellence for Matrimonial Real Property at www.coemrp.ca (forms, information)

First Nation Law-Making

First Nations can pass their own laws in this area

- Required support: 25% of members must participate in the vote, and majority of those who vote must approve

- No need for federal approval (though they are subject to Charter scrutiny)
- The Attorney General of the Province must be notified when a First Nation intends to pass a matrimonial property law

Significant Areas of Concern

1) Access to justice (to lawyers, to courts) is a significant issue for Indigenous Peoples.
   - The Act moves more decisions to the court process.
   - Without legal representation, and without access to courts, peoples' rights may be seriously impacted or denied.
   - Forms require parties to say that they give their "full and informed consent" .
   - Decisions may be made with one party being self-represented or not appearing at all.

2) A considerable amount of decision-making has been granted to Courts that have traditionally not considered matters related to interests on, or in, reserve lands.
   - Courts may not be aware of the regime that surrounds reserve lands, or of the importance of reserve lands to First Nations as collective bodies. Counsel for parties (if they can afford lawyers) may be unable to put this information before the Court.

3) The Act could create real hardship within First Nation communities. For any order other than an EPO, or where a Court has granted a Confidentiality Order, an applicant must send a copy to the First Nation.
   - The First Nation Council can make submissions about the cultural, social and legal context surrounding the application and to present the community's views about whether the order should be made.

4) Court orders will impact reserve communities, and First Nations will be asked to implement orders under the Act, without any additional resources to be able to do this.

5) In the Provisional Rules, there is no recognition of Indigenous laws or ways of resolving problems, and no options to explore alternative dispute resolution that might result in greater community involvement and solutions with a greater chance of holding over time.

6) Complexities of housing situations on reserve:

The “matrimonial home” of a couple whose relationship has broken down, might simultaneously be the home of an aging grandparent; an unemployed aunt; or, a barely-adult teenager starting their own family. Decisions made under the Act have the potential to consider only the interests of one couple, and not others who live within the home.

Different reserves have very complex systems of land ownership. Some interests are held under Certificate of Possession, some are held under custom, there are combinations of these interests; many people live in social housing which is owned and maintained by the First Nation.

For example:

A couple may live in a house but have no right to the house itself (for example, band owned social housing, or a home that they are borrowing from a family member). An EPO could grant temporary occupation of social housing on reserve to a non-member. The First Nation might be in a position of having to maintain the home, but have no way of forcing the occupant to pay rent, or, the EPO might displace others on a housing waiting list who have the next right of occupation.

7) An EOO could include provisions that require that a spouse maintain directly (or pay to maintain) the family home. A person may not have the resources to be able to maintain a family home. That person – due to poverty and lack of resources – would then be in violation of a court order. A band may ordinarily maintain the home, but not want to dedicate scarce resources to non-members.

8) An EOO could operate to remove a person (either a spouse involved in a relationship breakdown or a third party family member who lives in the home that then becomes subject to a matrimonial property court order) from a home on their First Nation, with no alternative accommodation available on reserve.

First Nation Councils asked to enforce orders?

- Councils may be asked to enforce orders – if they do not enforce, the party who has the order can go to court and seek to have a monetary payment made instead by the party against whom the order was made

- Penalties include fines and prison

Will Provincial law apply?

- Provincial laws can be used to determine how to divide the overall value of all matrimonial property (house, cash, cars, etc.)
- Either spouse can ask a court to determine their share of the matrimonial property
- Court can order one spouse or common-law partner to pay the other a sum of money to make an equal division of the matrimonial property

WILLS & ESTATES

Raymond D. Phillips, QC

FORMALITIES

- **IS THE WILL VALID? (Section 4 WESA)**

- The primary requirements relate to the "ability of a person" to make a will; a persons competency (testamentary); and the person's age.

- Other requirements relate to the formalities for the preparation and execution of the Will.

Note: If a Will is invalid, the Deceased is deemed to have died intestate. If the formality that makes a Will valid is deficient, it may be cured by a court order so as to uphold the wishes of the Will-maker.

- A Will comes into effect only upon the death of the Will-Maker.

Age Requirement

- To make a valid Will, a person must be 16 years of age (s.36(1)WESA). An exception is when the Will-maker is a member of the military forces or on active services.

Testamentary Capacity

- Be of sound mind
  - Understand the nature of the act (Will) and its effect;
- Have a general idea of the extent of the property that he or she owns;
- Understand and appreciate the nature of the document - division of property; and
- Have no insane delusion that would influence his will in disposing of this property

Undue Influence (s.52 WESA)

- The Will-maker must make and execute his or her Will voluntarily, free from undue influence. Have to establish that the beneficiary was in a position in which the potential for dependence or domination was present. Once established, the beneficiary must prove that undue influence was not exercised at the time Will was executed.

Statutory Requirements

1. Must be in writing (s.37(1)(a) WESA). A voice recording or a movie is not valid.

2. Will must be signed. To be valid, a Will must be signed “at its end” by the Will-maker – “attestation”.

3. Dated. Although not required by WESA, a Will is always dated in order to ensure that the one being executed is the last Will chronologically.

4. Will-maker’s signature must be witnessed.

SIGNING THE WILL

- The signature of the Will-maker must be witnessed by at least two witnesses who are present with the Will-maker. Each witness must sign in the other's presence and in the presence of the Will-maker, who must see the witness sign.

Holograph Will (no witnesses)

- Not valid in BC unless Will-maker was a member of the military on active service. Note: other provinces recognize holograph Wills (ie: Saskatchewan – Also Indian Act).

Legal Effect of a Will

- The main function of a Will is to:
  - Appoint an executor;
  - Appoint a guardian if there are infant children;
  - Provide for payment of Will-maker's debts;
  - Distribute property per Will-makers instructions; and
  - Provide for care of Will-makers family and/or business.

Gifts to Witnesses (s.43 WESA)

- A gift made to a witness, the spouse of a witness, or a child of a witness is void unless the witness seeking to uphold the gift makes a successful application to the court to declare that such a gift is valid.

Changes or Alterations to Wills (s.45 WESA)

- An alteration to a Will is valid if the signature or initials of the Will-maker and of the witnesses to the alteration are affixed in the margin or in some other part of the Will opposite or near the alteration.

Contesting a Will (s.60)

- A spouse or a child may contest a Will and apply to the court to vary its terms if it can be shown that the Will-maker has not made adequate provision for the proper maintenance and support of the Will-makers spouse and children. Action has to be commenced within 180 days from the date the representation grant is issued in BC, by initiating a pleading or petition.

Wills Notice

- In order to enable the personal representative to locate the original Will after the Will-makers death, it is recommended that a Wills Notice be filed with the chief executive officer under the Vital Statistics Act (Wills Registry).

Benefit Plans

- The designation of a beneficiary is one way to ensure that a benefit passes directly to a designated person or a trustee for the designated beneficiary and does not form part of the participants estate and is not subject to the claims of the participants creditors.

INTESTATE - NO WILL

- INTESTATE (Part 3 of WESA)

The Wills, Estates and Succession Act came into force on March 31, 2014. The act provides greater certainty for individuals who put their last wishes into writing and simplifies the process for those responsible for distributing an estate (Pre WESA – Estate Administration Act and Wills Variation Act).

WESA Benefits

- Clarifies the process of inheritance when a person dies without leaving a will;
- Makes the process easier for a person to transfer the title of their spousal home when their spouse dies;
- Clearly outlines the sequence in which to look for heirs to a person's estate;
- Provides the courts with more latitude to ensure a deceased person's last wishes will be respected;
- Clarifies obligations relating to property inheritance in the context of Nisga'a and Treaty First Nation lands; and
- Lowers the minimum age at which a person can make a will from 19 to 16 years old.

Per Stirpes v. Per Capita

Per Stirpes. (Latin for "by branch or stem") means that each branch of the deceased's family receives an equal share of the estate, regardless of how many people are in that branch. (s.24 WESA)

Per Capita. (Latin for "by head"). Means that shares are distributed to individual beneficiaries by "head", and if a beneficiary is no longer alive (and therefore not counted), there is no further share for that person and no distribution to descendants of that person.

Escheat

- When a person dies intestate and has no heirs entitled under Part 3 WESA, the deceased's estate will escheat to the Provincial Crown, except those personal or real assets (bank accounts) that fall under federal jurisdiction and escheat to the Federal Crown.

DISTRIBUTION ON INTESTATE

- If an intestate dies leaving...
- **A spouse but no surviving defendants:**
  - the entire estate goes to spouse

INTESTATE

- **A spouse and descendants:**
  - If all descendants are also descendants of spouse, then first $300K goes to spouse.
  - If all descendants are not common (blended family) to intestate and spouse, then $150K.
  - After spouse preferential share, then 1/2 of remainder to spouse - 1/2 to descendants per stirpes.

INTESTATE

- **No surviving spouse but descendants, whether surviving or deceased.**
  - Entire estate distributed equally among the deceased's descendants per stirpes.

INTESTATE

- **No surviving spouse or descendants**
  - The estate must be distributed equally to the intestate's parents or the survivor of them.

INTESTATE

- **No surviving spouse, descendants or parents.**
  - Estate must be distributed equally to descendants of the intestate's parents or either parent per stirpes.

INTESTATE

- No surviving spouse, descendants, parents or descendants of a parent but intestate survived by one or more grandparents or descendants of grandparents (uncles aunts)

- Estate divided equally for each surviving grandparent (or to descendants in equal shares per stirpes).

INTESTATE

- **Effect of Adoption**
  - An adoption severs a blood relationship for succession purposes. Adopted children have no right to inherit from their birth parents and the birth parents have no right to inherit from their adopted out child, unless provided for under a Will.

SURVIVORSHIP RULES

- Where 2 people die in common disaster, difficult to establish the order in which they died.
  - Pre-WESA - younger person presumed to survive the older - estate passes to younger (different family?).
  - WESA - 5 day survivor rule - if a person fails to survive a deceased by 5 days, he or she deemed to have died before the deceased.

REPRESENTATION / ESTATE GRANTS

- **3 types of estate grants**
  - Grants of probate;
  - Grants of administration with Will annexed;
  - Grants of administration without Will annexed.

REPRESENTATION/ ESTATE GRANTS

- **Grant of Probate**

- Applied for if the deceased left a Will;
- BC Supreme Court validates the Will and confirms the appointment of the executor.

REPRESENTATION /ESTATE GRANTS

- **Grant of Administration without Will annexed**
  - Applied for if the deceased did not leave a valid Will (intestate).

INDIAN ACT

- s.45 “Minister may accept as a will any written instrument signed by an Indian in which he indicates his wishes with respect to the disposition of his property on his death”

INDIAN ACT

- s.45(3) Probate. No will executed by an Indian is of any legal force or effect...until Minister has approved the will for a court has granted probate per IA.

INDIAN ACT

- s. 48 Intestate. surviving spouse share - $75K;
- s. 48(3) “where children not provided for Minister may direct all or part of estate go to children;

INDIAN ACT

- s.50 Person not entitled to reside on reserve cannot receive reserve land via estate.
- s50(2) Minister can sell land
- s.50(3) Unsold land reverts to band ownership

DEBT: Bankruptcy and Foreclosure
3:30 to 5 pm, Tuesday October 6, 2015

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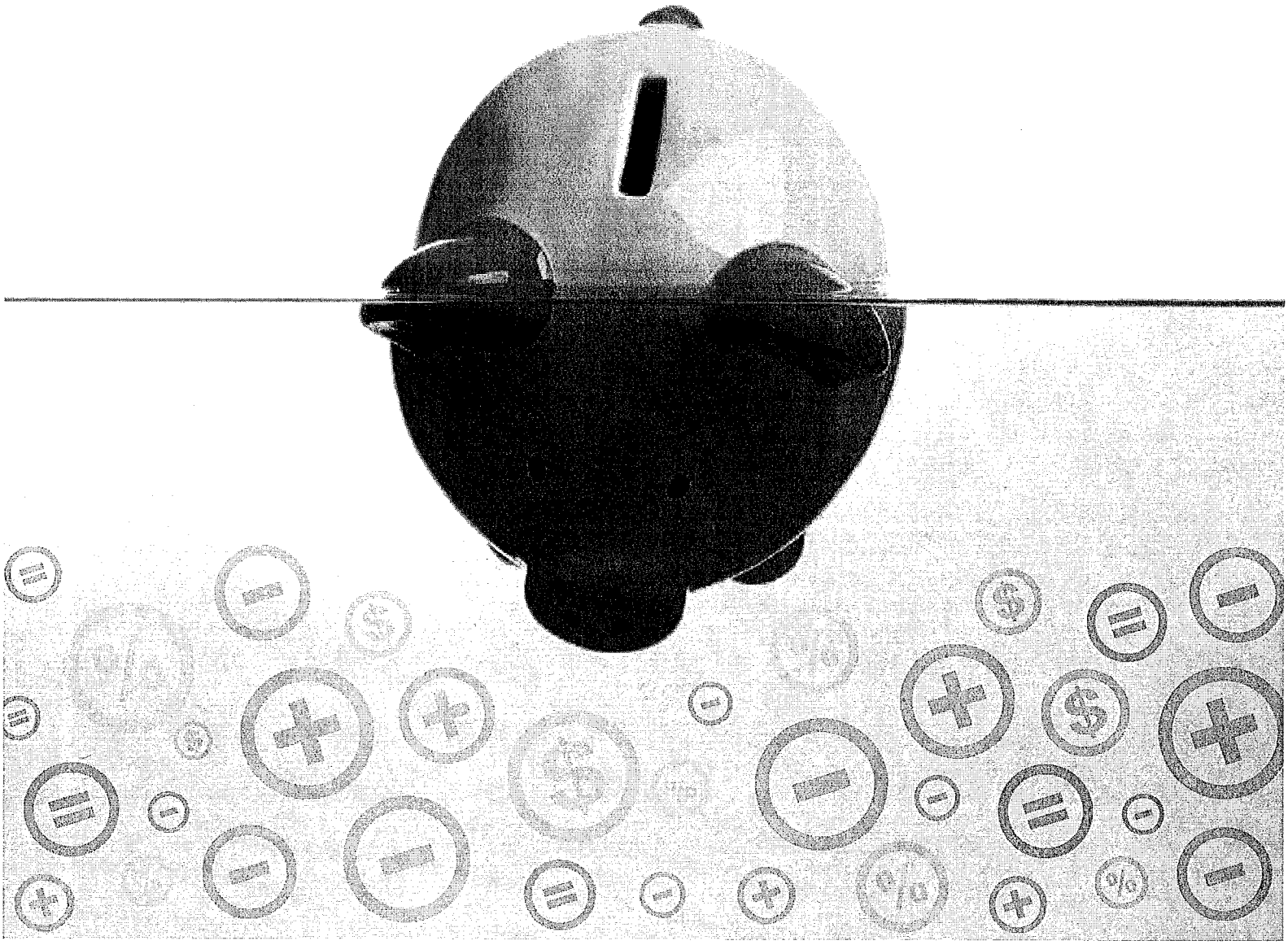

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This manual explains the law in general. It is not intended to give you legal advice on your particular problem. Because each person's case is different, you may need to get legal help. The information in this manual was up to date as of November 2012.

Consumer Law and Credit/Debt Law is only available in PDF format at **www.legalaid.bc.ca**.

3 | *Bankruptcy Act:* Assignments in bankruptcy

Client problems

- Client feels so far in debt that he or she has to "go bankrupt" but does not know anything about the process.
- Client has several creditors trying to collect and feels that the debts owed are unmanageable.
- Client thinks he or she needs to go bankrupt but has a number of questions for you, such as:
  - How long will it take?
  - Do I have to go to court?
  - What will I be left with?
  - How much does it cost?
  - Will I ever get credit afterwards?
  - Will I have to pay any debts even after bankruptcy?
  - Will I lose my house?
  - What will happen to my job?
  - Are there any alternatives?
- Client has heard about a law that allows the client to get rid of debts by paying off a part of each debt to each creditor.

Summary of the law

Bankruptcy (i.e., giving up what you own to get rid of your debts) in Canada is governed by the federal *Bankruptcy and Insolvency Act* (BIA). There are actually three debtor remedies under the BIA:

1. Assignment in bankruptcy
2. Proposals
3. Orderly payment of debts (this remedy is not available in BC at this time) (see chapter 4).

This section discusses assignments in bankruptcy (usually this involves a client working with a trustee in bankruptcy and volunteering to declare bankruptcy). See chapter 5 for information on proposals, and chapter 19 for orderly payment of debts (consolidation).

While remedies (legal ways of enforcing a right or approaching a problem) under the BIA are very important for debtors, advocate involvement is limited because assignments, proposals, and consolidations must all be handled by people authorized under the BIA. There is no "do-it-yourself bankruptcy" in Canada, and lawyers and advocates cannot perform the functions prescribed under the BIA. However, your role in these remedies is still important, and you must understand them so you can advise clients of all possible options for resolving a financial problem.

An assignment in bankruptcy is a serious step; once the assignment is made, there is usually no way to reverse the process. Advocates may continue to provide assistance and support for debtors who are going through assignments or proposals.

Going into bankruptcy

Debtors can go into bankruptcy in two ways:

- They may make a voluntary assignment in bankruptcy. This process is started by the debtor.
- They are forced into bankruptcy. A creditor can sometimes force a debtor into bankruptcy by filing a court action called a petition, and asking the court to declare the debtor bankrupt.

The majority of consumer bankruptcies are started by voluntary assignments in bankruptcy. Creditors will only try to force debtors into bankruptcy when there are considerable assets available to be sold to pay creditors, and when creditors think they are not going to get any more money from the debtor through any other means. Petitions in bankruptcy are used much more frequently against businesses than individual debtors.

Debtors legally qualify to make assignments in bankruptcy if they:

- owe more than $1,000 to their creditors,
- are generally unable to pay their credit obligations as the obligations become due, and
- are unable to file a viable proposal.

It is possible to go bankrupt by owing money to only one creditor, but most people who go bankrupt have several creditors (see chapter 18).

What has to be given up in a bankruptcy

Basically, the bankruptcy process involves debtors giving up most of their assets in exchange for having their debts eliminated by law. However, some assets are exempt and so can be kept by the debtor.

RRSPs, RRIFs, and DPSPs (deferred profit sharing plans), with the exception of contributions made in the last 12 months before the debtor went into bankruptcy, are designated exempt property under the *Income Tax Act* (ITA).

Also, debtors in British Columbia who go bankrupt may keep assets that are exempt from seizure under the *Court Order Enforcement Act* (COEA). The Court Order Enforcement Regulation allows an exemption value of $4,000 for household furnishings and appliances, $5,000 for one motor vehicle if the debtor is not a debtor under family maintenance provisions, $2,000 for one motor vehicle if the debtor is a maintenance debtor, and $10,000 for tools and other personal property used by the debtor to earn income from his or her occupation (see Appendix 3).

All essential clothing and medical and dental aids are exempt. A bankrupt may also keep equity in his or her principal residence of $12,000 if the residence is located within the Capital Regional District (Victoria area) or Metro Vancouver, and $9,000 if the residence is located elsewhere in BC. If two spouses own a principal residence together and both declare bankruptcy, they may each be able to claim a $9,000 or $12,000 (depending on the location) exemption on the equity in that principal residence (see *Re Halverson*).

In cases where creditors have security claims over a debtor's assets, bankruptcy can be a particular hardship because the creditor is usually entitled to repossess the asset as soon as a bankruptcy is started. It does not matter if the asset is normally exempt from being sold off for the creditors. If an asset is subject to a security agreement (i.e., extra assurance for the creditor in case the borrower cannot repay a loan; see chapter 36), even down to basic household furnishings, the secured creditor is legally allowed to take it and sell it. Debtors may be forced to make arrangements to repay at least the actual value of the assets, during or after the bankruptcy, to avoid having the assets repossessed.

What may still be owed after bankruptcy

To many debtors, the prospect of losing assets does not mean much because they have nothing, or nothing that can be taken in the bankruptcy process. However, debtors must understand that not all debts are eliminated through bankruptcy. Under s. 178 of the BIA, a discharge from bankruptcy will not release the bankrupt from certain debts, including:

- fines, penalties, or restitution orders imposed by a court;
- awards of damages by a court for intentionally inflicted bodily harm or sexual assault;
- spousal or child support arrears;
- debt or liabilities arising from certain types of fraudulent conduct on the part of the debtor; and
- student loans if the debtor files for bankruptcy before ceasing to be a student or within seven 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. For more information on student loans see chapter 18.)

In some instances, a debtor will have to pay back some money to the estate creditors as a condition of his or her discharge. Note that courts are more likely to order partial repayment when the bankrupt has an income tax debt.

Starting the process

The process begins when a debtor files an application for bankruptcy (called "the assignment") through a trustee. The application outlines all assets and debts, income and expenses, and other information about the debtor.

The trustee handles the affairs of the debtor and completes his or her bankruptcy process. A government employee called an official receiver supervises the process and makes sure the law is followed.

In most instances, a debtor goes to a trustee before making an assignment. The debtor may be referred to the trustee by a credit counselling service, a lawyer, or the official receiver. The trustee helps the debtor prepare the assignment papers. The trustee is usually then confirmed by the official receiver to handle the bankruptcy for that debtor.

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 judgment enforcement proceedings (see chapter 21 and chapter 22). Most insolvent individuals and families file for bankruptcy under the Summary Administration provisions because the value of their eligible assets is less than $15,000.

Bankruptcy trustees

Bankruptcy trustees are licensed by the federal government to handle a debtor's bankruptcy process; only trustees who have a licence can do this job. Under the BIA, a trustee's primary obligation is to the creditors of the debtor, not to the debtor. Trustees are usually accountants because lawyers

are not given licences to administer bankruptcies. This reflects a long-standing legal view that the trusteeship obligation to creditors conflicts with a lawyer's fundamental duty to his or her client, the bankrupt.

However, lawyers do have a significant role in the bankruptcy process. If any matter in the administration of the bankruptcy is disputed, the matter will likely have to go to court. When bankruptcy matters go to court, all the parties are entitled to be separately represented: trustees, each creditor, and the bankrupt.

The cost of bankruptcy

Sometimes the cost of the bankruptcy can be a problem for a debtor. The starting fee allowed under the BIA for handling a Summary Administration bankruptcy is around $1,500 plus tax (HST until March 31, 2013; GST from April 1, 2013) and counselling fees (BIA, rule 128). A trustee's fee for administering the bankruptcy must be paid by the debtor.

Technically, a debtor does not pay a fee straight to the trustee for a bankruptcy. The BIA says that a trustee is to be paid out of whatever funds are obtained during the administration of a bankruptcy. The total fund that the trustee holds is called a debtor's estate. This estate can be made up of money obtained from selling off the debtor's assets, as well as from some of his or her income, which may have to be paid every month to the trustee.

When there is little prospect for any assets to be sold off, and if the debtor has a very low income, there may not be an estate from which to take a fee. For this reason, a trustee may demand that a debtor get some money first to put into the estate to start the bankruptcy process. When the bankruptcy is finished, the trustee can then take that money. Usually, a trustee will want the debtor to pay most or all of the fee before starting the bankruptcy, because once a trustee agrees to take on a bankruptcy, it is essentially impossible for him or her to refuse to complete its administration.

Some financing arrangements are possible. A trustee may do a bankruptcy with a down payment and a commitment for monthly payments to be paid into the estate. Trustees may demand that someone else guarantee those payments by putting up the money until the trustee gets all the bankrupt's payments. Another option is to have the bankrupt sign over a post-bankruptcy tax refund or child tax credit to the trustee. However, such assignments have been found to be of "no force and effect" against the bankrupt (see *Marzetti v. Marzetti*).

If the debtor may have trouble either paying the fee up front or making a payment plan, it may be wise for him or her to approach the federal government bankruptcy office first to inquire about the Bankruptcy Assistance Program. Under this program, the office may be able to connect

the debtor with a trustee who is willing to take the case on easier terms than those usually required.

The client must understand that trustees are not obligated by law to administer anyone's bankruptcy. And even when they take on a debtor at the request of the government, it does not mean that the debtor will not have to pay anything for the process. A trustee usually requires the debtor to pay court filing fees. The trustee applies the normal bankruptcy rules to sell off any assets that are not exempt from the bankruptcy process, and may also demand that the bankrupt, if working, pay some wages into the estate.

Bankruptcy counselling

The BIA specifically requires debtors to obtain financial counselling during the bankruptcy process. The debtor is obliged to attend two counselling sessions following the assignment.

Summary administration of the estate

Following the assignment in bankruptcy of the debtor and the appointment of the trustee, the trustee begins administering the bankruptcy. From the time of the assignment, the non-exempt assets of the bankrupt technically belong to the trustee, on behalf of the creditors. The trustee owns those assets for the benefit of the creditors. All those assets comprise the estate. The main work of the trustee is to determine what assets are in the estate, identify all creditors and how much they are owed, and divide up the available estate among the creditors.

The trustee begins by locating the creditors. If they want to share in the estate, they must file a claim and have that claim accepted by the trustee. The trustee also works with the bankrupt to determine the assets in the estate. Sometimes assets must be sold and the sale proceeds are then paid into the estate.

Creditors who hold at least 25 percent of the dollar value of the total claims filed may request a meeting of creditors. They must do so within 30 days of the assignment.

The BIA treats secured creditors differently from other creditors. A bankrupt cannot claim exemption of assets covered by a *Personal Property Security Act* (PPSA) security agreement (see chapter 36). The result can be harsh for the bankrupt since it is possible in some cases for secured creditors to take almost everything a bankrupt possesses. For example, if a properly registered security agreement specifically covers a bankrupt's present household furnishings, they could be taken. Creditors can take and sell the assets covered by the security agreement and may also be able to

make a claim to the trustee for the balance. In practice, the creditor and the bankrupt may agree to avoid the seizure by having the bankrupt enter into a new credit contract to pay the creditor for the actual value of the assets covered by the security agreement.

If a bankrupt owns a house, it may have to be sold, even if the bankrupt owns the house with a non-bankrupt person (including a spouse). The bankrupt is only entitled to a half-share of the net sale value of a jointly owned house. If half of the equity exceeds the exemption limit for a principal residence prescribed by the COEA, it must go into the estate for the creditors.

An employed bankrupt who earns more than the amount set by the superintendent of bankruptcy will have to make monthly payments to the trustee for the benefit of the creditors from any income above what is reasonable to support the number of people in the bankrupt's family and the bankrupt's personal situation (called "surplus income").

When the trustee has completed the estate administration, the creditors are paid a share of the estate proportionate to the amount they are owed. The final steps for the trustee are to obtain a discharge from his or her duties and a discharge from bankruptcy for the bankrupt.

Discharge from bankruptcy

In most cases, a bankrupt will receive an automatic absolute discharge from bankruptcy after a specific period of time. As the discharge date approaches, the trustee must notify the government and the person's creditors of the bankrupt's right to an absolute discharge from bankruptcy. The creditors, the superintendent, and the trustee all have a right to object to this absolute discharge. If no objections are received, then the bankrupt is discharged at the end of the applicable time period.

The applicable period of time depends on whether or not the person has been bankrupt before and whether or not he or she has had surplus income during the bankruptcy. In the case of a first-time bankrupt, the period is 9 months if there has been no surplus income, and 21 months if there has. In the case of a second-time bankrupt, the period is 24 months if there has been no surplus income, and 36 months if there has.

Automatic discharges do not always apply. Situations in which they do not apply include:

- The bankrupt has been bankrupt more than once before.
- The bankrupt refused or neglected to take financial counselling.
- One or more of the creditors objects to the automatic discharge.
- The trustee or the superintendent objects to the discharge.

- The bankrupt has over $200,000 in income tax debt that comprises 75 percent or more of his or her debt.

If there is an objection to the discharge, the matter goes to mediation or before a court official for hearing. If the bankrupt has been bankrupt before, the discharge must be heard by the court. When discharge hearings are required, bankrupt persons must make the applications themselves. All creditors who filed claims are given notice of the hearing.

The various grounds on which creditors and trustees can object to a discharge are set out in the BIA. The grounds are broad enough that it is possible to object to any bankrupt's discharge. The real reason that creditors object is that they hope the court will make an order that the bankrupt has to pay back a percentage of the money owed to all the creditors. This is called a conditional order. The condition could be that 25 percent to 50 percent must be paid to every creditor, through the trustee, before the bankrupt is finally discharged. If the judge decides to ignore the objections of the creditors, then the bankrupt is granted an absolute (unconditional) discharge and the bankruptcy process is over.

In recent years, an increasing number of discharge cases have come up for discharge hearings. In part, this is simply because the number of bankruptcies has increased over the years. However, it is also because creditors appear to be objecting to discharges in more cases. Also, the superintendent has been objecting in situations where the bankrupt appears to have been abusing the bankruptcy process. Persons who have gone through bankruptcy before may attract special attention.

It is difficult to say with any certainty if a court will give an absolute discharge or impose conditions. Many factors are considered. One main factor is the behaviour of the debtor both before the assignment and during the course of the bankruptcy. For example, if the bankrupt has not cooperated with the trustee (e.g., has refused to pay a certain amount of wages every month), a judge may decide to give a discharge on condition that a portion of the wages be paid to the trustee for the following year or two.

Another important factor is the kind of debts the bankrupt had. While there are very technical rules governing which creditors a person is ordered to pay as a condition for bankruptcy discharge, the courts feel some kinds of debts are more important to repay, at least in part, as a condition of discharge from bankruptcy. These include debts to the government for past income taxes, and debts arising from court judgments in motor vehicle injury cases.

The debtor's income situation is probably the most important factor in a court's decision to impose repayment conditions for discharge. If there is little discretionary income after the debtor meets modest monthly expenses, there is little point in making an order for a large repayment.

However, for people making a reasonable salary, the court is likely to make a conditional discharge order, even if the bankrupt's behaviour before and during the bankruptcy was not criticized. The court may also impose conditions if the debtor emerges from bankruptcy with a large amount of exempt assets, such as RRSPs.

In a very few cases, courts may make one of two other kinds of orders when a bankrupt is asking for a discharge. The court may suspend the discharge for a few months to a year to show the debtor that his or her behaviour in the bankruptcy was not proper in the view of the court. In extreme cases, a court may refuse outright to give a discharge. Note that this does not mean that a bankrupt will stay in bankruptcy forever, but that he or she must make another court application after a reasonable waiting period.

The effect of a bankruptcy discharge

After discharge, a bankrupt is legally released from paying debts incurred prior to the assignment in bankruptcy, except those debts described in the BIA, s. 178 (as discussed above). In addition, debts owed to creditors who were not notified of the bankruptcy may not be completely released. A debtor may choose to pay debts from which he or she has been released, but has no obligation to do so.

Information gathering

The advocate's role with most debtors is to provide guidance for the most appropriate remedy to resolve the debt problem. This requires the advocate to obtain full details of the debtor's income and expenses, and assets and liabilities. The financial situation of a spouse may also be relevant. It is important to review the debtor's financial circumstances over both the short term and long term. An assignment in bankruptcy is not appropriate if the debtor is only temporarily unable to repay debts.

Solving the problem

Bankruptcy is a final solution after all other alternatives have been considered or tried. It is not a short-term solution for someone who is temporarily unemployed, for example. If there is any prospect of future income that will allow a debtor to repay debts over a reasonable period of time, then bankruptcy should be avoided.

To assess whether bankruptcy is appropriate, compare the level of debt to the level of income. It is not possible to set an arbitrary level and say, for

example, that everyone who owes $5,000 should not go bankrupt, or that everyone who owes $50,000 should go bankrupt. For a welfare recipient, $5,000 in debts may well be enough to justify bankruptcy. For a doctor, $50,000 in debts may not justify bankruptcy.

One question that often bothers debtors is whether they will be able to get credit after going through bankruptcy. It is difficult to give a general answer since each case is different but getting credit after bankruptcy may be a problem for a time. A person who is facing bankruptcy is probably not a good prospect for any, or increased, credit.

According to all the creditors' warnings, no bankrupt will ever get credit again. This is an exaggeration. There is no law that says that people who have gone through bankruptcy should not have credit. It is up to each borrower and creditor to decide after the bankruptcy.

It is probably true, however, that if creditors are aware of a person's recent bankruptcy, consumer or mortgage credit may be refused, particularly if the creditor is a bank. It may be somewhat easier to obtain credit from a creditor who is also a seller financing a sale and getting a security agreement for the item sold. Thus, for example, it may not be too difficult to buy an inexpensive car on credit (assuming a debtor decides he or she absolutely needs to buy on credit after a bankruptcy experience).

If some time has passed since a bankruptcy, the likelihood of getting credit is greater, particularly when a pattern of stability of income and residence has been established. For example, a person who has had a steady job for a couple of years and who has lived at the same address for that time may meet credit-granting terms, even those of a bank.

The advocate's role in advising on bankruptcy will usually be to give general advice on the appropriateness of the remedy and to generally explain the process to the debtor. If bankruptcy appears to be appropriate, refer the debtor to a trustee in bankruptcy or the federal bankruptcy office.

Related topics and materials

See *Bankruptcy Act:* Orderly payment of debts; *Bankruptcy Act:* Proposals; Creditors (types of); Debtors remedies: Financial remedies; Enforcing judgments against chattels; Enforcing judgments against land; Foreclosure and mortgages; Garnishment and set-off; Payday loans.

See also Discharge from Bankruptcy, Justice Education Society of BC; Personal Bankruptcy Guide, Bankruptcy Canada; You Owe Money, Office of the Superintendent of Bankruptcy Canada; and When You Can't Pay Your Debts, The Canadian Bar Association BC Branch.

5 | *Bankruptcy Act:* Proposals

Client problem

- Client wants advice on repaying debts and has the financial ability to pay something toward all of them, but needs a lower overall monthly payment and additional time to pay.

Summary of the law

Part III, divisions I and II, of the federal *Bankruptcy and Insolvency Act* (BIA) contains the provisions under which a debtor can make a proposal to all or a class of creditors (e.g., only unsecured creditors) (see chapter 18) to pay off a percentage of the debts, after which the debtor will be discharged at law from owing the balance of the debts to those creditors.

The proposal provisions are not the same as an assignment in bankruptcy (see chapter 3). They are designed to provide an alternative to bankruptcy (i.e., giving up what you own to eliminate your debts) for debtors who have some ability to pay on their debts, but who cannot be reasonably expected to pay off all their debts over a reasonable time because of the overall amount due relative to the monthly income available to make payments.

The process

The BIA provides for two types of proposals: consumer proposals and ordinary proposals.

Consumer proposals

Consumer proposals:

- can be made by individuals who have total debts of $250,000 or less (excluding money owed on a mortgage for the debtor's house), and
- generally take a maximum of five years to complete.

As with assignments in bankruptcy, the debtor must undergo counselling as part of the proposal process. Proposals are administered by proposal administrators (trustees licensed under the BIA).

A proposal administrator first makes a full inventory of the debtor's income and expenses, assets and liabilities, and creditors, and sets that information out in a proposal with the debtor's offer of partial payment. The proposal is filed with the local official receiver's office, which supervises proposals (and assignments in bankruptcy) for the federal government. Then that form, along with additional information, is immediately sent to all the creditors of the debtor.

Basically, the proposal to the creditors is that the debtor will pay them a percentage of the amount of money owed to them. For example, if the debtor owes all creditors $25,000, and the debtor and administrator feel that the debtor can pay $12,500 over five years to those creditors, each creditor would receive 50 percent of the amount owed to them during the five years that the payments are made.

Creditors have up to 45 days to accept or reject a proposal. Creditors who do not respond are deemed to have accepted the proposal. If no creditor objects to the proposal within 45 days, the proposal is considered to have been approved by the creditors.

If any creditor objects, or more than 25 percent are against the proposal, the trustee must hold a meeting of creditors at which they vote on the proposal. For a proposal to succeed, a majority of the creditors (based on the amount owed) must approve. (The votes are based on the amount of money owed, so each creditor has as many votes as he or she is owed in dollars.)

If the proposal is accepted (either because there is no objection or because it is approved at a meeting of the creditors), the debtor begins making payments to the administrator, and the administrator then forwards payments to the creditors.

Debtors who have had their proposals accepted are protected from legal action or judgment enforcement action by all creditors covered by the proposal. Under the BIA, creditors covered by the proposal cannot start or continue legal actions against the debtor as long as the proposal is in force.

Within two months of a proposal being approved, the debtor will meet with the administrator for the first of two counselling sessions. The second counselling session is held within seven months.

The cost of a consumer proposal is approximately $1,600, plus tax (HST until March 31, 2013; GST from April 1, 2013) and counselling fees. In addition, the debtor must pay a fee to the administrator equal to 20 percent of the counselling fees moneys distributed to creditors, and a levy to the superintendent equal to 5 percent of all the funds disbursed.

Ordinary proposals

Ordinary proposals are available to insolvent individuals, families, and businesses whose debts exceed $250,000. The process for obtaining approval of an ordinary proposal is similar to the process for obtaining approval of a consumer proposal, with some significant differences as follows:

- There is always a meeting of the creditors.
- A rejection of an ordinary proposal by creditors results in immediate bankruptcy as of the date of the creditors' meeting.
- The proposal must be approved by a majority of the creditors, who represent at least two-thirds of the total dollar amount owed. If the proposal is accepted by the creditors, it must then be approved by the court.
- The fees for each case are decided individually and voted on by the creditors.
- There are no mandatory counselling sessions.

Information gathering

The advocate's role with most debtors is to provide guidance for the most appropriate remedy to resolve the debt problem. This requires that the advocate obtain full details of the debtor's income and expenses, and assets and liabilities. The financial situation of a spouse may also be relevant. It is important to review the debtor's financial circumstances over both the short term and long term to assess whether bankruptcy really is the best option for the client.

Related topics and materials

See *Bankruptcy Act*: Assignments in bankruptcy; *Bankruptcy Act*: Orderly payment of debts; Creditors (types of); Debtors remedies: Financial remedies.

See also Discharge from Bankruptcy, Justice Education Society of BC; Personal Bankruptcy Guide, Bankruptcy Canada; You Owe Money, Office of the Superintendent of Bankruptcy Canada; and When You Can't Pay Your Debts, the Canadian Bar Association BC Branch.

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Office of the Superintendent of Bankruptcy Canada (/eic/site/bsf-osb.nsf/eng/home)

You Owe Money — Student Loans and Bankruptcy

Repayment assistance programs

If you are considering bankruptcy because of student loan debt, you may be able to apply for repayment assistance.

The federal government's Repayment Assistance Plan (http://www.canlearn.ca/eng/loans_grants/repayment/help/index.shtml) helps borrowers manage student loan debt by paying back what they can reasonably afford. If you have a provincial or territorial government student loan, contact your provincial/territorial student financial assistance office (http://www.canlearn.ca/eng/common/help/contact/provincial.shtml) to find out about their repayment assistance programs.

Your options at a glance (br03127.html) Definitions (br01467.html)

Order a publication (../frm-eng/SBEE-7JCKVV)

How bankruptcy affects your student loan debts

The seven-year rule

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A discharge from bankruptcy releases you from your obligation to repay your student loans if you filed for bankruptcy at least seven years after the date you ceased to be a part or full-time student. (**Note:** The federal or provincial student loan legislation applicable to your loan governs how you determine the date on which you ceased to be a full or part-time student.)

If you declare bankruptcy seven or more years after the date on which you ceased to be a full or part-time student, your student loan debts will be eligible for discharge, together with your other debts. (The seven-year rule applies to both new filings for bankruptcy as well as to bankruptcies that were not yet discharged as of July 7, 2008.)

However, the court can reduce this period to five years if repaying the loan will result in undue hardship.

Hardship provision

If it has been only five or more years since you ceased to be a full- or part-time student, and you are or have been bankrupt, you may make an application to the court for an early discharge of your student loan debts under the "hardship provision."

Under this provision, you will be discharged from your student loan debts only if the court is satisfied that you

- acted in good faith in connection with your obligation to repay your student loans; and
- have experienced, and will continue to experience, financial difficulty that will prevent you from repaying these debts.

When considering the question of good faith, the courts will look at how debtors used their student loan money, their efforts to complete their educational program, their efforts to repay the loans and their use of available repayment assistance programs, such as the federal government's Repayment Assistance Plan (http://www.canlearn.ca/eng/loans_grants/repayment/help/index.shtml), which is available to borrowers who are having difficulty paying back their student loan debt.

Learn more about the timing of your discharge from bankruptcy (br03128.html#discharge).

Date modified:

Print Email 2015-03-24

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400 St. Mary Avenue, 4th Floor
Winnipeg, Manitoba
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Industrie Canada
Bureau du surintendant des faillites Canada
400, avenue St. Mary, 4e étage
Winnipeg (Manitoba)
R3C 4K5
bsf.ic.gc.ca

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,

Ashleigh Benham
Office of the Superintendent of Bankruptcy Canada
Ashleigh.benham@ic.gc.ca
Ph. 204-983-5960 or 1-877-376-9902
Fax: 204-983-8904

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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: Ashleigh Benham
4th Floor 400 St. Mary Ave
Winnipeg, MB R3C 4K5
or/ashleigh.benham@ic.gc.ca
Ph: 1-877-376-9902 or 204-983-5960
Fax 204-983-8904

Canada

OSB • BSF

Protecting the Integrity of the Insolvency System

Protéger l'intégrité du système d'insolvabilité

Bankruptcy Assistance Program –
Participating Trustees list

Vancouver and Burnaby Trustee

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

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

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

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

Vancouver Island

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

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

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

Okanagan

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

Kootnays

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

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

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

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

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

Directive / Instruction

N° 20

BANKRUPTCY ASSISTANCE PROGRAM

Issued: August 14, 2009

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

Interpretation

1. In this Directive,

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

"BAP" means the Bankruptcy Assistance Program;

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

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

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

PROGRAMME D'ACCÈS À LA FAILLITE

Date d'émission : le 14 août 2009

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

Interprétation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Eligible Trustees

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

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

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

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

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

Syndics admissibles

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

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

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

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

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

Enquiries

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

Demandes de renseignements

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

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

COURT ORDER ENFORCEMENT ACT

[RSBC 1996] CHAPTER 78

Part 5 — Enforcement of Court Orders *(extract taken September 30, 2015)*

Definitions for sections 71 to 78

70 In sections 71 to 78, unless the context otherwise requires,

"debtor" includes the personal representative of the debtor if the debtor is dead, and in case of the absence of the debtor, includes any member of the debtor's household;

"value" means the net amount that the goods and chattels may be reasonably expected to realize at a sale of goods and chattels conducted in the manner in which such sales are usually conducted by a sheriff or other officer.

Personal property of debtor

71 (1) Subject to subsections (2) to (4) of this section and section 71.2, the following goods and chattels of a debtor, at the option of the debtor, are exempt from forced seizure or sale by any process at law or in equity:

(a) necessary clothing of the debtor and the debtor's dependants;

(b) household furnishings and appliances that are of a value not exceeding a prescribed amount;

(c) one motor vehicle that is of a value not exceeding a prescribed amount;

(d) tools and other personal property of the debtor, not exceeding in value a prescribed amount, that are used by the debtor to earn income from the debtor's occupation;

(e) medical and dental aids that are required by the debtor and the debtor's dependants;

(f) any personal property prescribed by the regulations that is of a value not exceeding a prescribed amount.

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

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

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

Principal residence of debtor

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

(2) This section does not apply to

(a) a corporate debtor, or

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

Property exceeding exempted values

71.2 (1) If the value of the property referred to in section 71 (1) or 71.1 (1) exceeds the prescribed amount of the exemption for the property, that property is subject to seizure and sale under this Act.

(2) If property to which subsection (1) applies is sold under this Act, a sheriff or other officer must, unless otherwise provided by law or by the agreement of all interested parties, distribute any of the proceeds of the sale as follows:

(a) pay firstly to a secured creditor the amount owed by the debtor to the secured creditor if the secured creditor

(i) has, at the time of seizure, a financing statement registered under the *Personal Property Security Act*, or

(ii) has a charge registered under the *Land Title Act*;

(b) pay secondly to the debtor an amount not exceeding the prescribed amount of the exemption.

(3) The sum received by the debtor under subsection (2) (b) is exempt from attachment.

(4) This section must not be construed as affecting the priority of a maintenance order under the *Family Maintenance Enforcement Act*.

(5) The priority of the claim of any person referred to in subsection (2) is not prejudiced by a payment to anyone made in accordance with that subsection.

Registered plans exempt from seizure

71.3 (1) In this section:

"DPSP" means a deferred profit sharing plan as defined in section 147 of the federal Act;

"enforcement process" means

(a) attachment,

(b) garnishment,

(c) execution,

(d) seizure, or

(e) any other remedy or legal process to enforce payment of a debt;

"federal Act" means the *Income Tax Act* (Canada);

"planholder" means

(a) with respect to a DPSP, a beneficiary under the plan,

(b) with respect to an RRIF, an annuitant as defined in paragraph (a) of the definition of "annuitant" in section 146.3 (1) of the federal Act, and

(c) with respect to an RRSP, an annuitant as defined in paragraph (a) of the definition of "annuitant" in section 146 (1) of the federal Act;

"registered plan" means a DPSP, an RRIF or an RRSP, whether registered before, on or after November 1, 2008;

"RRIF" means a registered retirement income fund as defined in section 146.3 of the federal Act;

"RRSP" means a registered retirement savings plan as defined in section 146 of the federal Act.

(2) Despite any other enactment, all property in a registered plan is exempt from any enforcement process.

(3) Subsection (2) does not apply

(a) to property contributed to a registered plan after or within 12 months before the date on which the debt being enforced came due,

(b) to property that has been or is being paid out of a registered plan,

(c) to an enforcement process that is being effected in support of the enforcement of a maintenance order as defined in the *Family Maintenance Enforcement Act*, or

(d) to an enforcement process initiated against a registered plan before November 1, 2008.

(4) For the purposes of subsection (3) (b),

(a) a transfer of property from a registered plan of the planholder

(i) to another registered plan of the planholder, or

(ii) after the death of the planholder, to the planholder's spouse or common-law partner as defined in section 248 of the federal Act who, under the terms of the registered plan, is entitled to receive that property on the planholder's death,

does not constitute a payment of that property out of a registered plan, and

(b) if an enforcement process is pursued against property being paid out of a registered plan of a planholder, that property is

deemed, for the purposes of that enforcement process and Part 1 of this Act, to be a debt due to the planholder for or with respect to the salary or wages of the planholder.

(5) Subject to subsection (6), if a provision of this section is inconsistent or in conflict with a provision of another Act, the provision of this section prevails unless the other Act expressly provides that it, or a provision of it, applies despite this section.

(6) Nothing in this section makes any property in a registered plan subject to an enforcement process if that property would not, but for this section, be subject to an enforcement process.

Art exempt from seizure

72 (1) Works of art or other objects of cultural or historical significance brought into British Columbia for temporary public exhibit are exempt from seizure or sale under any process at law or in equity.

(2) Subsection (1) does not apply

(a) to execution on a judgment respecting a contract for the transportation or warehousing or exhibition in British Columbia of the work or object, or

(b) to a work or object that is offered for sale.

Procedure for selection of exempt goods

73 (1) A sheriff or other officer seizing the personal property of a debtor under a writ of execution must

(a) allow the debtor to select goods and chattels from the personal property seized, not exceeding in value the exemption under section 71 (1), and

(b) in a form and manner determined by the Director of Debtor Assistance appointed under the *Debtor Assistance Act*, make every reasonable effort to inform the debtor of the services and advice available under that Act.

(2) A debtor whose personal property has been seized may, within 2 days after the seizure or notice of it, whichever is later, select goods and chattels from the personal property seized, not exceeding in value the exemption under section 71 (1), and then, if a list of the selected articles has not been delivered to the sheriff or other officer by the debtor, the sheriff or other officer must make a written list of articles, and give a copy to the debtor.

(3) The sheriff or other officer must at once, if in his or her opinion the goods and chattels selected do not exceed in value the exemption under section 71 (1), withdraw from possession of them, and they are, and the sheriff or other officer must certify in writing that they are, the goods and chattels exempt under section 71.

Procedure as to value of exempt goods

74 (1) If the sheriff or other officer is of the opinion that the goods and chattels selected by the debtor exceed in value the exemption under section 71 (1), he or she must

(a) within one day after the receipt or making of the list referred to in section 73, notify the debtor to that effect in writing, and

(b) unless within one day more the sheriff or other officer and the debtor agree on the goods and chattels to be exempt, not to exceed in value the exemption under section 71 (1), without delay call on a justice resident in the area, who must at once name an appraiser, whose duty it is to appraise.

(2) The appraiser named under subsection (1) (b) must, when sworn, without delay, appraise the selected goods and chattels in the presence of the debtor, or after one day's notice to the debtor, to be served either personally or tacked up in some conspicuous place where the seized goods are located.

(3) If a claim to exemption has been made and has been admitted or agreed on under subsection (1) (b), or if the goods claimed have been selected and appraised under or at the amount of the exemption under section 71 (1), the sheriff or other officer must withdraw from possession of them, and they are, and the sheriff or other officer must certify in writing that they are, the goods and chattels exempt under section 71.

If goods selected exceed in value the exempt amount

75 If the goods claimed by the debtor are appraised at more than the amount of the exemption under section 71 (1),

(a) the debtor is still allowed his or her option under that section if the debtor claims it,

(b) the appraiser must appraise as much of the claimed goods as will not exceed in value the exempt amount, and

(c) the goods appraised at the exempt amount constitute and must be certified as the exempt goods.

Appraiser's fees

76 (1) If the goods claimed by the debtor are appraised at more than the amount of the exemption under section 71 (1), then the fees of the appraiser, not to exceed a prescribed amount, and his or her expenses of travel for the distance actually and necessarily travelled by the appraiser, not to exceed a prescribed amount, must be levied out of the exempted goods.

(2) If the goods are appraised at an amount equal to or less than the amount of the exemption under section 71 (1), then the sheriff or other officer must pay the fees and expenses of travel of the appraiser, but in the latter case the sheriff or other officer may deduct the sum paid the appraiser from the proceeds of execution, if any, against goods not exempt.

Appraiser's oath

77 An appraiser must, before acting as an appraiser, take and subscribe the following oath before any person authorized to administer an oath, or in the absence of that person, then before any sheriff or sheriff's officer, who may administer it:

I, *A.B.*, having been appointed the appraiser of goods and chattels seized under an execution [*or as the case may be*], in the suit of ..... against [*or as the case may be*], do solemnly swear [*or* affirm] that I will faithfully perform the duties of the office without partiality, fear, favour or affection, and

that I will appraise the value of the goods and chattels submitted for my appraisal to the best of my ability. So help me God.

Sworn before me at ....., *[month, day, year]*.

....., *J.P.* [*or as the case may be*].

A.B., Appraiser under *Court Order Enforcement Act*.

Appeal from appraisal

78 (1) The debtor may appeal from the decision of the appraiser, or from any act of the sheriff or other officer, to the Supreme Court, on giving security for the appeal as a judge of that court may order.

(2) The appeal must be decided summarily and without delay.

Recovery of taxes, rent and other debts

79 Nothing in sections 71 to 76 must be construed as exempting any property

(a) from sale in satisfaction of debts owed to the government, including taxes, or

(b) from distress for rent.

Writs of elegit or fi. fa. land abolished

80 A writ of elegit or writ of fieri facias de terris must not be issued in British Columbia.

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B.C. Reg. 28/98
O.C. 122/98

Deposited February 6, 1998
effective May 1, 1998

Court Order Enforcement Act

COURT ORDER ENFORCEMENT EXEMPTION REGULATION

Note: Check the Cumulative Regulation Bulletin 2014 and 2015 for any non-consolidated amendments to this regulation that may be in effect.

Definition

1 In this regulation:

"Act" means the *Court Order Enforcement Act*;

"maintenance debtor" has the same meaning as **"debtor"** in section 1 (1) of the *Family Maintenance Enforcement Act*.

Exemptions for personal property of debtor

2 For the purposes of section 71 (1) of the Act, the prescribed amounts of exemption are as follows:

(a) $4 000 for household furnishings and appliances;

(b) $5 000 for one motor vehicle if the debtor is not a maintenance debtor;

(c) $2 000 for one motor vehicle if the debtor is a maintenance debtor;

(d) $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.

Exemption for principal residence of debtor

3 For the purposes of section 71.1 (1) of the Act, the prescribed amount of equity is as follows:

(a) $12 000 if the debtor is a person whose principal residence is located within the boundaries of the Capital Regional District or the Greater Vancouver Regional District;

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(b) $9 000 if the debtor is a person whose principal residence is located outside the boundaries of the Capital Regional District or the Greater Vancouver Regional District.

[Provisions of the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78, relevant to the enactment of this regulation: section 117 (2) (a) and (b)]

Discharge from Bankruptcy

This guidebook is for people who have declared bankruptcy but have not been granted a discharge from bankruptcy. If your trustee is no longer responsible for making another application for discharge, this guidebook will help you make your own application for discharge from bankruptcy.

If you are not currently in bankruptcy but are dealing with significant debt and want to know more about the process there is information in the right column of this page.

Discharge from bankruptcy is the legal process of being released from bankruptcy. At the conclusion of all legal steps in processing a bankrupt person's assets and debts, a court order forgives those debts which cannot be paid, with certain exceptions.

Once your trustee has fulfilled his or her duties under the *Bankruptcy and Insolvency Act* with respect to the administration of your property, your trustee MUST apply for their discharge upon completion of the administration of your bankruptcy. Your trustee may have reached this point shortly after bringing forward your first application for discharge.

If you were not granted a discharge on a previous application, you are an undischarged bankrupt and your trustee is not responsible for making another application for your discharge. This is up to you.

This guidebook will help you make your application for discharge from bankruptcy if you are an undischarged bankrupt.

Can't pay your debt?

There are many things you can do if you are dealing with significant debt:

- Get financial counselling (e.g., from the Credit Counselling Society of BC);
- Use a debt management program, which involves a written agreement between you and the person or company that lends you money;
- Consolidate or refinance your debts;
- Make a proposal to your creditors under Canada's bankruptcy laws; or
- As a last resort, declare personal bankruptcy.

Learn more information about your options:

- Consumer Law and Credit/Debt Law
- When you Can't Pay Your Debts
- Office of Superintendent of Bankruptcy

This Guidebook provides general information about civil, non-family claims in the Supreme Court of BC. It does not explain the law. Legal advice must come from a lawyer, who can tell you why you should do something in your lawsuit or whether you should take certain actions. Anyone else, such as court registry staff, non-lawyer advocates, other helpers, and this guidebook can only give you legal information about how to do something, such as following certain court procedures.

Standards are in effect for the filing of all Supreme Court civil and Supreme Court family documents, except divorce and probate. When you submit your completed documents, registry staff will check to make sure they meet the minimum standards before accepting them for filing. It is your responsibility to include all other information required by the court and ensure it is correct.

For information about how to get help, see Resource A at the end of this document.

There are reasons why you were not discharged from bankruptcy on the first application. In most cases, undischarged bankrupts have not done something that was required or met the conditions imposed by the Registrar in Bankruptcy who heard your application. For example, you may have been required to provide the trustee with monthly income and expense statements and failed to do so, or you may not have been paid all of the surplus income that you were required to pay, or you may not have attended your counselling sessions.

If there were things that you failed to do or moneys that must be paid, the trustee objected to your discharge when it was time to do so. When the trustee brought your discharge application before the court, it would have been adjourned or a payment amount may have been set. Often the reasons for the opposition (and adjournment) are set out in the trustee's "s. 170 report" (also called a section 170 report, an S170 report, or a Report of Trustee on Bankrupt's Application for Discharge).

The reasons you were not discharged from bankruptcy may also be noted on the order adjourning the discharge application. Any amount that you have been ordered to pay will be noted on the order made at the initial discharge hearing.

You should review the s. 170 report and the order to see what you have failed to do. You must make sure that you have fulfilled all of your duties under the *Bankruptcy and Insolvency Act* and have complied with all conditions that were imposed on you at the first discharge hearing before applying again. You may also consider an application to change or rescind any conditional order.

Automatic discharge from bankruptcy

You will be automatically discharged by your trustee (i.e., there is no requirement for a court application of any sort) *9 months* after filing for bankruptcy if:

- this is your first bankruptcy;
- your discharge is not opposed by your trustee, your creditors, or the Office of the Superintendent of Bankruptcy (OSB);
- you have attended counselling sessions;
- your income tax debt is less than $200,000 and less than 75% of your total debt; and
- you are not required to pay a portion of your surplus income to the bankruptcy estate. If you have to make payments, you are eligible for an automatic discharge after 21 months.

In most cases, you will receive an automatic discharge from bankruptcy. The trustee will notify the OSB and your creditors of the pending date of your discharge. The trustee, the OSB, and your creditors all have a right to object to your absolute discharge. If no one makes an objection, a court hearing is not necessary, and the trustee will send you a copy of your discharge.

If you are bankrupt for the second time, you may get an automatic discharge 24 months after filing for bankruptcy if you are not required to make payments of surplus income. If you are a second-time bankrupt with surplus income, you must contribute part of the surplus to your trustee for a period of 36 months. After that period, you are eligible for an automatic discharge, provided you have paid all of your surplus income within the time limit required.

Bankrupt's application for discharge

If you do not qualify for an automatic discharge, your trustee will make the first application for the discharge hearing and inform the court of the circumstances of your bankruptcy. The trustee will also notify your creditors and the OSB of your application for discharge, as they have a right to oppose your discharge.

The reasons why creditors and trustees may object to your discharge are set out in the *Bankruptcy and Insolvency Act* (s. 173). Creditors may be inclined to object if they think the court will order that you repay a percentage of the money that you owe to creditors (this is a conditional discharge). The OSB may object to your discharge if you have been bankrupt before and it appears that you have been abusing the bankruptcy process.

If the trustee is discharged, it is up to you to apply for your own discharge from bankruptcy. However, if the trustee is not discharged and the file is still open, the trustee may make the second application for discharge on your behalf.

Preparing your own application for discharge

The following information will help you if you are making a court application for your discharge from bankruptcy without the assistance of the trustee or a lawyer.

The first step is to locate your bankruptcy file at the court registry. You must look through your file and find:

- the trustee's report (also called a section 170 report, a S170 report, or a Report of Trustee on Bankrupt's Application for Discharge); and
- a copy of the order that was made at the previous discharge hearing.

Ask the registry to make copies of these documents for you. You will have to pay a fee for photocopying. In addition, you will need to prepare the following documents. Examples of the forms are attached to this guidebook.

- Notice of Motion;
- an Affidavit of Service;
- your affidavit, which explains why you are entitled to the order that you are seeking; and
- a draft of the order that you are seeking to be made, although the Registrar in Bankruptcy hearing your application for discharge may make any order he or she sees fit. If the Registrar in Bankruptcy makes the order you are seeking, he or she may sign it in court on the day you appear. That may save you some time later in having your order entered in court. Two examples of different types of orders are attached to this guidebook.

Notice of Motion

You begin an application for discharge by preparing and filing a Notice of Motion. There is a fee for filing your Notice of Motion. (Filing fees are set out in the Schedule attached to the Bankruptcy and Insolvency General Rules. The fees are $50 for an ordinary bankruptcy and $10 for a summary bankruptcy.)

The rules for serving the Notice of Motion are described under the heading "Serving your documents" in this guidebook. There is a sample Notice of Motion at the end of this guidebook.

The Affidavit

An affidavit is signed, written statement that contains important information in your case. Any evidence that you wish the court to consider in the application must be submitted in an affidavit. Your affidavit should state what led up to your bankruptcy and what your financial situation is at the present time. You should provide details, because the court needs to have a clear picture of your circumstances.

Your affidavit should only include evidence that relates specifically to your application for discharge. The following information might be relevant to your application:

- The cause of your bankruptcy.
- Your personal and financial situation since the date of bankruptcy (e.g., your employment, income, marital status, etc.).
- You should state why you did not seek the discharge earlier and/or why you have not been able to comply with the bankrupt's duties or conditional requirements.
- The reasons why you are seeking a discharge now.
- What debts and liabilities you have incurred since the date of bankruptcy.
- Your current assets and liabilities.
- What assets you have acquired, distributed, transferred or sold since the date of bankruptcy.
- Responses to any statements, findings, recommendations or objections set out in the trustee's report and any other reports that are filed in response to your application.

You should attach as exhibits to the affidavit any documents you have relating to the application you are making, such as the trustee's report and a financial statement setting out your current income, expenses, assets, and liabilities. A sample affidavit and financial statement are set out at the end of this guidebook. You will have to swear (or affirm) your affidavit in front of a lawyer, a notary public, or a designated person at the court registry. There is a fee for this service. For further information about preparing affidavits, see the guidebook, *A Guide to Preparing Your Affidavit*.

Serving your documents

Legally speaking, to serve documents means to provide a written copy – in some cases, this requires having a signature to confirm the document was received. You must serve the filed Notice of Motion and all other filed affidavits and documents on all proven creditors, your trustee and the OSB.

The Notice must be received by the persons to be notified at least 4 days before the hearing if the document is served, delivered personally, or sent by fax or electronic transmission. (Note that bankruptcy hearings in Vancouver are scheduled only on Wednesdays.) If it is couriered or mailed to the other parties, it must be sent at least 10 days before the hearing. (Time limits are set out in the *Bankruptcy and Insolvency Act*, Rule 6(1) – (2).) It is a good idea to give the other parties as much notice as possible about the hearing date.

The OSB's address for service is 2000 – 300 West Georgia Street, Vancouver, BC, V6B 6E1 (toll free telephone: 1-877-376-9902). You must provide proof of service at the discharge hearing if no one else attends the hearing. A sample Affidavit of Service is attached to this guidebook.

At the hearing

When your application is heard, you will have an opportunity to present your case in court to a judge or a Registrar in Bankruptcy. (When a master hears your application, he or she is called a Registrar in Bankruptcy.) This is the typical procedure:

1. You explain why you believe you are entitled to an absolute discharge from bankruptcy.
2. Anyone opposing your application explains his or her position.
3. You submit documents and affidavits in support of your case.
4. The opposing party's presents arguments in the same way.

When you are presenting your position at the hearing, remember these general guidelines:

- Tell the Registrar in Bankruptcy or judge what order you are seeking.
- Outline the facts necessary to support your application.
- Set out the law on the subject.
- Explain how the law applies to the facts of your case.
- Indicate that the application of the law to the facts of your case requires the Registrar in Bankruptcy or judge to make the order requested.
- Try not to switch back and forth between facts and law.

Stand when you are making your presentation to the Registrar in Bankruptcy and address him or her as follows:

- Address a male judge as "My Lord" and address a female judge as "My Lady."
- Address a master or registrar (both male and female) as "Your Honour."

The Registrar in Bankruptcy or judge will consider many factors at your application for discharge. Your conduct before your assignment into bankruptcy and during bankruptcy is an important factor and the trustee's report will provide that information. For example, if you have not cooperated by attending financial counselling sessions or by paying wages determined as surplus income to the trustee for your creditors, the Registrar in Bankruptcy or judge may make a conditional order that you be discharged when you have paid the surplus income to the trustee.

The Registrar in Bankruptcy or judge will also consider your current income. If you do not have much money left over from your paycheque after paying reasonable monthly expenses, it would be pointless to make an order for you to repay a substantial debt.

On the other hand, if you make a reasonable salary, the Registrar in Bankruptcy may order a conditional discharge, particularly if you have assets that are exempt from being attached as part of the assets in your bankruptcy (such as RRSPs purchased more than one year before you declared bankruptcy). In some cases, the Registrar in Bankruptcy or judge may order repayment of a substantial portion of the debt, even if you are of limited means (e.g., if you owe money to only one creditor, like the CRA or a litigation creditor).

After discharge, you are legally released from paying debts that you incurred before your assignment in bankruptcy, except certain types of debts, which are set out in Section 178 of the *Bankruptcy and Insolvency Act*:

- Alimony payments and child support;
- Student loans, if it is less than 7 years since you ceased to be a full or part-time student;
- A fine or penalty imposed by the court; or
- Debt arising from fraud.

At the end of the hearing, the Registrar in Bankruptcy or judge will either grant you a discharge from bankruptcy, adjourn the hearing, or dismiss your application. If you have prepared your order and brought it to the hearing, the Registrar in Bankruptcy or judge may sign your order from the bench.

Order for discharge

At the end of the hearing, the Registrar in Bankruptcy or judge will grant one of the following types of discharges:

- *An absolute discharge.* When an absolute discharge is granted, you will be released from the obligation to repay the debts you had as of the date of your bankruptcy. Note that you are still obliged to pay certain debts, as described above.

- *A conditional and suspended discharge.* If you get a conditional discharge, you must do certain things before you are entitled to an absolute discharge. For example, you may have to pay a certain amount of money to your trustee over a period of time. The court can impose other conditions; once those conditions are met, you will be granted an absolute discharge. A suspended discharge is where the court sets a specific date in the future when your absolute discharge becomes effective. Although no further court hearing is required, you are not discharged until that date.

The court may refuse to grant your discharge. In that case, you will have to make another application for discharge after a reasonable period of time, often set by the court in the order refusing your discharge.

Sample orders for discharge and the required backing sheet can be found at the end of this guidebook. A backing sheet is the last page of your document. It sets out the court registry information.

If you prepared your order before the hearing and the Registrar in Bankruptcy or judge has signed it on the bench, you may then take it to the court registry (bankruptcy division) and they will hold it for 10 days before filing it. At that point, you are discharged from bankruptcy.

If you did not prepare your order before the hearing, go to the court registry (bankruptcy division) and complete the order by filling in a form. You can take that order back to the Registrar in Bankruptcy in court and have him or her sign it. Take the signed order back to the bankruptcy court registry and they will hold it for 10 days before filing it. At that point, you are discharged from bankruptcy.

A copy of the signed and entered Absolute Order of Discharge must be sent to the OSB to update the public record. (Note: Credit Bureaus obtain their bankruptcy information from the OSB.)

Get Help With Your Case

Before you start your claim, you should think about resolving your case without going to court (see the guidebook, Alternatives to Going to Court). If you do not have a lawyer, you will have to learn about the court system, the law that relates to your case, what you and the other side need to prove, and the possible legal arguments for your case. You will also need to know about the court rules and the court forms that must be used when you bring a dispute to court.

Legal Information Online

All *Guidebooks for Representing Yourself in BC Supreme Court Civil Matters*, along with additional information, videos and resources for Supreme Court family and civil cases are available on the Justice Education Society website: www.SupremeCourtBC.ca.

Clicklaw gives you information about many areas of law and free services to help you solve your legal problems: www.Clicklaw.bc.ca.

The Supreme Court of BC's website has information for people who are representing themselves in court: www.Courts.gov.bc.ca/supreme_court/self-represented_litigants/

Legal information services

The Vancouver Justice Access Centre's, Self-help and Information Services includes legal information, education and referral services for Supreme Court family and civil cases. It is located at 290 - 800 Hornby Street in Vancouver (open Monday to Friday): www.SupremeCourtSelfHelp.bc.ca.

For information about other Justice Access Centre services in Vancouver and Nanaimo, see: www.JusticeAccessCentre.bc.ca.

Legal advice

You may be eligible for free (pro bono) legal advice. Access ProBono Society of BC's website gives you information about the legal assistance that is available to you: www.AccessProBono.ca.

Legislation

BC Legislation (statutes), regulations, and Rules of Court can be found at: www.BCLaws.ca.

Court rules and forms

Supreme Court forms can be completed in 3 ways:

1. Completed online and filed at: www.CourtServicesOnline.gov.bc.ca
2. Completed online, printed and filed at the registry
3. Printed, completed manually and filed at the registry

Court forms that can be completed online are available at: www.ag.gov.bc.ca/courts/other/supreme/2010SupRules/info/index_civil.htm
Printable court forms are available at: www.SupremeCourtBC.ca/civil/forms

Common legal terms

You can find out the meaning of legal terms at: www.SupremeCourtBC.ca/glossary

Family law

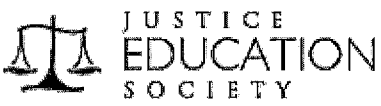
For information about family law claims, see: www.FamilyLaw.LSS.bc.ca.

This guidebook is part of a series:

Guidebooks for Representing Yourself in Supreme Court Civil Matters.

Produced by: www.JusticeEducation.ca

Funded by: www.LawFoundationBC.org



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The Society acknowledges the contributions of the Ministry of Attorney General.

Resource A: Where to get Legal Advice

Here are some places where you can get legal advice. To receive free legal advice, you must have low income to qualify. Phone the place listed and they will tell you if you qualify financially. Visit www.CourtInformation.ca to learn more.

Community Legal Assistance Society

The Community Legal Assistance Society runs legal clinics for BC Supreme Court for civil matters. There is financial qualification. Phone 604-685-3425. Their web site is: www.clasbc.net

Salvation Army's Pro Bono Lawyer Consultant Program

This program runs free legal advice clinics. There is a financial qualification. The phone number is 604-872-7681. Some of the clinics are run out of courthouses. See their web page: www.probono.ca

Access Pro Bono Society of British Columbia

This program runs free legal advice clinics. There is a financial qualification. The phone number is 604-878-7400. Some of the clinics are run out of courthouses. See their web page: www.accessprobono.ca

Lawyer Referral Service

The BC branch of the Canadian Bar Association offers a lawyer referral service. With a phone call (1-800-663-1919), you can get the contact information of a qualified lawyer who works in the area of law that you need. You will be able to meet with that lawyer for up to 30 minutes for only $25. See their web page: www.cba.org/bc/initiatives/main/lawyer_referral.aspx.

Law Students' Legal Advice Program

This program is run by law students at the University of British Columbia. It provides free advice and representation to clients who would otherwise be unable to afford legal assistance. Clinics are located throughout Greater Vancouver. To book an appointment, phone 604-822-5791. View their website: www.lslap.bc.ca.

NOTES

No. _____
Registry
_____

1 In the Supreme Court of British Columbia
In Bankruptcy
In the matter of the bankruptcy of

_____
[*your name*]

NOTICE OF MOTION

2 To: _____

Name(s) of applicant(s): _____

3 TAKE NOTICE that an application will be made by the applicant(s) to the presiding judge or master at the courthouse at _____

on _____ at _____ for the order(s) set out in Part 1 below.

4 **Part 1: ORDER(S) SOUGHT**

[*Using numbered paragraphs, set out the order(s) that will be sought at the application and indicate against which party(ies) the order(s) is(are) sought.*]

1

2

5 **Part 2: FACTUAL BASIS**

[*Using numbered paragraphs, set out a brief summary of the facts supporting the application.*]

1

2

[*If any party sues or is sued in a representative capacity, identify the party and describe the representative capacity.*]

6 **Part 3: LEGAL BASIS**

[*Using numbered paragraphs, specify any rule or other enactment relied on and provide a brief summary of any other legal arguments on which the applicant(s) intend(s) to rely in support of the orders sought. If appropriate, include citation of applicable cases.*]

1

2

Part 4: MATERIAL TO BE RELIED ON

7

[*Using numbered paragraphs, list the affidavits served with the notice of application and any other affidavits and other documents already in the court file on which the applicant(s) will rely. Each affidavit included on the list must be identified as follows:* "Affidavit #.....[*sequential number, if any, recorded in the top right hand corner of the affidavit*]..... of .....[*name*]....., made .....[*dd/mmm/yyyy*]....."."]

1 Affidavit # _____ of _____ made _____

Deponent _____ _____ _____ _____
Surname First name Second name Third name

2

8

The applicant(s) estimate(s) that the application will take _____ hours _____ minutes

[Check the correct box.]

[ ] This matter is within the jurisdiction of a master.

[ ] This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

a) file an application response in Form 33 within 5 days after the date of service of this notice of application or, if the application is brought under Rule 9-7 of the Supreme Court Civil Rules, within 11 days after the date of service of this notice of application , and

b) at least 2 days before the date set for the hearing of the application, serve on the applicant 2 copies, and on every other party one copy, of a filed copy of the application response and other documents referred to in Rule 9-7 (12) of the Supreme Court Civil Rules.

Date: .....[*dd/mmm/yyyy*]..... .....

Signature of
[ ] applicant [ ] lawyer for applicant(s)

.....[*type or print name*].....

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs ..... of Part 1 of this notice of application

[ ] with the following variations and additional terms:

.....

.....

.....

Date: .....[*dd/mmm/yyyy*].....

.....
Signature of [ ] Judge [ ] Master

NOTES

Court forms are available at: www.ag.gov.bc.ca/courts/other/supreme/2010SupRules/info/index_civil.htm. They can be completed online and filed electronically using Court Services Online: www.courtservicesonline.gov.bc.ca. They can also be printed and completed manually; or completed online, printed and filed.

Note: Form 32 in the BC Supreme Court Rules is a Notice of Application. Use this form, as modified in the following example. Change the name to Notice of Motion.

File this form in the court registry and serve it on the trustee, the OSB, and all your creditors that have filed a proof of claim.

1. The style of proceeding is the part at the top of the document that identifies your case within the court system. Insert the court number, the location of the registry (e.g., Vancouver), as it is part of your style of proceeding.

2. Insert the name of the people that must be notified of the hearing: the trustee, the OSB, and all your creditors that have filed a proof of claim.

3. Provide the address of the courthouse, and the date and time of the hearing.

4. List the orders that you are seeking in your application (e.g., That the court grant me an absolute discharge from bankruptcy).

5. State the facts you are relying on (e.g., It has been 12 months since my last application for a discharge. I have paid the amount to the trustee as required by the conditional order (dated). I have completed both counselling sessions, as required by the conditional order (dated)).

6. State the legal basis of your application (e.g., I am entitled to an absolute discharge from bankruptcy pursuant to s. 168.1 of the *Bankruptcy and Insolvency Act*).

7. List the affidavits and other documents that you will be relying on in your chambers application (e.g., Affidavit #1, of John Brown, made June 3, 2010. You should also list the trustee's report and any previous orders that the court made about your bankruptcy).

8. Estimate the time it will take you and the other party to make submissions to the judge or master in chambers.

NOTES

FORM 109
(RULE 22-2 (2) AND (7))

1 This is the 1st affidavit
Of _____
[name]
in this case and was made on _____
[dd/mmm/yyyy]

2 No. _____
Registry
_____

In the Supreme Court of British Columbia
In Bankrupcy
In the matter of the bankruptcy of

_____
[your name]

AFFIDAVIT
[Rule 22-3 of the Supreme Court Civil Rules applies to all forms.]

3 I, _____ of _____, _____
[name] [address] [occupation]

SWEAR (OR AFFIRM) THAT:

4 1

5 SWORN (OR AFFIRMED) BEFORE ME)
at _____, 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 22-2 (7) of the Supreme Court Civil Rules.*]

Endorsement of Interpreter
[if applicable]

I, _____ of _____, _____
[name] [address] [occupation]

CERTIFY THAT:

1 I have a knowledge of the English and _____ 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 _____ 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

NOTES

Court forms are available at: www.ag.gov.bc.ca/courts/other/supreme/2010SupRules/info/index_civil.htm. They can be completed online and filed electronically using Court Services Online: www.courtservicesonline.gov.bc.ca. They can also be printed and completed manually; or completed online, printed and filed.

This document must be filed in the court registry and attached to your notice of motion.

1. State your name and date that you swore the affidavit.

2. This information identifies your case within the court system. Insert the court file number and the location of the registry (e.g., Vancouver).

3. State your name, address, and occupation.

4. List the facts that you want the court to know about your application for bankruptcy, in numbered paragraphs. For example:

    1. I am the bankrupt in these proceedings and as such have personal knowledge of the matters hereinafter deposed to.

    2. My bankruptcy was caused by (provide explanation) and the details are set out in the Trustee's s. 170 report, attached as Exhibit A). (The trustee's report is also called a section 170 report, a S170 report, or a Report of Trustee on Bankrupt's Application for Discharge).

3. My original application for discharge was heard on (date). The result of the application was (state the result). (Or, if the application was adjourned, explain why.)

4. I am presently (employed/unemployed). I attach as Exhibit B to this affidavit my last 3 paystubs (if applicable).

5. I attach as Exhibit C to this affidavit an accurate statement of my monthly income and expenses for myself (and others, if applicable).

6. I make this affidavit in support of my application for an absolute discharge from bankruptcy, pursuant to the provisions of the *Bankruptcy and Insolvency Act.*

You might also include the following information if it is relevant to your application:

- Your past and present personal and financial situation since the date of bankruptcy. You should state why you did not seek the discharge earlier or why you were not able to comply with the bankrupt's duties or conditional requirements.
- Important changes in your financial situation during the period of bankruptcy, such as your employment, your income, etc.
- The reasons why you are seeking a discharge now.
- The reason why you are not represented by a trustee or a lawyer.
- Your current debts and liabilities.
- What debts and liabilities you have incurred since the date of bankruptcy.
- What assets you have acquired, distributed, transferred or sold since the date of bankruptcy.
- Respond to any statements, findings, recommendations or objections set out in the trustee's report and any other reports that are filed in response to your application.

5. Your affidavit must be sworn or affirmed before a lawyer, a notary public, or a designated court official at the court registry.

Exhibit C

FINANCIAL STATEMENT

MONTHLY INCOME

My salary is paid:
____ weekly _____ biweekly _____ monthly

Net monthly salary	$_____
Commission	$_____
Unemployment insurance	$_____
Pension	$_____
Investments/Dividends	$_____
Interest	$_____
Rental income	$_____
Business income	$_____
Child tax credit	$_____
Maintenance (if any)	$_____
Workers' Compensation	$_____
Other	$_____
	$_____
	$_____
Subtotal	$_____
Income Assistance	$_____
INCOME TOTAL	$

MONTHLY EXPENSES

Rent	$
Mortgage	$
Property taxes	$
Utilities (heat/light)	$
Phone	$
Cablevision	$
Home repair & furnishings	$
House/tenant insurance	$
Life insurance	$
Food	$
Restaurant meals	$
Sundries/personal grooming	$
Clothing	$
Laundry/drycleaning	$
Motor vehicle (lease/loan) (license, insurance, fuel service)	$
Transportation (public)	$
Medical/dental	$
Newspaper & subscriptions	$
Entertainment	$
Alcohol & Tobacco	$
Gifts	$
Churches & charities	$
Maintenance payments	$
Child care/babysitting	$
School expenses	$
Child's activities/lessons (list) _____	$
Child allowance	$
Other (list) _____	$
EXPENSES TOTAL	$

Income Total	$
Expense Total	$
Subtotal	$
Debt Payment total	$
Balance	$

NOTES

Form 15

(Rule 4-6 (1))

No._____

1 Registry _____

In the Supreme Court of British Columbia
In Bankrupcy
In the matter of the bankruptcy of

_____
[*your name*]

AFFIDAVIT OF PERSONAL SERVICE

[Rule 22-3 of the Supreme Court Civil Rules applies to all forms.]

2 I, _____ of _____,
[*name*] [*address*]

_____ SWEAR (OR AFFIRM) THAT:
[*occupation*]

3 On _____ at _____ I served _____
[*dd mmm yyyy*] [*time of day*] [*name of person served*]

with the _____
[*type of document*]

in this proceeding, a copy of which is attached to this affidavit and marked as Exhibit A, by handing it to and leaving it with that person.

4 SWORN (OR AFFIRMED) BEFORE ME

5 at _____, British Columbia)
on _____) _____
[*dd mmm yyyy*])
)
_____)
A commissioner for taking affidavits for British Columbia)
)
)

_____
[*print name or affix stamp of commissioner*]

NOTES

Court forms are available at: www.ag.gov.bc.ca/courts/other/supreme/2010SupRules/info/index_civil.htm. They can be completed online and filed electronically using Court Services Online: www.courtservicesonline.gov.bc.ca. They can also be printed and completed manually; or completed online, printed and filed.

This document must be filed in the court registry; it is not served on anyone.

1. The style of proceeding is the part at the top of the document that identifies your case within the court system. Insert the court number, the location of the registry (e.g., Vancouver), as it is part of your style of proceeding.

2. Insert the name, address, and occupation of the person who served the document.

3. State the date and time that the person served the document (e.g., a notice of application) and attach a copy of that document to your affidavit as Exhibit A.

4. Or, if you served the notice of application by registered mail, use this wording instead:

   "Attached and marked as Exhibit B is the proof of mailing by registered mail."

5. Your document must be sworn or affirmed before a lawyer, a notary public, or a designated court official at the court registry.

Conditional and Suspended Order of Discharge

NOTES

1

District of British Columbia
Division No. __
Court No. _____
Estate No. _____

2

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY
IN THE MATTER OF THE BANKRUPTCY OF

_____
[*your name*]

3

BEFORE) _____, THE ___ DAY
)
REGISTRAR) OF _____, 20__

ORDER

4 UPON THE APPLICATION of _____, a bankrupt who made an assignment on the ____ day of _____, _____;

AND UPON reading the report of the Trustee as to the bankrupt's conduct and affairs;

5 AND UPON hearing _____, on behalf of the Trustee _____; AND UPON hearing the bankrupt on his/her own behalf (*if applicable*);

6 AND WHEREAS proof has been made of the following fact(s) under Section 173 of the Bankruptcy and Insolvency Act, namely Section _____ (*set out details*);

IT IS ORDERED THAT:

7

1. The bankrupt shall pay to the Trustee for the general benefit of the creditors, the sum of $_____ in minimum monthly instalments of $_____ , commencing on the ___ day of _____, 20___ and continuing on the _____ day of each and every month thereafter until paid in full, with the right to prepay in part or in full at any time; and

8

2. The bankrupt's discharge be suspended for a period of _____ from the date of this Order.

AND UPON the Registrar being satisfied that the conditions set forth in this Order have been complied with, the Registrar shall grant the bankrupt an Absolute Discharge.

BY THE COURT

_____
REGISTRAR IN BANKRUPTCY

NOTES

This order must be signed by all affected parties and then submitted to the court registry for entry; once entered it is returned to the submitting party who is responsible for serving copies on the other parties.

1. Insert the division number, court registry number and the bankruptcy estate number.
2. Put your name here.
3. Insert the name of the registrar who heard the application and the date of the application.
4. Insert your name here, and the date that you made an assignment into bankruptcy.
5. Complete this if the Trustee appeared at the hearing. Put the name of the person who appeared, and the name of the Trustee.
6. Read section 173 of the *Bankruptcy and Insolvency Act* (the facts for which discharge may be refused, suspended or granted conditionally), and state which section of 173 applies to you, and provide details.
7. Complete this section according to the conditions that the court imposed. For example, the court may have ordered that you pay $2400 in minimum monthly installments of $200, commencing on March 1, 2011 and continuing on the first day of every month until it is paid in full.
8. Fill in the time period (e.g., one year).

Absolute Order of Discharge

NOTES

1 District of British Columbia
Division No. __
Court No. _____
Estate No. _____

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY
IN THE MATTER OF THE BANKRUPTCY OF

2 _____
[your name]

3 BEFORE) _____, THE ___ DAY
)
REGISTRAR) OF _____, 20__

ORDER

4 UPON THE APPLICATION of _____, a bankrupt who made an assignment on the ____ day of _____, _____;

AND UPON reading the report of the Trustee as to the Bankrupt's conduct and affairs;

AND WHEREAS proof has not been made of any of the facts mentioned in Section 173 of the Bankruptcy and Insolvency Act, nor has the bankrupt been guilty of any misconduct in relation to his/her property or affairs;

IT IS ORDERED THAT the bankrupt be and is hereby discharged.

BY THE COURT

_____
REGISTRAR IN BANKRUPTCY

NOTES

This order must be signed by all affected parties and then submitted to the court registry for entry; once entered it is returned to the submitting party who is responsible for serving copies on the other parties.

1. Insert the division number, court registry number and the bankruptcy estate number.
2. Put your name here.
3. Insert the name of the registrar who heard the application and the date of the application.
4. Insert your name here, and the date that you made an assignment into bankruptcy.

Backing Sheet

NOTES

1

Court No. _____
Estate No. _____

_____

[*your name*]

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY
2 IN THE MATTER OF THE BANKRUPTCY OF

_____

_____

ORDER

3 _____

Your Name and address

NOTES

This document must be attached as the last page to every document you file in the Bankruptcy Registry.

1. Put the court registry number and your bankruptcy (estate) number here.
2. Put your name here.
3. Your name and address goes here.

Can't Pay Your **Mortgage?**

What you can do if you're **facing foreclosure**

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

January 2015

http://www.lss.bc.ca/publications/pub.php?pub=15

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Can't Pay Your Mortgage? is a publication of the Legal Services Society (LSS), an independent organization that provides legal aid to British Columbians. LSS is funded primarily by the provincial government, and it also receives grants from the Law Foundation and the Notary Foundation.

This booklet explains the law in general. It isn't intended to give you legal advice on your particular problem. Because each person's case is different, you may need to get legal help. The information in this booklet is up to date as of January 2015.

Contents

About this booklet

Who this booklet is for

This booklet is only about residential mortgage foreclosures when the borrower lives in the home or rents it out. If your foreclosure involves a farm, a mortgage you took on assignment, or a mortgage on a commercial property, see a lawyer for legal advice.

This booklet is for you if:

- you're worried about missing a mortgage payment or you're about to miss a payment,
- you've already missed one or more mortgage payments,
- you've received a reminder letter or a demand letter from the lender, or
- you've received a foreclosure petition.

If any of the above applies to you, this booklet explains what you can do when the lender tries to take or sell your property because you haven't paid your mortgage. The legal process is called **foreclosure.**

This booklet also includes some information if you're a tenant in a property that's under foreclosure (see **page 25**).

About foreclosure

Your mortgage

To buy a residential property, you usually borrow money from a **lender**. The lender is usually a bank or credit union, but could be an insurance company, private individual, or loan company. In exchange for the loan, the lender registers a charge, or **mortgage**, against the **title** (ownership) of your home.

You sign a mortgage contract to agree to pay back the loaned money, usually in periodic payments, plus interest. In many mortgage contracts, the borrower also agrees to pay the property taxes, keep the property in good repair, and insure the property against fire and other risks.

Missed payments

When you **default** (don't make a payment) on your mortgage, you don't automatically lose your home. On default, the lender has the right to **accelerate** the mortgage contract. This allows the lender to claim the full balance owed plus interest and other costs. The lender can use the legal process of foreclosure to **repossess** (take back) your home or sell it to pay the mortgage debt.

If you own property jointly with your spouse or someone else, each of you is usually responsible for the whole amount owed. If one of you can't pay, the lender will try to collect all of it from the other person. If you signed a document guaranteeing that mortgage payments will be paid by someone else, you're responsible if that person misses payments.

Reminder letter and demand letter

As soon as you miss a payment, most lenders act quickly. They often send a **reminder letter** first.

If they don't hear from you or don't receive the missed payment after that, their next step is to send you a **demand letter**. In BC, the lender must send you a demand letter before going to court to ask for foreclosure.

About foreclosure

The demand letter must say exactly what you owe, and that:

- you have to pay a certain amount by a certain date to catch up on **arrears** (what you owe) to **reinstate** (restore to good standing) your mortgage, or
- you have to pay the whole amount you borrowed (not just the arrears) plus daily interest and other expenses to **redeem** (pay off) your mortgage.

The exact requests in the demand letter depend on the wording in your mortgage and what the lender wants to do. If you don't do what the demand letter asks, the lender can start foreclosure proceedings in court by filing a BC Supreme Court form called a **petition**. The lender will serve you with a copy.

What you can do

You (the **respondent**) can respond to a reminder or demand letter by doing one of the following:

- Solve the problem (by reinstating or redeeming the mortgage)
- Go to court (after you receive the petition — to fight the foreclosure, to get more time, or to cooperate)

The flow chart on **page 4** shows the steps for each option. The pages following the flow chart describe the steps in more detail.

Talk to a lawyer

If you think the lender misled or deceived you about the loan terms, or took advantage of your situation, talk to a lawyer right away. If you're served with a petition, get legal advice as soon as possible (see **page 29**).

About foreclosure

Can the lender sell my home without my consent?

Mortgage contracts usually have a clause that gives the lender the right to take possession and sell your home as soon as you break the contract by missing a payment. This is called the **power of sale**.

In BC, no matter what the mortgage contract says, the lender can't sell your home without either your consent or the court's permission through a court order.

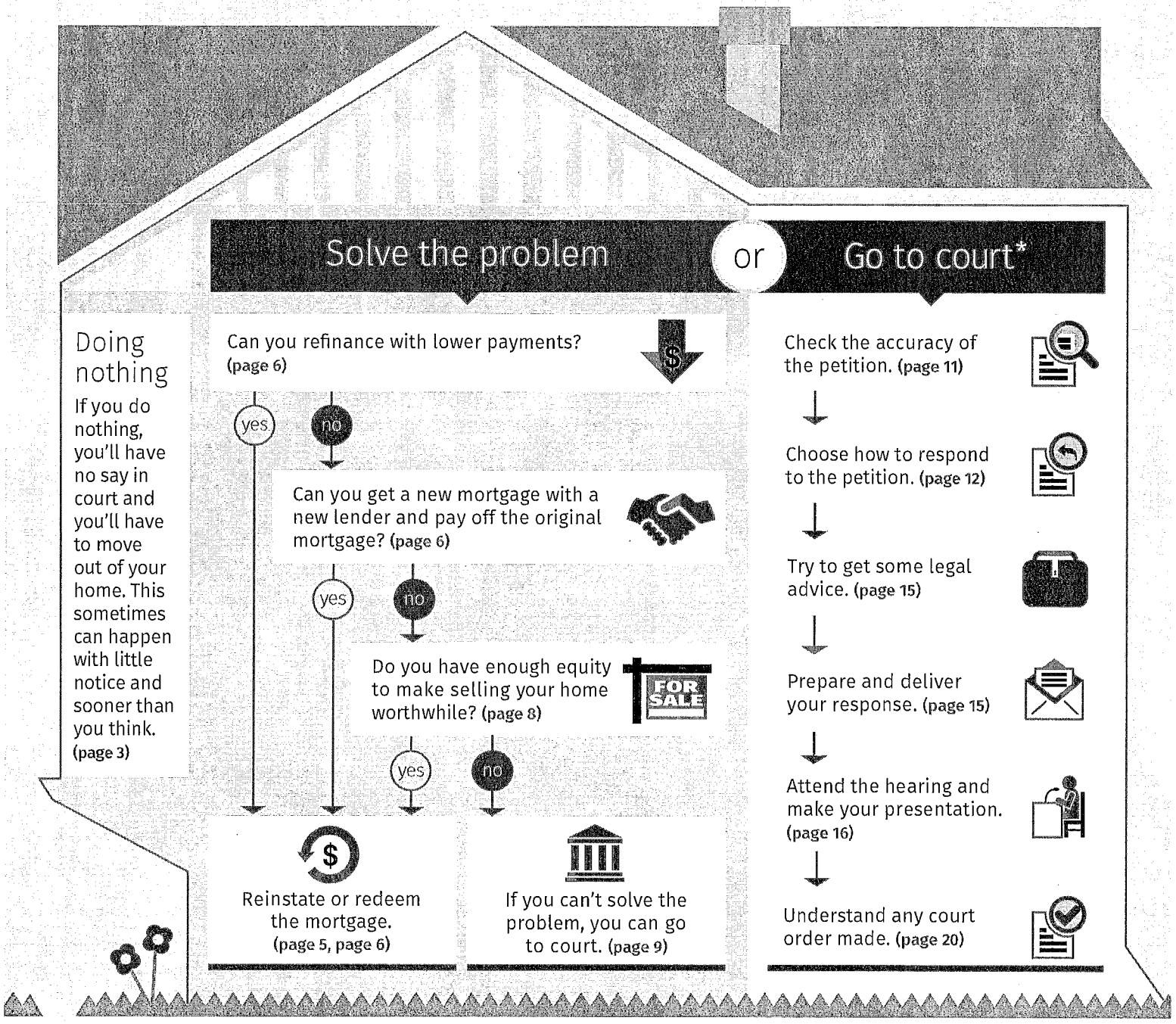
What will happen if I do nothing?

You may want to just ignore the demand letter, but be sure you know what the consequences are first. Doing nothing has serious consequences. You can live in your home without making mortgage payments while the foreclosure proceedings are going on, which could be up to six months. But it also means that:

- you don't get any say in the court proceedings, which will go ahead without you;
- you may get little or no notice if the home is sold, or if you have to move;
- you may have to leave your home much earlier than if you had appeared in court; and
- if the house is sold under an Order Approving Sale (see **page 22**) and the sale proceeds don't cover all that's owed, the lender will have an enforceable judgment made against you for the **shortfall** (remaining amount).

In short, doing nothing isn't a good option.

Your options when facing foreclosure



*You can try to reinstate or redeem your mortgage at any time during the court process. (page 18)

Solve the problem

Reinstate the mortgage

If you haven't made some payments but think you can manage them in the future, call the lender right away. Try to work out a way to reinstate your mortgage.

This means you pay all of the outstanding mortgage amounts to bring the mortgage back into good standing. You also have to pay anything it costs the lender to collect from you, including legal fees. You can reinstate a mortgage if the mortgage term hasn't expired.

Most lenders don't want to own buildings. They'd rather have you keep your home and keep paying them.

Tell the lender how and when you can catch up on your payments. Ask what your options are for making payments so you can keep your home. The lender may be willing to **refinance** (change the terms of) your mortgage. For example, they may say you can make smaller monthly mortgage payments, but you pay them over a longer period of time.

Be sure to ask what the total cost of reinstating your mortgage will be. When you fall behind, the money you owe adds up quickly because interest builds up on unpaid amounts.

If the lender doesn't agree to reinstate your mortgage and a foreclosure is started, you can try to get a court-ordered reinstatement. You'll need legal help to do this.

Mortgage term

A mortgage can only be reinstated if the mortgage term (usually between six months and five years) hasn't expired. If the renewal date has passed, reinstatement won't be an option unless the lender agrees to new terms.

Solve the problem

Redeem the mortgage

If the mortgage term has ended, you can do one of the following to pay the lender:

- get a new mortgage from another lender (**refinance**), or
- sell your home yourself.

You have to pay off the whole amount you borrowed plus daily interest and other costs. But first you should know what those costs might include.

Costs

The total amount you owe consists of:

- the principal still unpaid on the mortgage;
- the interest, which builds up daily;
- the lender's costs of collecting from you;
- property taxes and utilities;
- other mortgages, builders' **liens** (legal claim until a debt is paid), and judgments against the property; because second and third mortgage lenders are paid last, they often start foreclosure proceedings to try to control your home's sale and get back some of their money; and
- for condominiums, maintenance fees and any special assessments owed.

Refinance

You can pay off your whole mortgage with one lender by getting another mortgage from another lender (refinance). The new mortgage has to be big enough to pay the other mortgage plus any costs that you owe.

You may not find it easy to find a new lender, but shop around. Sometimes mortgage brokers can help you find a new mortgage at a reasonable interest rate. Check their references and prices carefully. Be cautious of any offers of help you didn't request, including those from real estate agents.

Solve the problem

If refinancing is possible, make sure you understand exactly what it'll cost you. You want to know:

- the monthly payment amount,
- how many years you'll pay this amount,
- what the interest rate is,
- what the costs are, and
- what you'll own in the end.

If other mortgages and/or judgments are registered against the property, the amount needed for refinancing may be too high for this to be practical.

Before you sign

If you're unsure about the new mortgage, ask for a copy of the contract to discuss the terms with someone else before you sign. If the new lender won't let you do that, or if the new mortgage sounds too good to be true, beware. Don't feel pressured to immediately sign the mortgage documents.

Solve the problem

Sell your home

You may want to sell your home right away and pay the lender if:

- you can't reinstate your mortgage,
- your home is in good condition and can be sold,
- your home is worth at least as much as the amount you owe the lender (plus any other mortgage or judgment registered against your title), and
- you don't want to or can't get a new mortgage.

You reduce the legal costs and interest you have to pay if you sell as soon as possible. This option may be more attractive if you have **equity** in your home. Equity is the money that's left for you to keep after you pay:

- the mortgage,
- interest,
- real estate commission,
- any other costs, and
- any other debts, judgments, or liens registered against your home.

Go to court

How the court action starts

If you can't reinstate or redeem your mortgage, the lender can start a court action to foreclose on your mortgage. This usually happens after you've missed three months of payments. But it can happen sooner.

To start the court action, the lender's lawyer files a **petition** in a Supreme Court registry and registers it in the land title office. If your home is located where there's a Supreme Court registry, the lender's lawyer must file the petition in the local registry.

If this isn't the case, they must still file at a registry within the local judicial district. This is called the **local venue rule**. This rule prevents, for example, Vancouver-based lawyers from starting foreclosure actions in Vancouver when the property is in Kelowna or Prince George.

The petition

The petition contains a list of what the lender wants the judge to do, including:

- Confirm that the mortgage and the debt exist.
- Confirm the amount you owe, including principal plus daily interest, legal costs, and other costs.
- Set the length of time you have to redeem or apply to reinstate your mortgage. Usually this is the same as the length of time you can keep living in your home.
- Grant a personal judgment against you and any guarantors.
- If there's a dispute over how much you owe, refer the file to a **registrar** (court official) for an **accounting** (calculation backed up with evidence).
- In some circumstances, give the lender control of your property's sale.
- Issue an order that says the total amount you'll owe at the end of the redemption period.

Go to court

Attached to the petition is at least one **affidavit**. The affidavit is a written statement from the lender, swearing that the list of facts is correct. Other papers may also be attached, such as a copy of your mortgage, the title search, tax bills, and related documents.

Generally, the petition must be **served on** you (given to you in person) by a **process server** (legal representative). If the process server has trouble finding you, the court rules may allow the petition to be served on you by **alternative service**. This means the court may direct that the petition can be served on an adult at your home (such as your spouse), posted on the door of your home, and/or emailed or mailed to you. The lender can add the cost of service to what you already owe.

The petition is also served on anybody else who has a **registered charge** against your home for money you owe them. These charges would be paid out of the sale proceeds of your home. Examples of other registered charges are judgments and builders' liens.

Redemption period

The **redemption period** is the length of time you're allowed to stay in your home. During this time, you must try to redeem your mortgage by paying the full amount you owe, plus interest, any property tax arrears, and legal costs before the lender either sells your home or gets title to it.

The court usually sets this period at six months. The trend now is to set a shorter period. A shorter period is likely when the amount owed to the lender is roughly equal to or more than the value of the property.

The courts will almost always set a short redemption period if:

› the lender can show you're damaging the property, or

› you've abandoned the home and it's empty.

Go to court

After you receive the petition

When you receive the petition, read all of it. There may be an explanation at the end of it. The more you know about what's in the petition, the better your response will be to the foreclosure action.

1. Check the accuracy of the petition

Your next steps will depend on your situation and what the lender asks for in the petition. Study the petition and your mortgage documents carefully so you can decide how to respond.

Check the math and details of your mortgage to make sure the lender has the terms, interest rate, and total amount right. Make sure you've been properly credited for all your payments. If you find errors, you can show them to the judge when you go to court.

Penalties or fines

In BC, a lender can't charge a penalty or fine for late payment. The lender can't increase the amount you owe, or increase the interest rate because you've defaulted.

After you've defaulted, you have to pay the lender the entire amount you borrowed plus interest to the day it's paid off. You also have to pay the lender the cost of collecting from you.

If you refinance, the lender can't demand payment of all the interest that would've been due by the time the mortgage matured.

Go to court

2. Choose how to respond to the petition

The following are some of the most common demands that lenders make, your possible responses to them, and the kinds of evidence you might need to prove any of these arguments.

The petition may ask for an **Order of Conduct of Sale** to sell your home right away for any of these reasons:

- The property has been abandoned or is being damaged.
- The present value of the property is less than the mortgage debt.
- You're unlikely to reinstate or redeem your mortgage.

If you disagree with the petition, you need to show:

- You're taking good care of the property and you're living there.
- There's a chance you'll have the money to keep your home.
- The property has value at the present. The best way to show this is with a proper appraisal (not just a letter from a real estate agent).
- You've listed your property with a real estate agent to prove that you're trying to get the money to pay the lender.

Go to court

You can present the following as evidence to support your argument:

- A letter from your employer to show you now have enough income to make payments
- A commitment letter from a new lender who has agreed to refinance your home
- A real estate listing agreement to show that you've listed the property and are trying to sell it

The petition may ask for a **redemption period shorter than six months** for any of these reasons:

- Your financial future is poor.
- The **net sale proceeds** (money received from your home's sale after you've paid taxes, real estate commission, and other costs) would be less than the mortgage debt.
- Repairs won't increase the value of your home.
- You're not maintaining your home.
- You're not paying taxes, strata fees, or levies for repairs.
- The lender wants to get the owed money quickly.

To keep the six-month redemption period, you need to show:

- It's possible you or your family can reinstate the mortgage or arrange refinancing. This means you can live in your home while you try to find a financial solution.
- The building is being repaired and will be worth more when the work is done.
- The home is in good shape.
- You're paying what you can toward the costs.
- The present value of the property is higher than the lender estimated and the longer period would allow time to get the highest possible price.

Go to court

You can present the following as evidence to support your argument:

› A letter from a real estate agent to help convince the judge that prices aren't likely to go down; or better, get a formal appraisal of the property

› Information about why you should be allowed to stay longer in your home (showing that you're taking care of it)

The petition may ask for **access to the property** for the following reason:

› The lender wants to make repairs and secure the property to keep its real estate value (the petition says you're not looking after the property or have abandoned it).

If you disagree with the petition, you need to show:

› You've been maintaining the property.

You can present the following as evidence to support your argument:

› Proof of maintenance, such as repair bills and photographs

The petition may ask for **legal costs** for the court action at any level higher than normally allowed (get legal advice about the amount).

If you disagree with the petition, you need to show:

› These costs have been unreasonably claimed.

The court will deal with this under special rules for foreclosure costs.

Personal judgment

The petition will usually ask for a **personal judgment** for the amount owing against you, any other joint debtors, and any guarantors involved in the mortgage transaction (see **page 9**). If this is the case, ask for an **adjournment** (postponement) of the application for a judgment. A judgment against you will lower your credit rating and you won't be able to refinance.

Go to court

3. Try to get some legal advice

A lawyer can help you prepare the necessary court documents, gather your supporting documents, and present your evidence in court. Even if you can't afford to pay a lawyer for the whole court process, you may be able to get some legal advice to help you prepare for court.

For example, you could call the Lawyer Referral Service to get the name of a lawyer to meet with for 30 minutes for $25 (plus taxes). See **page 29** for more information about this service and other legal help.

The lender's lawyer can't give you legal advice. They might be willing to answer your questions and listen to your concerns about terms in the foreclosure petition at or before the court hearing.

4. Prepare and deliver your response

You must prepare and deliver a document called a **response** (Form 67). If you don't do this, the lender can go ahead and set a court hearing date without notifying you.

In your response, you must state which parts of the **Statement of Relief** (the lender's written list of orders asked for in the petition) you **oppose** (don't agree with) and which parts you don't oppose. Your response must also list all supporting affidavits and other documents you're presenting in court at the petition hearing.

A response must also contain an estimate of how long the hearing will take. Court time estimates are difficult to predict, even for lawyers. Most lawyers expect the average foreclosure hearing to take only a few minutes. If you have any arguments to make, the hearing may take 10 to 15 minutes. If you believe the hearing will take longer, it's important to get legal advice. If your hearing might be more than 30 minutes, you have to file additional court documents.

You also need to prepare your affidavit and deliver it with your response to the lender's lawyer. The affidavit is a **sworn** (signed) statement that sets out the facts of your case. See **page 27** for examples of what to include in your affidavit.

Go to court

Attach copies of the documents you'll be using as evidence. For example, that might include an appraisal or letters from a potential new lender, employer, or a real estate agent to support your statements in the affidavit. (Always keep originals of documents so you can show them to the judge at the hearing.)

You can have the affidavit sworn by a lawyer, notary public, justice of the peace, or anyone else who has a commission to take oaths.

Within 21 days after the date the petition was served on you, you must file the response document (along with supporting affidavits) at the Supreme Court registry where the petition was filed. And you must deliver copies to the lender and any other named respondents.

If you live in the United States, you have *35 days* to deliver the documents.

If you live outside of Canada or the United States, you have *49 days* to deliver the documents.

About forms

See **page 26** for information about where to get blank response and affidavit forms and instructions on how to fill them out.

5. Attend the hearing and make your presentation

You must attend the hearing if you want to speak to the judge. If you don't show up at scheduled court hearings, the legal action goes on without you. Court orders can be made, including an order giving the lender permission to have control over the sale of your property.

If you need more time, go to the first hearing and ask the judge for more time to prepare your case. It may help to phone the lender's lawyer before the hearing to say you need more time.

Although having a lawyer is helpful, you can represent yourself at the court hearing. Judges are more receptive if you're well-organized, reasonable, and polite.

Go to court

If you can, go to the courthouse a few days before your case hearing to watch other foreclosure proceedings. You'll feel more at ease if you see how things are done at a hearing.

For your case, arrive at the courthouse at least 15 minutes before the hearing starts. Tell the court clerk which case you're attending and that you're acting on your own.

The lender's presentation

- The lender's lawyer speaks first and tells the judge what the lender is asking for — the items listed in the petition — and why.
- The lawyer reviews the lender's evidence with the judge, who may ask questions. You can make notes on any points the lawyer makes that you want to reply to.
- Often, the lender's lawyer will give the judge a Statement of Relief (a list of orders the lawyer is asking for). It's a good idea to ask for a copy of the Statement of Relief if you don't already have one.
- When the lender's lawyer is finished, the judge will tell you it's your turn.

Your presentation

- Before the hearing, prepare an outline of what you need to tell the judge and what affidavits, letters, or other papers you want to show as evidence.
- If you didn't file an affidavit, review the lender's petition and affidavits before the hearing, make a list of the points you want to tell the judge, and organize your supporting evidence in the same order.
- Make enough copies of the papers you're using to support your position to give to the judge and other parties at the hearing.
- You can make notes of what you want to say, but it's best to speak directly to the judge. The judge will ask you questions about your situation and the information you've supplied.

Go to court

Can I stop the foreclosure action?

At any stage before the court approves the sale of your home, you can stop a foreclosure by either reinstating or redeeming your mortgage.

a. Reinstate your mortgage

If you can come up with at least your missed payments, you may be able to have your mortgage reinstated. This means that you pay the arrears and then start your payments again. To reinstate, you have to pay any unpaid taxes, and you may have to pay a legal fee to cover the foreclosure action started against you.

b. Redeem your mortgage

If you can pay the lender in full what you owe on the mortgage, tell the lender right away. For example, you might arrange to sell the property yourself if the lender doesn't have an Order for Conduct of Sale. Or you've arranged a new mortgage to pay off the old one. You have to provide one or more of the following as proof that you can pay off the mortgage:

- A letter from a new lender saying the money is available to you
- A letter from your banker saying the money is in a trust account
- A letter from your lawyer saying the money is in the lawyer's trust account

If you have the money and the lender doesn't accept your offer to reinstate or redeem your mortgage, it may be possible to go to court and ask to stop the foreclosure. You need to give the court **proof** (written evidence) that you have the money.

Go to court

If you co-operate with the lender to sell your home

Under some circumstances, it may be in your best financial interest to agree to sell your home early in the foreclosure process to minimize cost. This may be wise if:

- your home is in good shape;
- there's a good real estate market for your home at a reasonable price;
- you have enough equity in your home to cover your debts, including any property tax or (condominium) strata arrears and the real estate commission from the net sale proceeds; and
- you can't or don't want to get refinancing.

You could agree to a court order that allows the lender to manage the sale and simply gives you notice when it's time for you to move out of the home.

To do this, you would file a response and then co-operate with the lender and the lender's lawyer. You can negotiate to stay in your home while it's being sold. Remember that interest will keep adding up while you stay.

Even when you agree to the sale and an offer is accepted, the lender needs a court order to clear other charges from the title to your home and transfer the title.

If you agree to the sale, the lender's lawyer will give you a **Consent Order** that states all the sale terms you've agreed to with the lender. Before signing it, try to get legal advice and make sure the terms are what you agreed to.

If you've abandoned your home

If you've abandoned your home, the court may order that the lender can send in a security guard or do whatever is necessary to make the home secure. These costs are deducted from the sale proceeds.

Go to court

6. Understand any court order made

When the judge has heard from everyone, the judge decides what must be done next. These decisions are listed in an **Order Nisi**. This is the main order in the foreclosure proceedings.

If the conditions set by the judge haven't been met by the end of a certain time, the lender can apply to court for orders to follow later to complete the foreclosure process. For example, the order could say that if you don't pay off the mortgage by the end of the redemption period (six months or shorter), the lender has the right to go back to court to ask for an **Order Absolute** (also known as a **Final Order of Foreclosure**) to sell your home. This would give the lender formal title to the property.

The Order Nisi always includes:

- the length of the redemption period (usually six months), and
- a personal judgment against you for the amount you owe under the mortgage, including daily interest, legal, and other costs (see **page 14** about postponing the application for a judgment).

Depending on circumstances, orders may be made at or after the Order Nisi that grant:

- an **Order for Conduct of Sale**, giving the lender the right to be in control of the sale;
- an order setting out how any **tenants** (renters) are to pay their rent during the foreclosure; and
- terms for the real estate listing agreement.

Read the court order carefully. If you disagree with anything in it, try to get some legal advice on how to proceed. The lender's lawyer will usually send you a copy of the order. It's a good idea to ask for it if you don't have a copy.

You have the right to try to sell your home during the redemption period unless the judge has made an Order for Conduct of Sale. If you can't sell your home, the lender's lawyer will probably apply to the court to get conduct of the sale. Even so, your right to redeem or reinstate your mortgage continues after an Order for Conduct of Sale.

Go to court

If you don't reinstate or redeem your mortgage and the lender doesn't get initial control of the sale, there'll be a second hearing.

If the court orders that the lender be given conduct of sale at the original hearing, or at any later time, you'll receive a copy of an affidavit that states the appraised value of your home.

When a sale order is requested, the lender's lawyer asks the judge to include in the order certain terms for the real estate listing agreement, such as the rate of commission.

The judge also sets the times when you have to let a real estate agent show your home. If you don't give the real estate agent access to your home, you could be **cited for contempt** (charged with disobeying a court order).

If your home isn't in saleable condition, the court may give the lender an order allowing its agents to have the property fixed up. These costs are deducted from the proceeds of the sale.

After the initial court hearing where an Order for Conduct of Sale is made, there must be a second hearing. If you've filed a response to the petition, you'll receive a **Notice of Motion**, along with one or more affidavits. The notice tells you when the second hearing will be held.

Go to court

At the second hearing, if the lender has received an offer on the property, the terms of the sale are confirmed and an order called an **Order Approving Sale** is made.

You may want to **dispute** (disagree with) the application for the Order Approving Sale; for example, if you think the proposed selling price for your home is too low. To do this:

- You must then file a response document again and one or more supporting affidavits. You must have those documents delivered to the petitioner *within seven days* of your receiving the Notice of Motion.
- The lender then delivers a Notice of Hearing and any responding affidavits.
- Finally, you must file the original of the response and any affidavit at the court registry before the hearing.

Early transfer of title

In some cases, you may want to transfer the title to your home to the lender right away. After the lender has title, given by the court in an Order Absolute, your mortgage contract no longer exists. You don't have to pay any **shortfall** (remaining amount). This means you don't owe the lender any more money (see **page 23**). An early transfer of title may be wise if:

- you have no equity in your home,
- your home is in good shape, and
- property values are likely to rise, so the lender may find it worthwhile to take title to your home.

The lender is normally entitled to apply for an Order Absolute after the redemption period has ended. The lender could ask for an immediate Order Absolute at the Order Nisi stage if you haven't any equity and the lender doesn't intend to try to collect the shortfall from you.

Most lenders won't ask for an Order Absolute and won't agree to the suggestion to do that. They want to keep the right to collect the shortfall from you after they eventually sell your home. This is their legal choice — they can't be forced to take this option.

Go to court

When your home is sold

The Order Approving Sale will set a date by when you have to move out of your home. This will usually be the possession date stated in the sale contract that will be part of the lender's affidavit. Courts usually give around *30 days* after the date the Order Approving Sale takes effect for you to move out. But it can be sooner.

When a home is sold under an Order Approving Sale, the sale proceeds are used to pay:

- taxes,
- utilities,
- outstanding strata fees or charges,
- the real estate commission,
- the mortgage debt, and
- other amounts owed to the lender.

The sale proceeds are also used to pay other debts registered against your house, including other mortgages, judgments, and items such as builders' liens still owing. The sale of your home doesn't end all of your creditors' claims and may not cover all the debts owing. You may still owe a large amount of money to the lender and to other creditors with mortgages or judgments registered against the property.

If the sale proceeds don't cover all that's owed of the mortgage debt, the lender will have a judgment made against you for the shortfall. The lender can try to collect this from you for *up to 10 years*. After that, the lender can renew the judgment. If the mortgage was insured, the insurer can enforce the judgment.

If it isn't financially possible for you to pay back the amount, get the advice of a bankruptcy trustee or not-for-profit credit counselling service.

If there's any amount left after all the debts registered against the property have been paid, you're entitled to receive it.

Go to court

If you own a condominium

Special rules apply to mortgage payments for condominiums. To keep the mortgage in good standing or to reinstate or redeem it, you have to pay any outstanding strata fees and special **levies**. Those are assessed amounts you pay for common expenses and specific purposes (for example, for leaky condo repairs). You can't sell your condominium without paying these charges. Title to your property can't be transferred without a **Certificate of Full Payment** from the strata corporation.

If you're not willing or can't pay your outstanding strata fees or a special levy owing, your strata corporation can bring a type of foreclosure proceeding against you in BC Supreme Court. The strata corporation will file a **Certificate of Lien** against the title to your property. The lien takes priority, even over mortgages registered on the title.

The strata corporation can bring legal action against you even if there are disagreements about who's responsible for leaks, water damage, or other problems with your unit. You can't wait for the outcome of legal action against the builder (or others) before paying your share. This foreclosure by the strata corporation is *separate* from any foreclosure a lender may bring against you for not making your condominium mortgage payments.

Go to court

If you're a tenant

If you're a tenant in a property that's under foreclosure, you're directly affected, especially if you're living in a house. The notice periods set out in the Residential Tenancy Act no longer apply. For example, if the courts approve an Order for Conduct of Sale, you have to move out of the home by a stated possession date, unless the buyer agrees to allow you to continue renting the home. You also have to move if the courts make an Order Absolute.

Unfortunately, you can do very little to change the foreclosure proceeding. You don't have any say in the redemption period or the terms of a sale under an Order for Conduct of Sale.

If you're living in the home when a foreclosure starts, the lender will want to make you a respondent in the foreclosure action. This means that the orders, such as an Order Approving Sale, will apply to you.

You'll be served with the petition and affidavits. If you rent a home after the foreclosure has started, the lender doesn't have to serve you with the foreclosure documents, but probably will. The foreclosure orders still apply to you.

If you're served with the petition and affidavits, read them carefully to figure out the length of the redemption period and whether to prepare and file a response. By filing a response, you'll receive copies of documents filed in court and know what's happening in the foreclosure proceedings. You have to prepare, file in court, and deliver your response and any affidavits to all parties *within 21 days* of the date you were served with the petition.

You still have to pay your rent under your tenancy agreement. However, a lender may also ask the court to make a **Receivership Order**. This is a special order directed to you. This order will say that you have to pay your rent to the receiver rather than to the landlord.

If you're involved in a foreclosure, you have to obey the terms in an Order for Conduct of Sale. For example, if the order says a real estate agent can show the property between 9 a.m. and 7 p.m., with reasonable notice, you have to let them show it when they give you notice.

See **page 28** about where to get more information if you're a tenant in a property facing foreclosure.

More information

About the court forms

A blank response form (Form 67) and affidavit (Form 109) are available as PDFs on the Ministry of Justice website. You can fill out the forms online, or print them and fill them out on paper. The website gives instructions to fill out forms.

www.ag.gov.bc.ca/justice

1. On the left side, click **Court Services — Forms** (on the second page at the left) — **Civil** (under Supreme).
2. Under **Using the Forms**, in the first sentence click **user guide**.
3. In the list of forms on the same page (Supreme Court Civil Rules — Forms), click **Affidavit** (Form 109) and **Response to petition** (Form 67) to open the blank forms.

Defending a Proceeding Started by Petition and *A Guide to Preparing Your Affidavit*, two guidebooks on the Courts of British Columbia website, give samples of a response form and affidavits.

www.courts.gov.bc.ca

1. On the left side, click **Self-Represented Litigants — Supreme Court**.
2. Under **If you want to learn about court procedures and documents**, click **guidebooks**; under **Getting Started**, click **Defending a Proceeding Started by Petition** (includes a sample blank response form and instructions to fill it out).
3. Under **Pre-Trial**, click **A Guide to Preparing Your Affidavit** (includes a sample blank affidavit, instructions to fill it out, and a sample completed affidavit).

More information

Preparing your affidavit

1. Copy the information at the top of the petition into the top of the affidavit.
2. Set out your case in numbered paragraphs in the rest of your affidavit. Include the following kinds of information:
   - Who you are
   - How old you are
   - Who lives in the home and how long you've lived there
   - The price you paid for your home and amount of your down payment
   - Where you work or, if you're unemployed, how long you've been unemployed and why
   - Why you haven't been able to make your mortgage payments
   - If you have health problems, what they are
   - What your financial circumstances are (for example, if you have any assets, RRSPs, pensions, or are supporting anyone, including children)
   - If your financial problems are temporary, when you think they may improve and how
   - What you're doing to pay off your mortgage
   - Your best information about the value of the home
3. Have the affidavit sworn by a lawyer, a notary public, or a justice of the peace at the courthouse. You must sign the affidavit in front of this person. There may be a small fee for this. The person who signs the affidavit must print/type/stamp their name above or below their signature, or the court registry may not accept the affidavit.
4. Make copies for everyone listed in the petition, plus one for the court registry.
5. Follow the instructions in this booklet about when you have to deliver your affidavit to the lender and other respondents and file the original (see **page 16**).

More information

About foreclosure

Dial-A-Law

www.cbabc.org/For-the-Public

Click **Dial-A-Law — Topics in English — Housing** (in the list).

604-687-4680 (Greater Vancouver)
1-800-565-5297 (call no charge)

The Canadian Bar Association, BC Branch, provides this service. Its library of scripts gives information about the law in BC. For example, script #415 (Foreclosure — also available in Simplified Chinese and Punjabi) explains about foreclosure. Call the above numbers at any time to listen to the script.

Tenants' Resource and Advisory Centre (TRAC)

www.tenants.bc.ca

Under **Information for Tenants**, click **Foreclosure.**

604-255-0546 (Greater Vancouver)
1-800-665-1185 (call no charge)

Community Legal Assistance Society (CLAS)

www.clasbc.net

604-685-3425 (Greater Vancouver)
1-888-685-6222 (call no charge)

Information for tenants and homeowners with low incomes facing foreclosure.

More information

About legal help

Access Pro Bono Society of British Columbia

www.accessprobono.ca

604-878-7400 (Greater Vancouver)
1-877-762-6664 (call no charge)

Free legal help.

Civil Chambers Pro Bono Duty Counsel Project

www.accessprobono.ca/chambers

604-603-5797

If you live in Greater Vancouver, you may qualify for free legal help from a volunteer lawyer who's participating in the Civil Chambers Pro Bono Duty Counsel Project.

Justice Access Centres: Nanaimo, Vancouver, Victoria

www.ag.gov.bc.ca/justice-access-centre

Service BC: **1-800-663-7867** (call no charge)

Free legal help.

Lawyer Referral Service

cbabc.org/For-the-Public/Lawyer-Referral-Service

604-687-3221 (Greater Vancouver)
1-800-663-1919 (call no charge)

If you don't have a lawyer, call the above numbers to get the name of one. Ask for a lawyer who specializes in foreclosures. You can have a half-hour appointment for $25 (plus taxes) to find out if you have a case and the fee to hire the lawyer. You can also ask what they charge for some help to prepare or review your documents, without going to court. The Lawyer Referral Service isn't available in all areas of BC.

More information

About the law

Consumer Law and Credit/Debt Law

www.lss.bc.ca/publications

This manual is for legal information counsellors, paralegals, and lawyers with clients who have consumer or debt problems. It covers 46 topics, including bankruptcy, creditors, debtors, fraud, harassment, leases, mortgages and foreclosures, prepayment rights, recovery of goods, and torts of assault and trespass. It also includes consumer and debtor statutes, case citations, and resources. *Consumer Law and Credit/Debt Law* is up to date as of November 2012 and available online only.

Clicklaw

www.clicklaw.bc.ca

This website has links to legal information, education, and help for British Columbians. Here, you can find out about your rights and options to solve legal problems, find toll-free numbers for law-related help, and learn about family law and the legal system.

How to get free LSS publications

Read: www.legalaid.bc.ca/publications

Order: www.crownpub.bc.ca
(under Quick Links, click BC Public Legal Education & Information)

Questions about ordering?

Phone: 604-601-6000
distribution@lss.bc.ca

Feedback on this publication?

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BC Student Loans and Repayment

Janette Demianchuk

Integrated Student Loans

- One application
- Student Loan Types
  - Canada Student Loan
  - BC Student Loan
- Master Student Financial Assistance Agreement

School Completion

A three stage repayment process begins when a student finishes school:

1. Non repayment period
2. Consolidation
3. Repayment

Stage 1: Non Repayment Period

- Starts day after study end date/withdrawal date
- Lasts six months
- No payments required
- Interest accrues
- Government will pay interest if student returns to school in grace period

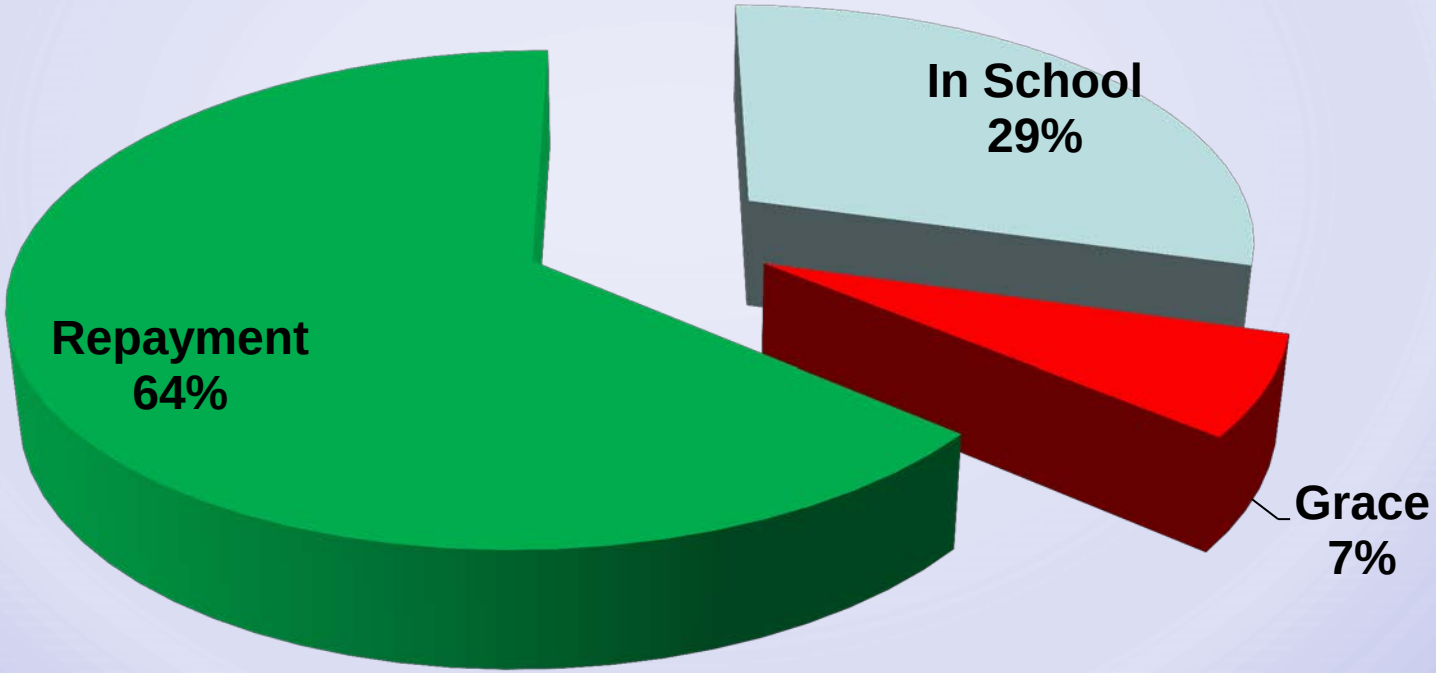
Stage 2: Consolidation

- Approximately 45 days before repayment:
  - ✓Cover letter including:
    - Consolidation date
    - First payment date
    - Payment options
  - ✓Consolidation Agreement:
    - Payment amount
    - Bank account details
    - Payment date, amortization, interest rate (fixed/floating)

Stage 3: Repayment

- Debited directly from account
- Extra payments can be made by:
  - ✓On-line payments
  - ✓One time debit
  - ✓Online or telephone banking
  - ✓Cheque

March 31, 2015 Snapshot (#s)



BRITISH COLUMBIA

Need Help?
Can't Pay?

Missed Payments

- Outbound calls are made
- Letters and emails are sent
- Credit rating is affected

Repayment Assistance Plan (RAP)

- Reduces monthly payment amount, sometimes to zero.
- Online or paper application every six months.
- Must:
  - reside in Canada (or on an international internship or a reservist deployed abroad); and
  - be in repayment.

RAP Details

- No borrower should have a repayment period of more than 15 years (or 10 years for borrowers with permanent disabilities).
- Payments are based on the borrower's family income and family size.
- Borrowers will not make payments exceeding 20 percent of their family income towards loans covered by RAP.

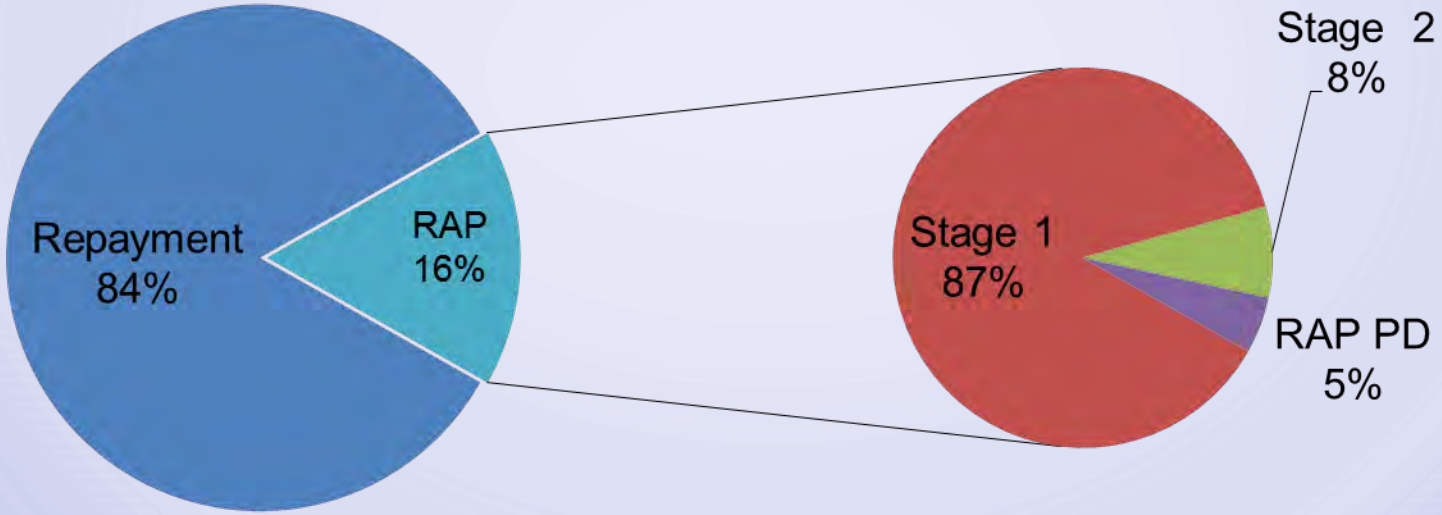
RAP Stages

- Stage 1
  - Affordable payments or $0 payment
  - No interest payments
  - 60 months
- Stage 2
  - Stage 1 exhausted or payment > 10 years
  - Principal payments may be covered by Government

RAP Permanent Disability (RAP-PD)

- Additional application may be required.
- Offered to those with a permanent disability.
- Approval puts borrower directly into Stage 2 RAP.

Repayment and RAP March 31, 2015 (#'s)



Default

- Nine months of consecutive payments are missed.
- Loans are split and BC portion is sent to Revenue Services of BC for collection.
- Canada Student Loan portion is sent to CRA for collection.

Rehabilitation of Student Loans

- Canada Student Loan
  - Equivalent of two months of payments plus all interest
- BC Student Loan
  - BC - six consecutive monthly payments plus all outstanding interest required
  - Formal application process
  - Canada Student Loan must be rehabilitated before BC will be approved

Other Programs available

- British Columbia Provision for Students with Severe Disabilities
- BC Loan Forgiveness Program
- Pacific Leaders BC Loan Forgiveness Program
- Revision of Terms
- Payment Deferral
- BC Completion Grant
- BC Completion Grant for Graduates (Application)

Important Information

- Keep communication lines open
- Keep address up to date
- Ask for help

Reference Materials

- StudentAid BCWebsite: www.StudentAidBC.ca
  - Provincial Repayment Programs
  - StudentAid BC Policy Manual
  - Loan funding options
  - Forms/Applications, including MSFAA
- CanLearn website: http://www.canlearn.ca/
  - RAP Application
  - Federal Repayment Programs

Canada | British Columbia

IMPORTANT - PLEASE READ BORROWER PAGES
PROTECTED WHEN COMPLETED - B

Master Student Financial Assistance Agreement

for Canada and British Columbia

BC	MSFAA #

Part A YOUR INFORMATION

Full Name of Student and Mailing Address	Date of Birth (yyyy/mm/dd)	Social Insurance Number
	For office use only	
Area Code and Telephone Number		

Part B MASTER STUDENT FINANCIAL ASSISTANCE AGREEMENT

1. **Agreement:** This integrated Master Student Financial Assistance Agreement ("MSFAA") is comprised of two separate loan contracts between you ("you" or "your"), as identified in Part A, and: (1) Her Majesty the Queen in Right of Canada, as represented by the Minister of Employment and Social Development ("Canada"), made pursuant to the *CSFAA* and called the Master Student Financial Assistance Agreement for Canada ("MSFAA-Canada"); and (2) Her Majesty the Queen in Right of the Province of British Columbia as represented by the Minister of Advanced Education and the Minister of Finance ("BC") and called the Master Student Financial Assistance Agreement for British Columbia ("MSFAA-BC").
   In consideration of Canada and BC providing Financial Assistance under the MSFAA-Canada and the MSFAA-BC, and, by signing **Part D** below, you agree to the Terms and Conditions of each of these loan contracts.
   The MSFAA is comprised of:
   Part A: Your Information
   Part B: Master Student Financial Assistance Agreement
   Part C: Electronic Funds Transfer
   Part D: Your Acknowledgement and Signature
   Part E: Definitions
   Part F: Additional Terms and Conditions of your MSFAA-Canada and MSFAA-BC
   The terms in this MSFAA will form part of each of your MSFAA-Canada and your MSFAA-BC, to the extent applicable.
2. **Agreement to Repay:** You promise to pay your total Outstanding Loan Balance in accordance with the Terms and Conditions of each of the MSFAA-Canada and the MSFAA-BC.
3. **Certification:** You certify that all information provided in your application(s) for Financial Assistance and on this MSFAA is true and complete to the best of your knowledge.
4. **Authorization:** Where required by law, you authorize each of Canada and BC to collect, use and disclose information related to any of your Canada or BC Student Loan(s) or Student Grant(s), as applicable, (i) by Canada, for the purposes of carrying out the administration and enforcement of the *CSFAA* or *CSLA*, or (ii) by Canada or BC, in accordance with sections F.11(c), F.11(d) and F.11(e) of this MSFAA.
5. **Ratification of Terms and Conditions:** At any time, Canada or BC may amend the Terms and Conditions of the MSFAA-Canada or the MSFAA-BC, respectively. You should review the Terms and Conditions at: CanLearn.ca/MSFAA upon each application for Financial Assistance. You acknowledge that your acceptance of any disbursement made under this MSFAA will ratify your acceptance of any revised Terms and Conditions.

PRINTED IN B.C. 4500298301

Part C ELECTRONIC FUNDS TRANSFER

The approved amount of any Financial Assistance disbursed under the MSFAA-Canada and the MSFAA-BC will be electronically deposited into your bank account as entered below, which must be held in your name, either solely or jointly. Electronic withdrawals may also be made from this bank account when payment is triggered, as per section F.7(c)(iii), subject to your right of revocation, as per section F.7(e). If you fail to provide this bank account information, disbursement of your Financial Assistance will be delayed and may not proceed.

Transit Number | Bank ID | Account Number (Refer to bottom of personal cheque):

OR ATTACH A VOID CHEQUE

Name and Address of Financial Institution:

Part D YOUR ACKNOWLEDGEMENT AND SIGNATURE

This MSFAA is a legal document that outlines your responsibility related to your MSFAA-Canada and MSFAA-BC. This MSFAA does not specify the actual amount(s) that will be disbursed to you or the amount(s) you will be required to repay. The amount(s) that will be disbursed to you under this MSFAA will be determined based on needs assessment(s) of your application(s) for Financial Assistance in accordance with federal and provincial legislation and policies. You will be responsible under this MSFAA for paying your Outstanding Loan Balance.

By signing Part D, you freely provide your consent(s), certification(s) and ratification(s) set out in this MSFAA and you agree to all the Terms and Conditions set out in this MSFAA. You understand that if you fail to sign this MSFAA, you will not receive any Financial Assistance.

Signature _____ Date (yyyy/mm/dd) _____

National Student Loans Service Centre

P.O. Box 4030
Mississauga, ON
L5A 4M4

1-888-815-4514 (within North America)
800-2-225-2501 (outside North America, dial your appropriate country code first)
1-888-815-4556 (for the hearing impaired – TTY)

Copy 1 - NSLSC copy

May 2015-E

Canada BRITISH COLUMBIA

IMPORTANT - PLEASE READ BORROWER PAGES
PROTECTED WHEN COMPLETED - B

Master Student Financial Assistance Agreement

for Canada and British Columbia

BC	MSFAA #

Part A YOUR INFORMATION

Full Name of Student and Mailing Address	Date of Birth (yyyy/mm/dd)	Social Insurance Number
	For office use only	
Area Code and Telephone Number		

Part B MASTER STUDENT FINANCIAL ASSISTANCE AGREEMENT

1. **Agreement:** This integrated Master Student Financial Assistance Agreement ("MSFAA") is comprised of two separate loan contracts between you ("you" or "your"), as identified in Part A, and: (1) Her Majesty the Queen in Right of Canada, as represented by the Minister of Employment and Social Development ("Canada"), made pursuant to the *CSFAA* and called the Master Student Financial Assistance Agreement for Canada ("MSFAA-Canada"); and (2) Her Majesty the Queen in Right of the Province of British Columbia as represented by the Minister of Advanced Education and the Minister of Finance ("BC") and called the Master Student Financial Assistance Agreement for British Columbia ("MSFAA-BC").
   In consideration of Canada and BC providing Financial Assistance under the MSFAA-Canada and the MSFAA-BC, and, by signing **Part D** below, you agree to the Terms and Conditions of each of these loan contracts.
   The MSFAA is comprised of:
   Part A: Your Information
   Part B: Master Student Financial Assistance Agreement
   Part C: Electronic Funds Transfer
   Part D: Your Acknowledgement and Signature
   Part E: Definitions
   Part F: Additional Terms and Conditions of your MSFAA-Canada and MSFAA-BC
   The terms in this MSFAA will form part of each of your MSFAA-Canada and your MSFAA-BC, to the extent applicable.
2. **Agreement to Repay:** You promise to pay your total Outstanding Loan Balance in accordance with the Terms and Conditions of each of the MSFAA-Canada and the MSFAA-BC.
3. **Certification:** You certify that all information provided in your application(s) for Financial Assistance and on this MSFAA is true and complete to the best of your knowledge.
4. **Authorization:** Where required by law, you authorize each of Canada and BC to collect, use and disclose information related to any of your Canada or BC Student Loan(s) or Student Grant(s), as applicable, (i) by Canada, for the purposes of carrying out the administration and enforcement of the *CSFAA* or *CSLA*, or (ii) by Canada or BC, in accordance with sections F.11(c), F.11(d) and F.11(e) of this MSFAA.
5. **Ratification of Terms and Conditions:** At any time, Canada or BC may amend the Terms and Conditions of the MSFAA-Canada or the MSFAA-BC, respectively. You should review the Terms and Conditions at: CanLearn.ca/MSFAA upon each application for Financial Assistance. You acknowledge that your acceptance of any disbursement made under this MSFAA will ratify your acceptance of any revised Terms and Conditions.

PRINTED IN B.C. 4500298301

Part C ELECTRONIC FUNDS TRANSFER

The approved amount of any Financial Assistance disbursed under the MSFAA-Canada and the MSFAA-BC will be electronically deposited into your bank account as entered below, which must be held in your name, either solely or jointly. Electronic withdrawals may also be made from this bank account when payment is triggered, as per section F.7(c)(iii), subject to your right of revocation, as per section F.7(e). If you fail to provide this bank account information, disbursement of your Financial Assistance will be delayed and may not proceed.

Transit Number | Bank ID | Account Number (Refer to bottom of personal cheque):

OR ATTACH A VOID CHEQUE

Name and Address of Financial Institution:

Part D YOUR ACKNOWLEDGEMENT AND SIGNATURE

This MSFAA is a legal document that outlines your responsibility related to your MSFAA-Canada and MSFAA-BC. This MSFAA does not specify the actual amount(s) that will be disbursed to you or the amount(s) you will be required to repay. The amount(s) that will be disbursed to you under this MSFAA will be determined based on needs assessment(s) of your application(s) for Financial Assistance in accordance with federal and provincial legislation and policies. You will be responsible under this MSFAA for paying your Outstanding Loan Balance.

By signing Part D, you freely provide your consent(s), certification(s) and ratification(s) set out in this MSFAA and you agree to all the Terms and Conditions set out in this MSFAA. You understand that if you fail to sign this MSFAA, you will not receive any Financial Assistance.

Signature _____ Date (yyyy/mm/dd) _____

National Student Loans Service Centre

P.O. Box 4030
Mississauga, ON
L5A 4M4

1-888-815-4514 (within North America)
800-2-225-2501 (outside North America, dial your appropriate country code first)
1-888-815-4556 (for the hearing impaired – TTY)

Copy 2 - Your copy

Part E DEFINITIONS

"**BC Authorized Administrator**" or "**BCA**" means Canada acting on behalf of BC in administering parts of the BCSAP.
"**BC Collection Agent**" means any contracted party or its subcontractor(s) or agent(s) acting on behalf of BC in collecting BC Student Loans.
"**BC Student Grant**" means any non-repayable assistance made under the BCSAP.
"**BC Student Loan**" means a British Columbia student loan made to a Full-Time Student under the BCSAP on or after August 1, 2000.
"**BCSAP**" means the British Columbia Student Assistance Program, as modified from time to time, the requirements of which are posted at: www.studentaidbc.ca. The BCSAP is administered by BC (acting on its own or through its contractors or agents) or on behalf of BC by the BCA (acting on its own or through the NSLSC).
"**Canada Student Grant**" means a grant made under the *CSFAA*.
"**Canada Student Loan**" means a Direct Loan made under the *CSFAA* or Student Loan made under the *CSFAA* or *CSLA*.
"***CSFAA***" means the *Canada Student Financial Assistance Act* and the *Canada Student Financial Assistance Regulations*, as in effect at any given time.
"***CSLA***" means the *Canada Student Loans Act* and the *Canada Student Loans Regulations*, as in effect at any given time.
"**Direct Loan**" means any loan made by Canada under section 6.1 of the *CSFAA* on or after August 1, 2000.
"**Financial Assistance**" (a) when used in the MSFAA-Canada, means Direct Loans, Canada Student Grants, repayment assistance, interest-free periods and any other form of financial assistance provided under the *CSFAA*, directly or indirectly to you; or (b) when used in the MSFAA-BC, means BC Student Loans, BC Student Grants, debt management programs, interest-free periods and any other form of financial assistance provided under the BCSAP, directly or indirectly to you.
"**Full-Time Student**" status is maintained for a person, (a) who is enrolled in a minimum 60 percent full course load; or (b) who has a permanent disability, is enrolled in courses that constitute between 40 percent and 60 percent of a full course load and applies to be considered as a Full-Time Student; (c) whose primary occupation is the pursuit of studies in those courses; and (d) when used i) in the MSFAA-Canada, who otherwise complies with the requirements of the *CSFAA*, and ii) in the MSFAA-BC, who otherwise complies with the requirements of the BCSAP;
PROVIDED THAT the definition of Full-Time Student when used in the MSFAA-BC will be applied and interpreted in a manner that is consistent with and that provides for equivalent effect as the definition of Full-Time Student when used in the MSFAA-Canada.
"**Lender**" means a financial institution that is a party to an agreement with Canada, entered into under the *CSFAA* or the *CSLA*.
"**NSLSC**" means the National Student Loans Service Centre which administers parts of the Financial Assistance programs on behalf of Canada.
"**Outstanding Loan Balance**" means: (a) when used in the MSFAA-Canada, the principal amount of your full-time Direct Loans outstanding at any time, including any Canada Student Grant amount(s) converted to a Direct Loan, together with all interest on those amounts; or (b) when used in the MSFAA-BC, the principal amount of your BC Student Loans outstanding at any time, including any BC Student Grant amount(s) converted to a BC Student Loan and the principal amount forming part of any student loan amounts consolidated under section F.15(b)(i) or F.15(b)(iv), together with all interest on those amounts, and any unpaid non-sufficient funds ("NSF") fees outstanding as of August 1, 2011.
"**Prime Rate**" means the variable reference rate of interest as calculated by Canada, based on the average of the middle three of the largest five Canadian financial institutions' prime rate.
"**Student Loan**" when used in the MSFAA-Canada and in the definition of Canada Student Loan, means any loan made to you by a Lender under the *CSFAA* or the *CSLA*, prior to August 1, 2000.
"**Terms and Conditions**" when used in the MSFAA-Canada means the applicable sections found in Parts A, B, C, D, E, and F of this MSFAA, and when used in the MSFAA-BC means the applicable sections found in Parts A, B, C, D, E, and F of this MSFAA, and as may be amended from time to time in accordance with these agreements. Note certain sections contained in this MSFAA will only form part of your MSFAA-Canada or only form part of your MSFAA-BC, respectively.

Part F ADDITIONAL TERMS AND CONDITIONS OF YOUR MSFAA-CANADA AND MSFAA-BC

6. **General Principles** Subject to the Terms and Conditions of each of the MSFAA-Canada and the MSFAA-BC, and the requirements of the *CSFAA* and the BCSAP, as applicable, you may be eligible for Financial Assistance (with limits on amount and time), and you are not required to make payments nor will interest accrue on the principal amount of your Outstanding Loan Balance while you are a Full-Time Student.

7. **Return of Money**

(a) **Refund of Loan Proceeds**: You authorize your educational institution to refund to Canada or BC, as applicable, any fees that have been paid with the proceeds of your Canada or BC Student Loan or Student Grant for credit against any Outstanding Loan Balance you may have.
(b) **Early Payment**: You may pay all or any part of your Outstanding Loan Balance at any time without notice, penalty or bonus.
(c) **Payment Terms**: Unless you enter into an agreement to alter payment terms, you agree to pay your Outstanding Loan Balance according to the standard payment terms, which are as follows:

(i) **Principal, Interest and Fees**: your Outstanding Loan Balance;
(ii) **Interest**: simple interest will accrue on the principal amount of your Outstanding Loan Balance at a floating rate equal to the Prime Rate plus two and one-half (2½) percent, accruing daily and calculated monthly, unless you enter into an agreement with a fixed interest rate equal to the Prime Rate plus five (5) percent;
(iii) **Payment Trigger Date**: is the first day of the seventh month following the month in which you cease to be a Full-Time Student;
(iv) **Loan Payment Due Date**: is, at the latest, the last day of each month, starting on the seventh month following the month in which you cease to be a Full-Time Student;
(v) **Loan Payment Amount**: is the monthly payment amount calculated using these payment terms, with a minimum monthly payment of $25 per month for combined MSFAA-Canada and MSFAA-BC loan payments;
(vi) **Amortization Period**: nine and one-half (9½) years or such lesser period of time as is required to support a minimum combined monthly loan payment amount of $25;
(vii) **Payment Allocation**: payment amounts under this MSFAA will be allocated proportionately to the Outstanding Loan Balance under each of the MSFAA-Canada and the MSFAA-BC. The payment amount allocated to the Outstanding Loan Balance under each of the MSFAA-Canada and the MSFAA-BC may be applied first to NSF fees, then to interest and then to principal;
(viii) **Final Lump Sum Payment**: any amount of your Outstanding Loan Balance that remains at the end of your Amortization Period; and
(ix) **Prime Rate Variance**: if the Prime Rate changes significantly it may result in: (1) your loan being paid in full early; (2) the lengthening of your Amortization Period (to a maximum of fourteen and one-half (14½) years); or (3) you being required to pay a Final Lump Sum Payment.

(d) **Interest up to Payment Trigger Date**: Unless you pay the interest that accrues between the end of your Full-Time Student status and the Payment Trigger Date, that interest will be added to and form part of the principal amount of your Outstanding Loan Balance.
(e) **Personal Pre-Authorized Debit**: Unless you otherwise agree in writing, upon the Payment Trigger Date, you authorize each of Canada and BC to debit the bank account you have identified in Part C of this MSFAA (or such other bank account as you have advised in writing) in order to collect your Outstanding Loan Balance as follows:
You grant your revocable authority and direction to each of Canada and BC (including the BCA), and any financial institution which holds such a bank account, to:

(i) exchange the financial information necessary to facilitate such Personal Pre-Authorized Debits according to the Canadian Payments Association Rule H1; and
(ii) debit the bank account on each Loan Payment Due Date, for the Loan Payment Amount in accordance with the payment terms of each of the MSFAA-Canada and the MSFAA-BC, and to remit that as payment to Canada or BC, as applicable.

You waive any requirement to receive written pre-notification of Personal Pre-Authorized Debits. You may revoke your authorization at any time, subject to providing 30 days notice. You have certain recourse and reimbursement rights if any debit does not comply with the terms of this section. To obtain a sample cancellation form, or for more information on your right to revoke this authorization and your recourse rights to dispute or receive reimbursement for any debit that is not authorized or is not consistent with the terms of this section, you may contact your financial institution or visit: www.cdnpay.ca . Revocation of your authorization does not terminate your responsibility to pay your Outstanding Loan Balance; it only terminates the method of payment.
(f) **Return of Money to You**: Subject to any right of set-off, if you have paid $10 or more in excess of your Outstanding Loan Balance under each of the MSFAA-Canada and the MSFAA-BC, respectively, you will be issued a refund. Refunds of less than $10 will only be issued on your request.

8. **Interest-Free Period** Subject to sections F.8(c), F.8(d), F.8(e), F.12 and F.13, and the requirements of the *CSFAA* and the BCSAP, as applicable:

(a) **Interest-Free Period**: Interest will not accrue while you are a Full-Time Student.
(b) **Interest-Free Period Ends**: Interest will start to accrue on the principal amount of your Outstanding Loan Balance on the first day of the month following the month in which you cease to be a Full-Time Student.
(c) **Interest-Free Period Upon Return to Full-Time Studies**: If you return to Full-Time Student status, and you confirm your enrolment as required by the *CSFAA* or the BCSAP:

(i) you may be returned to interest-free status for the applicable period;
(ii) any obligations you have in respect of your Outstanding Loan Balance up to your confirmation of enrolment may be suspended for the applicable period; and
(iii) if you are returned to interest-free status, you will not be required to make payments nor will interest accrue on the principal amount of your Outstanding Loan Balance while you remain a Full-Time Student, all as specified under the *CSFAA* or the BCSAP, as applicable.

(d) **Maximum Number of Weeks of Interest-Free Status**: You are entitled to no more than the maximum number of weeks of interest-free status, as prescribed by the *CSFAA* or specified under the BCSAP. If you return to Full-Time Student status after you have reached the maximum number of weeks, interest will accrue, but you will not be required to start making payments on your Outstanding Loan Balance until the Payment Trigger Date, and you may not be eligible for certain Financial Assistance.
(e) **Interest-Free Period Terminated or Denied**: Interest will accrue while you are a Full-Time Student if your interest-free period is terminated or denied. Termination or denial of an interest-free period can result if you do not meet the requirements for interest-free status under the *CSFAA* or the BCSAP, as applicable.

9. **Conversion of Canada Student Grant to Loan** You acknowledge that all or a portion of your Canada Student Grant(s), may be converted into a Direct Loan if you withdraw from full-time studies within 30 days after the first day of classes or you receive a Canada Student Grant disbursement that exceeds your eligibility for that grant, and will be added to your Outstanding Loan Balance which you agree to repay in accordance with all applicable Terms and Conditions of the MSFAA-Canada.

10. **Conversion of BC Student Grant to Loan** You acknowledge that all or a portion of your BC Student Grant(s), may be converted into a BC Student Loan if you withdraw from full-time studies or you receive a BC Student Grant disbursement that exceeds your eligibility for that grant, and will be added to your Outstanding Loan Balance which you agree to repay in accordance with all applicable Terms and Conditions of the MSFAA-BC.

Part F (Continued) ADDITIONAL TERMS AND CONDITIONS OF YOUR MSFAA-CANADA AND MSFAA-BC

11. Information

(a) **Notification**: You agree to promptly notify Canada and BC of any change to your family status, financial situation or Full-Time Student status, or to information you have provided in your application for Financial Assistance or in this MSFAA.

(b) **Complete Disclosure**: You confirm that, to the best of your knowledge, all information that you have disclosed relating to any previous Canada or BC Student Loan(s) or Student Grant(s) is accurate and complete.

(c) **Acknowledgment and Consent**: You acknowledge that Canada, and any of its contractors or agents, may collect, use, and retain your personal information directly from you, or indirectly from a third party. Your personal information will only be used for the purpose of administering your Financial Assistance under the MSFAA-Canada, and administering and enforcing the *CSFAA* or *CSLA*. Your personal information may be exchanged with and disclosed to BC, financial institutions, lenders, educational institutions, employers, credit bureaus and Canada Revenue Agency. The collection, use, exchange and disclosure will be undertaken as required and in compliance with the *Privacy Act*, and Part 4 of the *Department of Employment and Social Development Act*. Where your consent is required by law to permit the direct or indirect collection, retention, use or disclosure of personal information, by your signature on this agreement, you provide your consent.

(d) **Consent**: For the purposes of assessing your ongoing eligibility for Financial Assistance, administering Financial Assistance and enforcing your obligations under the MSFAA-BC (including the direct deposit of funds and obtaining repayment of money owed under the MSFAA-BC), and administering the BCSAP, you consent to the collection, use and disclosure of your personal information relevant to your BC Student Loan(s) or your BC Student Grant(s), between BC, the BCA, NSLSC, any BC Collection Agent, and any of their respective contractors or agents, each with each other, and with the following: Canada, NSLSC, financial institutions, lenders, educational institutions, financial aid offices, employers, credit bureaus, credit reporting agencies, Native Bands, federal and provincial Crown corporations and federal, provincial and municipal ministries/departments/agencies, including the BC Ministry of Social Development and Social Innovation, the BC Ministry of Children and Family Development, the BC Ministry of Health, the BC Ministry of Justice, the BC Ministry of Finance, the BC Ministry of Advanced Education, the BC Ministry of Education, Private Career Training Institutions Agency, BC Public Service Agency, BC Office of the Superintendent of Motor Vehicles, Insurance Corporation of BC, BC Hydro, BC Assessment Authority, Land Title and Survey Authority of BC, BC Registry Services, WorkSafe BC, BC Vital Statistics Agency, Office of the Superintendent of Bankruptcy Canada, Employment and Social Development Canada, Canada Revenue Agency and Citizenship and Immigration Canada. This consent takes effect when you sign Part D of this MSFAA.

(e) **Authorization**: You authorize any of your current, past or future employers to release to Canada or its contractors or agents, and to BC, the BCA, any BC Collection Agent or their respective contractors or agents, information to locate you including your name, SIN, date of birth, banking information, permanent and alternate address, telephone number, employer, and educational institution address for the purpose of enforcing your obligations pursuant to each of the MSFAA-Canada and MSFAA-BC.

12. Denial, Termination and Immediate Repayment Under Your MSFAA-Canada

You agree that the following events may result in you being denied further Financial Assistance, interest-free status or you being required to immediately pay all or part of your Outstanding Loan Balance:

(a) you fail to make a regularly scheduled loan payment by the Loan Payment Due Date in accordance with the payment terms of the MSFAA-Canada, and that failure continues for two consecutive months;

(b) you fail to make any regularly scheduled loan payment(s) by the Loan Payment(s) Due Date in accordance with the payment terms of the MSFAA-Canada, and Canada demands that you make the payment(s) and you demonstrably and unequivocally refuse to do so;

(c) you file for or have filed against you any bankruptcy-related proceeding;

(d) you seek relief under a provincial law relating to the orderly payment of debts that includes a Canada Student Loan;

(e) you are found guilty of an offence under any Act of Parliament by reason of your conduct in obtaining or repaying a Student Loan or Financial Assistance; or

(f) you knowingly provided information or made representation related to your application(s) or other document upon which the Minister takes administrative measures under section 17.1(1) or (2) *CSFAA*, you agree to immediately repay the outstanding amount of your Canada Student Loan(s) and Canada Student Grant(s) obtained on false or misleading information.

13. Denial, Termination and Immediate Repayment Under Your MSFAA-BC

(a) Your Outstanding Loan Balance will be delinquent if you fail to make a regularly scheduled loan payment by the Loan Payment Due Date in accordance with the payment terms of the MSFAA-BC, and that failure continues without you having made payment in full of the overdue loan payment for two (2) consecutive months.

(b) At any time after your Outstanding Loan Balance becomes delinquent, as per section F.13(a), and if you have not made payment in full of your overdue loan payment referred to in that section, BC may demand immediate payment of your Outstanding Loan Balance in full. If a demand is made under this section, your Outstanding Loan Balance becomes immediately due and payable in full on the day after the demand is made.

(c) At any time after your Outstanding Loan Balance becomes delinquent, as per section F.13(a), or at any time you do not meet the requirements for Financial Assistance under the BCSAP, you may no longer be eligible for Financial Assistance under the BCSAP, including further BC Student Loans or BC Student Grants, assistance under debt management programs or interest-free periods. Nothing in the MSFAA-BC limits the rights of BC to deny or terminate Financial Assistance at any time under the BCSAP. Note that if you become bankrupt or insolvent or take advantage of or are the subject of any bankruptcy or insolvency-related proceeding, you may no longer be eligible for Financial Assistance.

(d) If you fail to make a regularly scheduled loan payment by the Loan Payment Due Date in accordance with the payment terms of the MSFAA-BC, and that failure continues without you having made payment in full of the overdue loan payment for NINE (9) consecutive months, and if a demand has not already been made under section F.13(b), your Outstanding Loan Balance becomes immediately due and payable in full on the day thereafter.

(e) Subject to any applicable repayment assistance agreement or agreement to alter payment terms, if you become bankrupt or take advantage of or are the subject of any bankruptcy or insolvency related proceeding, any principal or interest that accrued prior to and during that proceeding and that remain owing 30 days after the Trustee's discharge, are payable immediately. If you fail to pay any accrued principal and interest within 30 days of the Trustee's discharge your Outstanding Loan Balance becomes immediately due and payable in full on the day thereafter.

(f) Upon your Outstanding Loan Balance becoming due and payable in full under section F.13(b), (d) or (e), BC may transfer collection of your Outstanding Loan Balance to any BC Collection Agent.

(g) Nothing in sections F.13(b), (c), (d) or (e) limits BC's right to pursue any remedy or any other action available to BC at law or in equity.

14. Survival The MSFAA-Canada and the MSFAA-BC will remain in force notwithstanding your entry into or fulfillment of an agreement to alter payment terms or the full payment by you of your Outstanding Loan Balance, subject to the *CSFAA*.

15. Miscellaneous

(a) **Ratification**: If you have entered into any Canada or BC Student Loan agreements while you were a minor, by signing this MSFAA, you ratify those agreements.

(b) **Previous Outstanding Student Loan Amounts**:

(i) You agree that all amounts you owe on previous Canada Direct Loans and BC Student Loans will be administered and paid under the Terms and Conditions of the MSFAA-Canada and the MSFAA-BC, respectively, and that all such amounts are consolidated into and form part of your Outstanding Loan Balance, as applicable.

(ii) You acknowledge that none of the amounts you owe on any Student Loan will be administered or paid under the Terms and Conditions of the MSFAA-Canada, and that no such amounts form any part of your Outstanding Loan Balance.

(iii) You acknowledge that, except as set out in section F.15(b)(iv), none of the amounts you owe on any guaranteed BC student loans (issued before August 1, 1995) or risk-shared BC student loans (issued between August 1, 1995 and July 31, 2000) will be administered or paid under the Terms and Conditions of the MSFAA-BC, and that no such amounts form any part of your Outstanding Loan Balance.

(iv) You agree that all amounts that you owe on any guaranteed BC student loans or risk-shared BC student loans will be administered and paid under the Terms and Conditions of the MSFAA-BC, and that all such amounts will be consolidated into and form part of your Outstanding Loan Balance, if, at any time before or after entering into this MSFAA, you have defaulted on those loans, they have been assigned to BC and you meet the rehabilitation requirements of the BCSAP.

(c) **Further Funding**: If you return to Full-Time Student status after the Payment Trigger Date, and you apply for Financial Assistance, funding may be disbursed to you under this MSFAA or you may be required to enter into a new MSFAA.

(d) **Death**: All your rights and obligations under the MSFAA-Canada and the MSFAA-BC in respect of your Outstanding Loan Balance will terminate upon your death.

(e) **Governing Law**: Subject to the *CSFAA* and the *CSLA* and any laws of Canada, the MSFAA-Canada and the MSFAA-BC will be governed by the laws of British Columbia.

(f) **Limitation Period**: You acknowledge that the period for the limitation of actions shall be six years.

(g) **Use of Financial Assistance**: You acknowledge that the Financial Assistance provided to you under this MSFAA is for the purpose of providing necessities for your education and maintenance.

(h) **Severability**: Any provision that becomes void or unenforceable will be severed from this MSFAA, and the validity and enforceability of all other provisions will not be affected.

(i) **Interest and Costs**: You agree to pay all legal fees and disbursements incurred by Canada or by BC to collect any amount of your Outstanding Loan Balance owing under this MSFAA, and you agree to pay interest, as per section F.7(c)(ii), before and after default and delinquency. You agree to pay interest before and after judgment.

NOTICE OF COLLECTION OF PERSONAL INFORMATION

Information about you under the control of Canada or BC will be administered in accordance with the *Privacy Act* (Canada), or the *Freedom of Information and Protection of Privacy Act* ("*FOIPPA*") (BC), as applicable.

The personal information is collected and used for administration of the Canada Student Loans Program (CSLP) under the authority of the *CSFAA* and the *CSLA*, and in accordance with the *Privacy Act* and Part 4 of the *Department of Employment and Social Development Act*.

Administration and enforcement of the CSLP means development and operation of the program, including investigations into allegations of wrongdoing, audits, and policy analysis, research and evaluation. These activities may involve the matching of various sources of data that are under the control of the Government of Canada.

The Social Insurance Number (SIN) is collected by the Minister of Employment and Social Development under the express authority of the *CSFAA* and in accordance with the Treasury Board Secretariat Directive on Social Insurance Number. The SIN will be used for the administration of the CSLP under the *CSFAA*. The SIN will be used as a file identifier and, along with the other information you provide, will also be used to validate your application, and to administer and enforce the CSLP. You must provide your SIN and the other personal information requested on this form to be considered for the CSLP.

You have the right to the protection of and access to your personal information. It will be retained in Personal Information Bank ESDC PPU 030. Instructions for obtaining this information are outlined in the government publication entitled Info Source, which is available at the following website address: http://www.infosource. gc.ca. Info Source may also be accessed on-line at any Service Canada Centre.

Your personal information on this MSFAA-BC, and your personal information subsequently collected from you, by or on behalf of BC, relevant to your BC Student Loan(s) or your BC Student Grant(s), is collected under the authority of section 26(c) and 26(e) of the *FOIPPA* for the purposes of assessing your ongoing eligibility for Financial Assistance, administering Financial Assistance, enforcing your obligations under the MSFAA-BC (including the direct deposit of funds and obtaining repayment of money owned under the MSFAA-BC), administering the BCSAP and for statistical and evaluation purposes. Questions about the collection and use of this information can be directed to the Director, StudentAid BC, Ministry of Advanced, PO Box 9173, Stn Prov Govt, Victoria, BC V8W 9H7 call 1-800-561-1818 (toll-free in Canada/US) or 1-250-387-6100 (outside North America).

National Student Loans Service Centre

PLEASE TYPE OR PRINT IN BLOCK LETTERS
(Version française disponible sur demande)

This is a revision of terms of a Consolidated Student Loan Agreement ☐ Yes ☒ No

CONSOLIDATED STUDENT LOAN AGREEMENT AND REPAYMENT FORM

NATIONAL STUDENT LOANS SERVICE CENTRE P.O. BOX 4030 MISSISSAUGA, ONTARIO L5A 4M4 1-888-815-4514	DATE «TapeDate»
	PHONE NUMBER (BORROWER) «PhoneNum»
Borrower's full legal name and address «First_Name» «Last_Name» «Address1» «Address2» «City» «Prov» «PostalCode» «Country»	DATE OF BIRTH (DAY/MONTH/YEAR) «BirthDate»
	SIN «SIN»

SUMMARY OF REPAYMENT DETAILS: «Program1»

Principal Balance:	«Principal1»	Loan Number:	«LoanNum1»
Capitalized Interest:	«GraceInt1»		
Principal plus Capitalized Interest:	«PrinGraceInt1»	Interest Method:	«IntMethod1»
Outstanding Interest Owing:	«OSIntOwe1»		
First Payment Due Date:	«FirstPayDate1»	Effective Interest Rate*:	«PrimeInt1»
Payment Frequency:	«PayFreq1»		
Monthly Payment Amount:	«Monthly1»	Amortization Period:	«Term1» months

«Program1IntRate1»
«Program1IntRate2»

REPAYMENT OPTIONS AVAILABLE TO YOU

If you would like us to make changes to your repayment details outlined above, please check the appropriate option(s) below:

☐ Please increase my Monthly Payment Amount to $_____.

☐ I wish to make a lump sum payment of $_____. ☐ Please debit my bank account (noted below) or ☐ I have attached a cheque.

☐ I would like to pay the Capitalized Interest amount referred to in the *Summary of Repayment Details* section above.
☐ Please debit my bank account (noted below) for the Capitalized Interest amount or ☐ I have attached a cheque.
IMPORTANT: LUMP SUM AND CAPITALIZED INTEREST PAYMENTS WILL BE DEBITED **WHEN THIS AGREEMENT IS RECEIVED.**

☐ I would like to reduce my Amortization Period to _____ months.
(Please Note: A reduction in your amortization period proportionately increases your monthly payment. Should you select this option, a revision of terms outlining your new repayment terms will be mailed to you.

SUMMARY OF REPAYMENT DETAILS: «Program2»

Principal Balance:	«Principal2»	Loan Number:	«LoanNum2»
Capitalized Interest:	«GraceInt2»		
Principal plus Capitalized Interest:	«PrinGraceInt2»	Interest Method:	«IntMethod2»
Outstanding Interest Owing:	«OSIntOwe2»		
First Payment Due Date:	«FirstPayDate2»	Effective Interest Rate*:	«PrimeInt2»
Payment Frequency:	«PayFreq2»		
Monthly Payment Amount:	«Monthly2»	Amortization Period:	«Term2» months

«Program2IntRate1»
«Program2IntRate2»

REPAYMENT OPTIONS AVAILABLE TO YOU

If you would like us to make changes to your repayment details outlined above, please check the appropriate option(s) below:

☐ Please increase my Monthly Payment Amount to $_____.

☐ I wish to make a lump sum payment of $_____. ☐ Please debit my bank account (noted below) or ☐ I have attached a cheque.

☐ I would like to pay the Capitalized Interest amount referred to in the *Summary of Repayment Details* section above.
☐ Please debit my bank account (noted below) for the Capitalized Interest amount or ☐ I have attached a cheque.
IMPORTANT: LUMP SUM AND CAPITALIZED INTEREST PAYMENTS WILL BE DEBITED **WHEN THIS AGREEMENT IS RECEIVED.**

☐ I would like to reduce my Amortization Period to _____ months.
(Please Note: A reduction in your amortization period proportionately increases your monthly payment. Should you select this option, a revision of terms outlining your new repayment terms will be mailed to you.

FIXED INTEREST RATE OPTION

You have the option of selecting a fixed rate of interest of Prime + 5.0% on your student loans*. Please note that once you have chosen a fixed interest rate, the floating rate option is no longer available. Choosing this option may increase your monthly payment from the amount shown on this document. If you wish to choose a fixed rate of interest please contact the National Student Loans Service Centre. A new Consolidated Student Loan Agreement will be mailed to you showing your new monthly payment amount due to this change in interest rate.

***Note**: The fixed rate option is not available on the Ontario portion of a Canada-Ontario Integrated Student Loan. It is also not available on the Newfoundland and Labrador portion of a Canada-Newfoundland and Labrador Integrated Student Loan as interest does not accrue on this portion.

PRE-AUTHORIZATION PAYMENT PLAN INFORMATION

The following account is on file at our office.
Bank: «BankCode» - «BankName»
Transit: «Transit» Account: «AccountNum»

☐ I do not wish to use the Pre-Authorized Payment Plan for my student loan payments.
Payments are to be made payable to the National Student Loans Service Centre.

☐ Please set me up on pre-authorized payment/change my Payment Account Information to (please attach a void cheque).
The information you send must be for an account at a Canadian bank held in your name solely or jointly.

Bank_____ Transit _____ Account_____

Signature of Account Holder: _____

Name: _____

Date: _____

Signature of Joint Account Holder (if applicable): _____

Name: _____

Date: _____

IMPORTANT: ADDITIONAL TERMS AND CONDITIONS OF REPAYMENT OF YOUR STUDENT LOANS ARE SET OUT ON THE ENCLOSED PAGES ENTITLED "ADDITIONAL TERMS AND CONDITIONS," WHICH ARE A PART OF THIS AGREEMENT. **BY SIGNING THIS AGREEMENT**, YOU ACKNOWLEDGE THAT YOU HAVE RECEIVED, READ, AND INTEND TO BE BOUND BY ALL APPLICABLE TERMS AND CONDITIONS AND THAT YOU AGREE TO REPAY YOUR STUDENT LOANS IN ACCORDANCE WITH THESE TERMS AND CONDITIONS.

_____ Date

_____ Signature

Copy 1 – NSLSC Copy (Please sign and return this copy to the National Student Loans Service Centre)

National Student Loans Service Centre

PLEASE TYPE OR PRINT IN BLOCK LETTERS
(Version française disponible sur demande)

This is a revision of terms of a Consolidated Student Loan Agreement ☐ Yes ☒ No

CONSOLIDATED STUDENT LOAN AGREEMENT AND REPAYMENT FORM

NATIONAL STUDENT LOANS SERVICE CENTRE
P.O. BOX 4030
MISSISSAUGA, ONTARIO L5A 4M4 1-888-815-4514

DATE
«TapeDate»

PHONE NUMBER (BORROWER)
«PhoneNum»

Borrower's full legal name and address
«First_Name» «Last_Name»
«Address1»
«Address2»
«City» «Prov» «PostalCode» «Country»

DATE OF BIRTH (DAY/MONTH/YEAR)
«BirthDate»

SIN
«SIN»

SUMMARY OF REPAYMENT DETAILS: «Program1»

Principal Balance:	«Principal1»	Loan Number:	«LoanNum1»
Capitalized Interest:	«GraceInt1»		
Principal plus Capitalized Interest:	«PrinGraceInt1»	Interest Method:	«IntMethod1»
Outstanding Interest Owing:	«OSIntOwe1»		
First Payment Due Date:	«FirstPayDate1»	Effective Interest Rate*:	«PrimeInt1»
Payment Frequency:	«PayFreq1»		
Monthly Payment Amount:	«Monthly1»	Amortization Period:	«Term1» months

«Program1IntRate1»
«Program1IntRate2»

REPAYMENT OPTIONS AVAILABLE TO YOU

If you would like us to make changes to your repayment details outlined above, please check the appropriate option(s) below:

☐ Please increase my Monthly Payment Amount to $_____.

☐ I wish to make a lump sum payment of $_____. ☐ Please debit my bank account (noted below) or ☐ I have attached a cheque.

☐ I would like to pay the Capitalized Interest amount referred to in the *Summary of Repayment Details* section above.
☐ Please debit my bank account (noted below) for the Capitalized Interest amount or ☐ I have attached a cheque.
IMPORTANT: LUMP SUM AND CAPITALIZED INTEREST PAYMENTS WILL BE DEBITED **WHEN THIS AGREEMENT IS RECEIVED.**

☐ I would like to reduce my Amortization Period to _____ months.
(Please Note: A reduction in your amortization period proportionately increases your monthly payment. Should you select this option, a revision of terms outlining your new repayment terms will be mailed to you.

SUMMARY OF REPAYMENT DETAILS: «Program2»

Principal Balance:	«Principal2»	Loan Number:	«LoanNum2»
Capitalized Interest:	«GraceInt2»		
Principal plus Capitalized Interest:	«PrinGraceInt2»	Interest Method:	«IntMethod2»
Outstanding Interest Owing:	«OSIntOwe2»		
First Payment Due Date:	«FirstPayDate2»	Effective Interest Rate*:	«PrimeInt2»
Payment Frequency:	«PayFreq2»		
Monthly Payment Amount:	«Monthly2»	Amortization Period:	«Term2» months

«Program2IntRate1»
«Program2IntRate2»

REPAYMENT OPTIONS AVAILABLE TO YOU

If you would like us to make changes to your repayment details outlined above, please check the appropriate option(s) below:

☐ Please increase my Monthly Payment Amount to $_____.

☐ I wish to make a lump sum payment of $_____. ☐ Please debit my bank account (noted below) or ☐ I have attached a cheque.

☐ I would like to pay the Capitalized Interest amount referred to in the *Summary of Repayment Details* section above.
☐ Please debit my bank account (noted below) for the Capitalized Interest amount or ☐ I have attached a cheque.
IMPORTANT: LUMP SUM AND CAPITALIZED INTEREST PAYMENTS WILL BE DEBITED **WHEN THIS AGREEMENT IS RECEIVED.**

☐ I would like to reduce my Amortization Period to _____ months.
(Please Note: A reduction in your amortization period proportionately increases your monthly payment. Should you select this option, a revision of terms outlining your new repayment terms will be mailed to you.

FIXED INTEREST RATE OPTION

You have the option of selecting a fixed rate of interest of Prime + 5.0% on your student loans*. Please note that once you have chosen a fixed interest rate, the floating rate option is no longer available. Choosing this option may increase your monthly payment from the amount shown on this document. If you wish to choose a fixed rate of interest please contact the National Student Loans Service Centre. A new Consolidated Student Loan Agreement will be mailed to you showing your new monthly payment amount due to this change in interest rate.
***Note**: The fixed rate option is not available on the Ontario portion of a Canada-Ontario Integrated Student Loan. It is also not available on the Newfoundland and Labrador portion of a Canada-Newfoundland and Labrador Integrated Student Loan as interest does not accrue on this portion.

PRE-AUTHORIZATION PAYMENT PLAN INFORMATION

The following account is on file at our office.
Bank: «BankCode» - «BankName»
Transit: «Transit» Account: «AccountNum»

☐ I do not wish to use the Pre-Authorized Payment Plan for my student loan payments.
Payments are to be made payable to the National Student Loans Service Centre.

☐ Please set me up on pre-authorized payment/change my Payment Account Information to (please attach a void cheque).
The information you send must be for an account at a Canadian bank held in your name solely or jointly.

Bank_____ Transit _____ Account_____

Signature of Account Holder: _____

Name: _____

Date: _____

Signature of Joint Account Holder (if applicable): _____

Name: _____

Date: _____

IMPORTANT: ADDITIONAL TERMS AND CONDITIONS OF REPAYMENT OF YOUR STUDENT LOANS ARE SET OUT ON THE ENCLOSED PAGES ENTITLED "ADDITIONAL TERMS AND CONDITIONS," WHICH ARE A PART OF THIS AGREEMENT. **BY SIGNING THIS AGREEMENT**, YOU ACKNOWLEDGE THAT YOU HAVE RECEIVED, READ, AND INTEND TO BE BOUND BY ALL APPLICABLE TERMS AND CONDITIONS AND THAT YOU AGREE TO REPAY YOUR STUDENT LOANS IN ACCORDANCE WITH THESE TERMS AND CONDITIONS.

_____ _____
Date Signature

Copy 2 – Borrower Copy (Please keep this copy for your records)

E&OE
NSLSC-4C-ConsolForm(2 lns)(E)(vers 5.4)

ADDITIONAL TERMS AND CONDITIONS

IMPORTANT: IF YOU ALSO HAVE STUDENT LOANS AT A FINANCIAL INSTITUTION, YOU MUST CONTACT YOUR PREVIOUS LENDER TO INFORM THEM IF YOU ARE NO LONGER A FULL-TIME STUDENT.

DEFINITIONS

"**BC**" means Her Majesty the Queen in Right of the Province of British Columbia, represented by the Minister of Advanced Education and the Minister of Finance, or its authorized agent, as applicable.

"**Canada**" means Her Majesty the Queen in Right of Canada, as represented by the Minister of Human Resources and Skills Development.

"**NSLSC**" means the National Student Loans Service Centre, which administers parts of the financial assistance programs on behalf of Canada, SLCNL, New Brunswick, Ontario, Saskatchewan and BC.

"**New Brunswick**" means Her Majesty the Queen in Right of New Brunswick, as represented by the Minister of Post-Secondary Education, Training and Labour.

"**Ontario**" means Her Majesty the Queen in Right of Ontario, as represented by the Minister of Training, Colleges and Universities.

"**Prime**" with respect to a rate of interest, means the average variable reference rate of interest as calculated monthly, based upon the average variable reference rates of interest for a month, by each of the Bank of Montreal, the Bank of Nova Scotia, the Canadian Imperial Bank of Commerce, the Royal Bank of Canada and the Toronto Dominion Bank (now TD Canada Trust) as their rate for Canadian dollar consumer demand loans, and calculated without reference to the highest and the lowest of those five rates by averaging the remaining three rates.

"**Saskatchewan**" means Her Majesty the Queen in Right of the Province of Saskatchewan as represented by the Minister of Advanced Education.

"**SLCNL**" means the Student Loan Corporation of Newfoundland and Labrador.

TERMS AND CONDITIONS IF YOU HAVE A MASTER STUDENT FINANCIAL ASSISTANCE AGREEMENT (MSFAA)

1. This section applies to you if you have entered into a MSFAA with Canada, SLCNL, New Brunswick, Ontario, Saskatchewan or BC.
2. This agreement operates in accordance with your most recently negotiated MSFAA, which remains in force notwithstanding your entry into this agreement, and the Summary of Repayment Details portion of this agreement operates to summarize or alter your repayment terms.

NOTICE FOR INDIVIDUALS WITH CANADA-NEW BRUNSWICK INTEGRATED STUDENT LOANS

Your benefits and obligations for repayment of the New Brunswick portion of your Canada-New Brunswick Integrated Student Loan will be solely determined by your Provincial Loan Agreement and the Student Financial Assistance Act and Regulations that apply to it, which should be referred to in case of uncertainty or dispute regarding your rights and obligations.

NOTICE FOR INDIVIDUALS WITH CANADA-SASKATCHEWAN INTEGRATED STUDENT LOANS

Your benefits and obligations for repayment of the Saskatchewan portion of your Canada-Saskatchewan Integrated Student Loan will be solely determined by either your Master Student Financial Assistance Agreement or your Provincial Loan Agreement and the Saskatchewan act and regulations that apply to it, which should be referred to in case of uncertainty or dispute regarding your rights and obligations.

TERMS AND CONDITIONS FOR THE NEWFOUNDLAND AND LABRADOR PORTION OF CANADA-NEWFOUNDLAND AND LABRADOR INTEGRATED STUDENT LOANS

1. "MSFAA" means Master Student Financial Assistance Agreement for Canada and Newfoundland and Labrador.
2. If you entered into a MSFAA with SLCNL this agreement sets terms for repayment for your SLCNL student loan(s). If you entered into a Canada-Newfoundland and Labrador Integrated Student Loan Agreement with SLCNL prior to August 1, 2012 but did not enter into a MSFAA with SLCNL after July 31, 2012 this agreement consolidates the SLCNL student loan(s) made to you and replaces any previous consolidated loan agreement entered into with SLCNL that set out repayment terms for your SLCNL student loans(s).
3. Your benefits and obligations for repayment of your SLCNL student loan(s) (the Newfoundland and Labrador portion of your MSFAA or Canada-NL Integrated Loan Agreement) will be solely determined by your Provincial Loan Agreement and the NL Student Financial Assistance Act and Regulations that apply to it, which should be referred to in case of uncertainty or dispute regarding your rights and obligations.
4. All Payments received from you on a MSFAA or a Canada-NL Integrated Loan shall be allocated to Canada and SLCNL loan balances in accordance with the administrative integration agreement between Canada and Newfoundland and Labrador. Any payment may be applied first to NSF fees, then to interest, then to principal. Neither the Canada Student Loan portion nor the SLCNL portion may be paid in full without paying the total balance of both portions, except when an allocated payment is payment in full of one portion.

TERMS AND CONDITIONS FOR THE ONTARIO PORTION OF CANADA-ONTARIO INTEGRATED STUDENT LOANS

Whereas the Ontario portion of your Canada-Ontario Student Loans ("OSLs") have been made to you, the borrower, pursuant to the *Ministry of Training, Colleges and Universities Act* ("the *Provincial Act*") and the Regulations ("the *Provincial Regulations*") made thereunder, both as amended from time to time, you agree as follows:

1. This agreement consolidates the OSLs made to you by the Ontario Student Loan Trust ("the Lender") which loans are guaranteed by Ontario in accordance with the *Provincial Act and Regulations* and it replaces any previous Consolidated Student Loan Agreement entered into by you with the Lender and Ontario. Nothing in this agreement affects your rights, duties and obligations set out in your Loan Agreements with the Lender and Ontario. If there is any uncertainty, dispute or conflict between the terms and conditions of this agreement and the *Provincial Act and Regulations*, the *Provincial Act and Regulations* shall prevail.
2. During the six months after the month in which you ceased to be a full-time student (the 6-month period), no interest is charged on the Ontario portion of Integrated Student Loans during the 6-month period.
3. You agree to pay to the NSLSC the outstanding principal with interest in accordance with the terms in the Summary of Repayment Details portion of this agreement.
4. Each installment paid shall be applied first to interest accrued to the date of the payment and then to the outstanding principal.
5. Your liability under this agreement shall be discharged upon payment in full of the principal balance of this agreement and all interest accrued at the rate(s) stated less any reduction to the principal and/or interest after receiving an Ontario Student Opportunity Grant ("OSOG") or any other debt reduction or interest-relief program made pursuant to the *Provincial Act and Regulations.*
6. The OSOG will not be paid until all income reported on your OSAP application has been verified with the Canada Revenue Agency. All information, including income, that you provided on your application is subject to further verification and audit by Ontario. If it is found through this verification and audit process, that you are not entitled to all or a portion of your OSLs, you will repay to Ontario, all or a portion of the OSLs that was reduced by the OSOG.
7. If the total OSOG is greater than the principal amount owing under this agreement, Ontario may require you to pay the difference to the Ontario Minister of Finance.
8. If you are in default in respect to your obligation to repay your OSLs, the loans are due and payable in accordance with the *Provincial Act and Regulations*.
9. If you are in default of your OSLs and Ontario pays the Lender the amount of loss sustained by the Lender, Ontario is subrogated in and to the rights of the Lender in respect of the OSLs. Upon subrogation, the loan constitutes a debt to the Crown.
10. If you become a full-time student following the date of this agreement and comply with the *Provincial Regulations* pertaining to the reinstatement of status as a full-time student, your obligations under this agreement with respect to principal and interest shall be suspended in accordance with, and for the applicable period specified in the *Provincial Regulations*. [For more information, see the Student Loan Repayment Notice.]
11. You may, at any time within the period of this agreement, repay all or part of the principal balance of the loan that you are obligated to pay under this agreement, together with any interest accrued to date of such payment without notice or penalty. You may also vary monthly payments if the change has been approved by the NSLSC on behalf of the Lender, for OSLs.
12. Failure to fulfill your obligations under this agreement may impact your credit rating and/or may prevent you from receiving further financial assistance. If you are unable to make a payment for any reason, you must contact the NSLSC immediately.
13. You authorize the NSLSC and Ontario to disclose to and obtain from consumer creditors, credit bureaus or credit reporting agencies all particulars and information relevant to collecting on your loan.
14. You agree to notify the NSLSC promptly of any changes in your name or address. If you fail to make a payment on your OSLs required pursuant to this agreement, you authorize any designated educational institution you have attended, Ontario, or any employer to release to the NSLSC and/or Ontario or its agents, whatever information they need to locate you.
15. Canada and Ontario may exchange information obtained from any source with each other and with any of: financial institutions, the NSLSC, any designated educational institution you have attended and previous lenders holding your Ontario Student Loans issued prior to August 1, if any, but solely for the purposes of the administration or enforcement of the Provincial Acts and Regulations.

NOTICE OF USES OF PERSONAL INFORMATION (OSLS)

Ontario uses relevant personal and tax information, including your Social Insurance Number, to administer the Ontario Student Assistance Program (OSAP), including Aiming for the Top Tuition Scholarships. This includes determining eligibility; verifying the application, any loans approved, grants, bursaries or scholarships issued and loans forgiven; maintaining and auditing your file; and collecting loans, overpayments, and repayments. Ontario collects and uses this information under the authority of the *Ministry of Training, Colleges and Universities Act*, R.S.O. 1990, c. M.19, as amended, and R.R.O. 1990, Reg. 774 and Reg. 775, as amended, and O. Reg. 268/01; the *Financial Administration Act*, R.S.O. 1990, c. F. 12, as amended; the *Canada Student Financial Assistance Act*, S.C. 1994, c. 28, as amended; and, the *Canada Student Financial Assistance Regulations,* SOR 95-329, as amended. If you have any questions about the collection or use of this information, contact the Director, Student Financial Assistance Branch, Ministry of Training, Colleges and Universities, PO Box 4500, Thunder Bay ON P7B 6G9.

E&OE

ADDITIONAL TERMS AND CONDITIONS

TERMS AND CONDITIONS APPLICABLE FOR BRITISH COLUMBIA STUDENT LOANS

If you entered into a loan agreement, other than a MSFAA, with BC as a condition of receiving the BC portion of your Canada-BC Integrated Student Loan ("BCSL"), (which loan agreement, as amended from time to time, is called the "BCSLA"), you agree as follows:

1. In this agreement:
   (i) "authorized agent" has the meaning set out in section 3 below;
   (ii) "BC Collection Agent" means any contracted party or its subcontractor(s) or agent(s) acting on behalf of BC in collecting BC student loans;
   (iii) "BCSAP" means the British Columbia Student Assistance Program, as modified from time to time, the requirements of which are posted at www.studentaidbc.ca;
   (iv) "previous Consolidated Loan Agreement" means an agreement that you entered into with BC pursuant to or in conjunction with your BCSLA that set out the repayment details for your BCSL;
   (v) "Prime" when used in the Summary of Repayment Details portion of this agreement applicable to your BCSL has the meaning set out in the definition of Prime in the Definitions section above.
2. This agreement operates in conjunction with your BCSLA as follows. This agreement rescinds and replaces any previous Consolidated Loan Agreement. The Summary of Repayment Details portion of this agreement applicable to your BCSL operates to set out the repayment details for your BCSL. The provisions of your BCSLA that are not inconsistent with this agreement apply to your BCSL. In the event of any inconsistency between the provisions of this agreement and your BCSLA, a provision in this agreement will prevail over any inconsistent provision in your BCSLA to the extent required to resolve the inconsistency.
3. Parts of the BCSAP are administered on behalf of BC by its authorized agent. Canada, acting through the NSLSC, is the authorized agent of BC.
4. Unless you pay the interest that accrued pursuant to your BCSLA during the six months after the month in which you ceased to be a full-time student, that interest (the "capitalized interest") will be included in the principal balance of your BCSL.
5. Interest calculated in accordance with the terms in the Summary of Repayment Details portion of this agreement applicable to your BCSL will accrue on the principal balance of your BCSL (the principal plus any capitalized interest).
6. You agree to pay to BC the outstanding principal balance of your BCSL with interest in accordance with the terms in the Summary of Repayment Details portion of this agreement applicable to your BCSL.
7. In addition to any authorization(s) for collection, use, exchange or disclosure of information provided by you in your BCSLA, you authorize as follows:
   (i) For the purposes of administering your BCSL and enforcing your obligations under this agreement, and administering the BCSAP, you authorize BC, the authorized agent, any BC Collection Agent, and any of their respective contractors or agents, to collect, use, exchange and disclose all particulars and information, including personal information, relevant to your BCSL with each other and with: financial institutions, lenders, educational institutions, employers, credit bureaus, credit reporting agencies, other financial aid offices, Native Bands, federal and provincial Crown corporations and federal, provincial and municipal ministries/departments/agencies, including the BC Ministry of Social Development, the BC Ministry of Children and Family Development, the BC Ministry of Health, the BC Ministry of Attorney General, the BC Ministry of Finance, the BC Ministry of Advanced Education, the BC Ministry of Education, BC Office of the Superintendent of Motor Vehicles, Insurance Corporation for British Columbia, BC Assessment Authority, Land Title and Survey Authority of BC, WorkSafe BC, BC Vital Statistics Agency, Office of the Superintendent of Bankruptcy Canada, Human Resources and Skills Development Canada, Canada Revenue Agency and Citizenship and Immigration Canada; and
   (ii) You authorize any of your current, past or future employers, the Canada Revenue Agency, your financial institution(s) and the Ministry of Social Development to release to BC, the authorized agent, any BC Collection Agent, or their respective contractors or agents, information to locate you including your name, SIN, date of birth, banking information, permanent and alternate address, telephone number, employer and educational institution address for the purpose of enforcing your obligations pursuant to this agreement.
8. At any time, BC may amend this agreement. You should review the terms and conditions of this agreement at: www.studentaidbc.ca.

TERMS AND CONDITIONS IF YOU HAVE DIRECT LOANS MADE BY CANADA

Whereas Direct Loans have been made to you pursuant to the *CSFAA*, you agree as follows:

1. In this agreement:
   (i) "Appropriate Authority" means an appropriate authority designated for the province pursuant to section 3.1 of the *CSFAA*;
   (ii) "*CSFAA*" means the *Canada Student Financial Assistance Act* and the *Canada Student Financial Assistance Regulations*, as in effect at any given time;
   (iii) "*CSLA*" means the *Canada Student Loans Act* and the *Canada Student Loans Regulations*, as in effect at any given time;
   (iv) "Direct Loan" means any loan made by Canada under section 6.1 of the *CSFAA* on or after August 1, 2000;
   (v) "Financial Assistance" means Direct Loans and any other form of financial assistance provided under the *CSFAA,* directly or indirectly to you;
   (vi) "Student Loan" means any loan made to you by a lender under the *CSFAA* or *CSLA*, prior to August 1, 2000.
2. This agreement consolidates your Direct Loans, it does not consolidate any previous Student Loans that you may have.
3. Unless you enter into an agreement to alter payment terms, you agree to pay to Canada the principal balance together with all interest in accordance with these terms and conditions and the payment terms in the Summary of Repayment Details portion of this agreement. The *CSFAA* should be referred to in case of uncertainty or dispute regarding your legal rights and obligations.
4. Payment amounts may be applied first to interest and then to principal.
5. Unless you pay the capitalized interest under the Summary of Repayment Details, if applicable, that interest will be added to your principal balance.
6. You may pay all or any part of the principal balance and all interest accrued at any time without notice, penalty or bonus.
7. If the Prime rate changes significantly and you have chosen a floating rate of interest it may result in: (1) your principal balance being paid in full early; (2) the lengthening of your amortization period to (to a maximum fourteen and one-half (14.5) years); or (3) you being required to pay a final lump sum payment.
8. Your liability under this agreement shall be discharged upon payment in full of the principal balance of this agreement and all interest accrued at the rate(s) stated.
9. Subject to any right of set-off, if you have overpaid $10 or more than your principal balance, you will be issued a refund. Refunds of less than $10 will only be issued on your request.
10. If you become a full-time student pursuant to the *CSFAA*, your obligations under this agreement will be suspended for the applicable period of study or this agreement will be terminated upon your entering into a new agreement with Canada.
11. You confirm that, to the best of your knowledge, all information that you have disclosed relating to any Direct Loans or Student Loans is accurate and complete.
12. You agree to promptly notify Canada of any change to your personal information.
13. You acknowledge that Canada, and any of its contractors or agents, may collect, use, and retain your personal information directly from you, or indirectly from a third party. Your personal information will only be used for the purpose of administering your Financial Assistance under this agreement, and administering and enforcing the *CSFAA* or *CSLA*. Your personal information may be exchanged with and disclosed to the Appropriate Authority, financial institutions, lenders, educational institutions, employers, credit bureaus and Canada Revenue Agency. The collection, use, exchange and disclosure will be undertaken as required and in compliance with the *Privacy Act*, and Part 4 of the *Department of Human Resources and Skills Development Act*. Where your consent is required by law to permit the direct or indirect collection, retention, use or disclosure of personal information, by your signature on this agreement, you provide your consent.
14. You authorize any of your current, past or future employers to release to Canada or its contractors or agents information to locate you including your name, SIN, date of birth, banking information, permanent and alternate address, telephone number, employer, and educational institution address for the purpose of enforcing your obligations pursuant to this agreement.
15. Failure to fulfill your obligations under this agreement may prevent you from receiving further Financial Assistance or you being required to pay all or a part of your Direct Loans or Student Loans and accrued interest, all as specified under the *CSFAA*.
16. All your rights and obligations under this agreement in respect of your principal balance will terminate upon your death.
17. Any provision that becomes void or unenforceable will be severed from this agreement, and the validity and enforceability of all other provisions will not be affected.

NOTICE OF COLLECTION OF PERSONAL INFORMATION

The personal information is collected and used for the administration of the Canada Student Loans Program (CSLP) under the authority of the *CSFAA* and the *CSLA*, and in accordance with the *Privacy Act* and Part 4 of *The Department of Human Resources and Skills Development Act*.

Administration and enforcement of the CSLP means development and operation of the program, including investigations into allegations of wrongdoing, audits, and policy analysis, research and evaluation. These activities may involve the matching of various sources of data that are under control of the Government of Canada

The Social Insurance Number (SIN) is collected by the Minister of Human Resources and Skills Development under the express authority of the *CSFAA* and in accordance with the Treasury Board Secretariat Directive on Privacy Protection regarding use of the SIN. The SIN will be used for the administration of the CSLP under the *CSFAA*. The SIN will be used as a file identifier and, along with the other information you provide, will also be used to validate your application, and to administer and enforce the CSLP. You must provide your SIN and the other personal information requested on this form to be considered for the CSLP.

You have the right to the protection of and access to your personal information. It will be retained in Personal Information Bank HRSDC PPU 030. Instructions for obtaining this information are outlined in the government publication entitled Info Source, which is available at the following website address: http://www.infosource.gc.ca. Info Source may also be accessed on-line at any Service Canada Centre.

FAMILY LAW UPDATE

Provincial Training Conference for Legal Advocates

06 October 2015, Richmond, B.C.

Assunta De Ciantis

Lawyer Mediator Arbitrator

ACKNOWLEDGEMENT TO JP BOYD

- This format and the majority of theses slides were prepared by JP Boyd for last year's conference.
- I have updated case law;
- made some other changes; and
- added some final comments from recent personal experience

- ****Please note that I do not know how to remove the logo at the bottom right*****

IMPORTANT CASES

- http://www.crilf.ca/Documents/Essential%20FLA%20-%20May%202015.pdf

Underdevelopments in the case law

- Parentage and parentage when assisted reproduction is involved
- Children's property
- Child support, spousal support
- Extraprovincial family property
- Family debt
- Impact of WESA on division of property :
- http://disinherited.com/category/family-law/

CHANGE WITHIN THE BAR?????

- Has the rush to training (mediator; parenting coordinator; arbitrator) been effective?
- Cost?
- Access?

UNSOLVED MYSTERIES

- Who is a guardian when the child's parents never lived together
- Whether guardianship status survives when a pre-FLA order or agreement gives a parent sole custody but is silent on guardianship
- Whether the effect of the one remaining triggering event gives a property interest that survives the two-year limit

Changes to the *Family Law Act* and the rules of court

Amendments

BC LAWS

- http://bclaws.ca/civix/document/id/complete/statreg/e3tlc11025

Provincial Court Family Rules

- Registry to draft Protection Orders
- Affidavits required in applications for guardianship (*** FLA says Affidavit for non-parent guardian*)
- Family Justice Counsellors' reports as to result of court-ordered mediation

Protection orders

- In both BCPC and BCSC the official rules have not been amended, but the practice has:
- The Registry now drafts PO's
- Difference b/n PO and Conduct Orders

Applications for guardianship

- **Rule 18.1**: rules about required attachments (criminal records check, child protection check and protection order records check) somewhat tightened
- Applications when order already exists

http://www.provincialcourt.bc.ca/downloads/Practice%20Directions/FAM%2005%20Guardianship%20Applications%20When%20There%20Is%20An%20Existing%20Order.pdf

Part 1

Interpretation

“Family violence”, s. 1

- Demeaning remarks, blaming parent to a child qualify *D.N.L. v C.N.S.*, 2014 BCSC 1417
- Derogatory outbursts, demeaning comments qualify *D.N.L. v C.N.S.*, 2013 BCSC 809
- Threats, de minimus physical contact qualify *K.L.L. v D.J.*, 2014 BCPC 85
- Court should take a broad view of what is and is not family violence *M.W.B. v A.R.B.*, 2013 BCSC 885

“Family violence”, s. 1

- Litigation abuse, failure to cooperate qualify *M.W.B. v A.R.B.*, 2013 BCSC 885
- Behaviour causing financial hardship and stress, threats to cause financial hardship qualify *Hokhold v Gerbrandt*, 2014 BCSC 1875
- Deliberate failure to pay child support intended to inflict emotional harm or control behaviour qualifies *J.C.P. v J.B.*, 2013 BCPC 297; *S.N. v E.C.*, 2014 BCPC 82

“Spouse”, s. 3

- Someone separating within two years of FLA is a spouse *Meservy v Field*, 2013 BCSC 2378
- Parties living together for less than two years but have a child are spouses, even if separated before FLA *C.A.M. v M.D.Q.*, 2014 BCPC 110
- Merely living together doesn’t mean a relationship is marriage-like *Matteucci v Greenberg*, 2014 BCSC 1434; *Trudeau v Panter*, 2013 BCSC 706

Part 2

Resolving family law disputes

Duty to disclose, s. 5

- Intended to encourage earlier disclosure, imposes a duty to disclose at the outset *J.D.G. v J.J.V.*, 2013 BCSC 1274
- Imposes mandatory obligation to provide full and true information *J.C.P. v J.B.*, 2013 BCPC 297
- Don’t forget about s. 213!

Parenting coordination, ss. 14 - 19

- Legislation intended to give PCs adjudicative powers require to role; PC intended to be cost-effective, should be cheaper than litigation; legislation intended to create alternative process to litigation; court should be reluctant to terminate PC agreement for minor or technical problem *M.J.H. v C.D.S.*, 2013 BCSC 2232

Parenting coordination, ss. 14 - 19

- May be appointed when future disagreements are foreseeable *Rashtian v Barghoush*, 2013 BCSC 994
- "Considerable conflict" suggests appointment *J.C.P. v J.B.*, 2013 BCPC 297
- "Inability to achieve rational compromise " suggests appointment *R.M. v N.M.*, 2014 BCSC 1755

Parenting coordination, ss. 14 - 19

- If no ambiguity in parenting order, shouldn't be appointed *McBeth v Lakey*, 2014 BCSC 735

No case law

- Duties of family dispute resolution professionals, s. 8
- Duties of parties, s. 9
- Confidentiality of information, s. 11

NEW KID ON THE BLOCK

- MED/ARB

Part 3

Determining parentage

No case law

- Void and voidable marriages, s. 21
- Donor not automatically parent, s. 24
- Parentage without assisted reproduction, s. 26
- Parentage with assisted reproduction, s. 27
- Parentage with surrogacy, s. 29
- Declarations of parentage, s. 31

Part 4

Parenting

Best interests, s. 37

- Best interests are only consideration *Hadjioannou v Hadjioannou*, 2013 BCSC 1682; *S.J.F. v R.M.N.*, 2013 BCSC 1812
- Each of the s-s. (2) factors must be separately considered but "in the end the evidence has to be considered as a whole" *M.W.B. v A.R.B.*, 2013 BCSC 885
- Assessment of impact of family violence is mandatory *J.C.P. v J.B.*, 2013 BCPC 297

Impact of family violence, s. 38

- Analysis requires consideration of each factor
  N.C.R. v K.D.C., 2014 BCPC 9
- Expert evidence may assist court's analysis
  Keith v MacMillan, 2014 BCSC 1352

Guardianship, s. 39

- Cannot apply for an order of "sole guardianship," must apply for removal *S.T.H. v R.M.G.*, 2013 BCPC 114
- Court needn't make an order declaring someone who is a guardian by definition to be a guardian, court simply acknowledges the fact *K.L.L. v D.J.*, 2015 BCPC 85
- However some judges "appoint" *M.J.A. v R.D.A.*, 2014 BCSC 1222

“Applying” for guardianship, s. 39

- PCFR do not distinguish between someone seeking order under ss. 39(3) or 51(1), guardianship application affidavit required in both cases (doubtful) *M.C. v D.C.*, 2013 PCPC 212

Guardianship, s. 39

- Others make declarations confirming status as guardians *T.T. v J.M.H.*, 2014 BCSC 451
- Others just simply say that parents "are" guardians *K.B. v A.S.R.*, 2014 BCSC 1642

DISCUSSION ON GUARDIANSHIP

- JP Boyd's 29 September 2015 blog entry
- Cannot apply for ''sole guardianship'', must apply to have ''guardian removed''
- Can remove guardianship only in egregious cases: 2013 BCPC 135 and 2013 BCPC 114
- PC cases affirmed by SCBC:

Parenting arrangements, s. 40

- No presumptions in favour of a parent that predetermine child's best interests *M.W.B. v A.R.B.*, 2013 BCSC 885
- No presumptions of equal time *Henderson v Bal*, 2014 BCSC 1347
- Person who is not guardian cannot have parental responsibilities, only contact *C.L.T. v S.L.R.*, 2014 BCPC 131; *M.A.G. v P.L.M.*, 2014 BCSC 126

Parenting arrangements, s. 40

- "Exclusive rights over all of the parenting arrangements," without necessity of consultation, may be ordered *J.D.S. v D.Y.C.P.*, 2014 BCSC 1577
- Court may also simply order joint exercise per s. 40(2) *Shier v Shier*, 2014 BCSC 998
- Court may conclude necessity of consultation is unreasonable and may assign responsibilities as best suits child's best interests *S.T.H. v. R.M.G.*, 2013 BCPC 114

Parenting arrangements, s. 40

- Court may give views of primary caregiver more weight as they are more familiar which child's needs, but must not be presumed *K.L.G. v D.J.T.*, 2013 BCSC 1684

Parental responsibilities, s. 41

- Court may order that some be shared and some not *C.A.J. v N.J.*, 2014 BCSC 279; *M.S. v G.S.*, 2013 BCSC 1744
- Court may assign primary care to one parent, with sharing of rest *McCaw v Hawkey*, 2014 BCSC 765
- Court may order "equal parental responsibilities" *Wafa v Faizi*, 2014 BCSC 1760

Parental responsibilities, s. 41

- Court may impose terms on sharing of parental responsibilities similar to Joyce and Horn models *J.L. v L.D.*, 2013 BCPC 201; *Van Koten v More*, 2013 BCSC 1076
- Court may require sharing but give one parent right to decide in the event of impasse with no other terms *L.A.R. v E.J.R.*, 2014 BCSC 966
- Court may assign all to one guardian *K.M.M. v D.R.M.*, 2014 BCSC 569

Parenting time, s. 42

- Guardian has parental responsibility of day-to-day decision making and care and control of child during parenting time *A.B.Z. v A.L.F.A.*, 2014 BCSC 1453
- Court may order that this parental responsibility be vested solely in a guardian during his or her parenting time *K.B. v A.S.R.*, 2014 BCSC 1643

Assignment of responsibilities, s. 43

- Court may “authorize” non-guardian to exercise parental responsibilities (doubtful)
  J.L. v L.D., 2013 BCPC 201

Agreements on parenting, s. 44

- Agreement filed in court can be enforced as court order, and breach of agreement is breach of order and can be punished as contempt (doubtful) *A.T. v J.T.*, 2014 BCSC 1874
- Unclear whether someone who is not guardian can use this section to enforce right of contact *T.C. v S.C.*, 2013 BCPC 217

Orders on parenting, s. 45

- Application for parenting time by person applying for guardianship is contingent on outcome of guardianship application *S.J.F. v R.M.N.*, 2014 BCSC 1812
- If application for parenting time is brought in context of plan to change residence, s. 46 applies *S.J.F. v R.M.N.*, 2014 BCSC 1812
- Only consideration is best interests per s. 37 *S.J.F. v R.M.N.*, 2014 BCSC 1812

Relocation if no order, s. 46

- Section applies to initial application for parenting arrangements when guardian indicates an intention to change child's residence *S.J.F. v R.M.N.*, 2013 BCSC 1812
- If existing order is for contact only, there is no order on "parenting arrangements" and s. 46 applies *S.J.F. v R.M.N.*, 2013 BCSC 1812
- Doesn't apply if guardian has already moved *De Jong v Gardner*, 2013 BCSC 1303

Relocation if no order, s. 46

- **Test**: determine the parenting arrangements in the best interest of the children, based on each of s. 37(2) factors, plus the reasons for the change of residence; cannot consider whether guardian would move without child *S.J.F. v R.M.N.*, 2013 BCSC 1812
- Relocation test under s. 69 "involves a more nuanced approach" *A.J.D. v E.A.E.*, 2013 BCSC 2160

Changing orders, s. 47

- **Test**: change of circumstance threshold from *Gordon v Goertz* applies, "change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way" *Gilmour v Herrick*, 2013 BCSC 1591

Changing orders, s. 47

- Applicant bears burden of proving change in needs or circumstances of child *M.R. v L.J.*, 2014 BCPC 39
- Intervention of MCFD, child's election not to see a parent qualify *J.L. v L.D.*, 2013 BCPC 201
- Taking child out of school, mental health issues, family violence qualify *T.D. v E.D.*, 2013 BCPC 135

Changing orders, s. 47

- Moves within province where parents already lived far apart don't qualify *McNaught v Friedman*, 2013 BCSC 1836
- Breach of court order, parent's discussion of adult issues with children, parent obtaining live-in caretaker may not qualify *D.J.S. v J.M.D.*, 2013 BCSC 2301
- Change in applicant's financial circumstances doesn't qualify *M.R. v L.J.*, 2014 BCPC 39

Informal arrangements, s. 48

- Presumption against unilateral change not against relocation, but against change without consultation *L.J.P. v D.L.B.*, 2014 BCPC 104

Appointing guardians, s. 51

- Requirements of s. 51 and rules of court on guardianship applications are mandatory
  L.A.M.G. v C.S., 2014 BCPC 172
- Interim order may be made to provide person with standing of guardian for purposes of an application if in the best interests of child and in the interest of the administration of justice
  T.C. v S.C., 2013 BCPC 217

Terminating guardianship, s. 51

- Should only occur in "most extreme situations" *D. v D.*, 2013 BCPC 135
- **Test**: first see whether with redistribution of parental responsibilities it remains in child's interest that person remain a guardian; person ceasing to be guardian loses all parenting responsibilities and rights *D. v D.*, 2013 BCPC 135

Terminating guardianship, s. 51

- "By allocating or reallocating parenting responsibilities to a more capable parent as opposed to terminating guardianship, a child may safely retain the benefit of having a parent remain a significant part of his or her life" *M.A.G. v P.L.M.*, 2014 BCSC 126
- Good summary case: *J.W.K. v E.K.*, 2014 BCSC 1635

Orders for contact, s. 59

- Person who is not guardian may only have contact *C.L.T. v S.L.R.*, 2014 BCPC 131; *S.J.F. v R.M.N.*, 2013 BCSC 1812
- Supervision should be ordered when necessary for best interests of child and not to serve another purpose; long-term supervision orders are discouraged; test is s. 37(2) factors *L.A.M.G. v C.S.*, 2014 BCPC 172

Denial of time or contact, s. 61

- Applicant must prove denial wrongful *Shaw v Shaw*, 2014 BCSC 984
- Court should not consider evidence of incidents beyond 12 month limit *Shaw v Shaw*, 2014 BCSC 984
- Court cannot impose prospective sanctions in anticipation of future breach *S.G. v M.G.*, 2014 BCPC 6; *D.J.S. v J.M.D.*, 2014 BCSC 1143

Denial of time or contact, s. 61

- Compensable expenses may include loss of income, increased living costs, travel costs, but applicant must prove expenses claimed to have been incurred *L.S. v G.S.*, 2014 BCSC 187

Denial of time or contact, s. 61

- "Missed parenting time should be assessed on a qualitative rather than a quantitative basis. Access days should not be totted up and traded back and forth like poker chips." *K.L.K. v E.J.G.K.*, 2013 BCSC 2030
- Applicant must prove children missed a special event or activity, should provide plan or schedule for make up time *K.L.K. v E.J.G.K.*, 2013 BCSC 2030

Permissible denial, s. 62

- Belief justifying withholding of parenting time or contact must be held at time of withholding, not established after the fact *D.N.L. v C.N.S.*, 2014 BCSC 1417
- Attempted use of force to compel child to go may justify withholding on basis of family violence *D.N.L. v C.N.S.*, 2014 BCSC 1417

Application of Division 6, s. 65

- Not intended to apply to interim applications *S.J.F. v. R.M.N.*, 2013 BCSC 1812; *A.J.D. v E.A.E.*, 2013 BCSC 2160
- Applies to separation agreements *S.B. v N.L.*, 2013 BCPC 233
- Non-guardian parent may have "standing" under s. 65 if has a "significant role" in child's life (doubtful) *C.V.G. v M.A.L.*, 2014 BCPC 214

Application of Division 6, s. 65

- Focus is on children's relationships and impact of relocation on those relationships; "to qualify as a relocation, the impact must be significant," move within a municipality not significant *Berry v Berry*, 2013 BCSC 1095

Notice of relocation, s. 66

- Degree of proof of delivery varies depending on severity of repercussions of missing 30 day time limit *S.B. v N.L.*, 2013 BCPC 233

Notice of relocation, s. 66

- Notice can be provided by letter from lawyer *S.B. v N.L.*, 2013 BCPC 233; *Klyne v Gardner*, 2014 BCSC 1332
- … by letter from guardian *S.N. v E.C.*, 2014 BCPC 82
- … by notice of motion *Hokhold v Gerbrandt*, 2014 BCSC 1875

Objection to relocation, s. 68

- Only a guardian has standing to object to relocation *S.J.F. v R.M.M.*, 2013 BCSC 1812
- Court may prohibit relocation despite expiry of 30 day period, court should consider length of delay in filing objection, reasonableness of explanation for late filing, prejudice to moving guardian if hearing allowed; prejudice relates to date of move and planning already undertaken *S.B. v N.L.*, 2013 BCPC 233

Relocation, s. 69

- **Test**: reasonableness of arrangements proposed depends on location; good faith factors are subjective, objective or both, and must be considered in light of the facts; best interests require analysis of each s. 37(2) factor *L.J.R. v S.W.R.*, 2013 BCSC 1344

1. **Is the party objecting to the move a guardian?** If yes, continue. If no, the party lacks standing unless appointed as a guardian of the child.
2. **Is there a written agreement or a court order respecting parenting arrangements in place?** If yes, proceed under s. 69. If no, proceed under s. 46. Remember that it is immaterial whether the agreement or order is interim or final in nature.
3. Assuming you are proceeding under s. 69, **does the objecting guardian have substantially equal parenting time with the moving guardian?** If yes, apply the test under s. 69(5). If no, apply the test under s. 69(4).
4. **Has the moving guardian proposed reasonable arrangements to continue the child's relationship with other guardians and persons with contact?** If yes, continue to the issue of good faith. If no, the application must be rejected. Remember that the reasonableness of the proposed arrangements depends on the proposed destination.
5. **Does the moving guardian seek to move in good faith?** If yes, continue to the issue of the best interests of the child. If no, the application must be rejected. Remember that the determination of good faith may require an assessment of each of the factors set out in s. 69(6) and that these factors may entail both subjective elements concerning the guardian's intentions and objective elements concerning the facts of the case.
6. **Is the proposed move in the best interests of the child?** If yes, the move should be allowed. If no, the application must be rejected. Remember that the determination of the child's best interests requires an assessment of each of the factors set out in s. 37(2)

Relocation, s. 69

- **Test**: good faith requires proof that not moving for improper reasons and that move will enhance child's or guardian's quality of life; reasonable arrangements means preserving child's relationship with guardian, not augmenting or enhancing; best interests require analysis of each s. 37(2) factor *T.C. v S.C.*, 2013 BCPC 217

If relocation is permitted, s. 70

- Purpose of s. 70 is to preserve existing arrangements “to the extent that is reasonably possible” if relocation permitted, not to “fundamentally change the parenting arrangements” *J.P. v J.B.*, 2013 BCPC 168

No case law

- Referral of questions to court, s. 49
- Agreements on guardianship, s. 50
- Appointment of testamentary guardian, s. 53
- Appointment of standby guardian, s. 55
- Agreements for contact, s. 58
- Changing orders for contact, s. 60
- Failure to exercise time or contact, s. 63

No case law

- Non-removal orders, s. 64
- Order prohibiting relocation is not a change in circumstances, s. 71

Part 5, selected bits

Interim orders about property

Interim distribution, s. 89

- Applicant must detail anticipated expenses and explain why they cannot be met from earnings or funds from other sources *L.L.J. v E.J.*, 2013 BCSC 1233
- Cash advanced to fund litigation where parties have disparity in income and "proceed toward and into trial in very unequal circumstances" *M.A.L. v N.A.L.*, 2014 BCSC 203

Exclusive occupancy, s. 90

- Applicant must show that shared use of home is a "practical impossibility" and that he or she should be preferred occupant on balance of convenience, applying FRA case law *Ferguson v Ferguson,* 2014 BCSC 216; *Bateman v Bateman*, 2013 BCSC 2026
- Conclusion that family violence has occurred will influence decision given FLA's emphasis *J.R.E. v. 07----8 B.C. Ltd*, 2013 BCSC 20138

No case law

- Protection of property, s. 91

Part 8

Child support and spousal support

“Child”, s. 146

- FLA does not change law on whether adult child remains a child for support purposes
  D.M.P. v G.E.A., 2013 BCPC 117

Duty to provide child support, s. 147

- All parents and qualifying guardians have a duty to pay support *D.Z.M. v S.M.*, 2014 BCPC 198
- Qualifying stepparents have a duty to pay support *C.L.P. v N.D.*, 2014 BCPC 154
- Old case law from FRA and CSG s. 5 on stepparents applies *Henderson v Bal*, 2014 BCSC 1347

Duty to provide child support, s. 147

- Amount of stepparent's obligation is determined under CSG s. 5 along with new FLA factors of length of relationship and standard of living *C.L.P. v N.D.*, 2014 BCPC 154
- May result in stepparent paying no child support *C.L.P. v N.D.*, 2014 BCPC 154
- May result in stepparent paying full amount *S.S. v P.W.*, 2014 BCPC 177

Duty to provide child support, s. 147

- May result support obligation terminating before stepchild reaches age of majority
  Bouzane v Martin, 2014 BCCC 1690

Duty to provide child support, s. 147

- Purpose is to ensure children have consistent and reasonable standards of living; primary responsibility lies on parents and if parents can adequately provide stepparents are exempt, if parents cannot provide stepparent may be ordered to contribute *C.B. v M.B.*, 2014 BCPC 75
- See also *U.V.H. v M.W.H.*, 2008 BCCA 177

Duty to provide child support, s. 147

- Removal of children by state is not voluntary withdrawal intended by FLA *D.Z.M. v S.M.*, 2014 BCPC 198
- Child's refusal to visit does not amount to voluntary withdrawal *Henderson v Bal*, 2014 BCSC 1347
- Child who is incarcerated for more than a year has voluntarily withdrawn *M.A. v F.A.*, 2013 BCSC 1077

Agreements on child support, s. 148

- Court may only replace part of agreement on child support prospectively, not retroactively; agreements between parents on support issues should be given "considerable weight" (doubtful) *R.M. v N.M.*, 2014 BCSC 1755
- Whether court would make a different order to be determined by applying the CSG *Young v Yong*, 2013 BCSC 1574

Orders on child support, s. 149

- Support from stepparents may only be ordered after stepparent and parent have separated *D.J. & K.J. v C.K. & T.K.*, 2013 BCPC 197; *C.L.L. v D.K.L.*, 2014 BCSC 1020

Amount of child support, s. 150

- Quantum of child support continues to be determined by CSG *Thibault v White*, 2014 BCSC 497
- CSG are unchanged by the FLA, and old law on child support under FRA continues to apply *S.M.L. v R.X.R.*, 2013 BCPC 123

Changing support orders, s. 152

- FLA makes it clear that child support orders can be changed retroactively *S.M.L. v R.X.R.*, 2013 BCPC 123
- Applicant must show that significant, long-lasting change occurred, that the change was real and not one of choice, and that every effort was made to earn money *K.B. v J.O.*, 2014 BCPC 212

Changing support orders, s. 152

- Test to retroactively reduce child support under s. 152 is different than test to cancel arrears under s. 174 because of "more stringent" gross unfairness *A.B.Z. v. A.L.F.A.*, 2014 BCSC 1453
- However, strong policy reasons to apply same standard to retroactive variation *P.L. v J.D.L.*, 2013 BCSC 1492

Spousal support, s. 160

- Court must first consider s. 161 objectives and consider the conditions, means and needs and other circumstances of the spouses under s. 162, analysis is a "balancing act" *Quaife v Quaife*, 2014 BCSC 1418
- A duty to pay support only exists where entitlement exists, taking into account the s. 161 objectives *S.S. v P.W.*, 2014 BCPC 177

Objective of support, s. 161

- Language of FLA is "substantially identical" to that employed in DA and "differs significantly" from that of FRA, courts should apply DA case law including *Moge*, *Bracklow*, *Chutter* and *Yemchuk* *Rathlou v Haylock*, 2014 BCPC 59
- Outcome will be the same whether under DA or FLA *Sinclair v Sinclair*, 2013 BCSC 2400

Determining support, s. 162

- The provisions of DA and FLA s. 162 “are so close” that “any difference is immaterial” *Hutchen v Hutchen*, 2014 BCSC 729

Spousal misconduct, s. 166

- Payor's failure to take meaningful steps toward employment and repeated applications to terminate support are arbitrary actions adversely affecting ability to pay support *Peterson v Lebovitz*, 2013 BCSC 651
- Cause of failure of relationship not a factor to be considered *Bateman v Bateman*, 2013 BCSC 2026

Changing support orders, s. 167

- Court must be satisfied that there has been a change in circumstances of a spouse, that new evidence has become available or that evidence of a lack of disclosure has been discovered, before changing or cancelling an order and must take that factor into consideration *M.K.M. v P.S.M.*, 2013 BCSC 579

Changing support orders, s. 167

- Test under FLA is that under DA, with addition of new FLA factors of new evidence and lack of disclosure *A.B.Z. v A.L.F.A.*, 2014 BCSC 1453

Binding estate with support, s. 170

- FLA makes it clear that ongoing support can be made binding on estate, overruling previous cases expressing doubt, however FLA requires court to peer into future and guess whether other obligations of payor's estate allow for ongoing payments; evidence must be provided of children's life expectancies, payor's estate and likely claims against estate
  Joffres v Joffres, 2014 BCSC 1778

Binding estate with support, s. 170

- Orders charging payor's estate are not indefinite or incapable of discharge as payor's personal representative can apply to change or cancel the order *P.K.C. v J.R.R.*, 2014 BCSC 932

Life insurance, s. 170

- Order requiring payor to maintain life insurance and designate spouse or child as beneficiary only available if payor has existing policy, court cannot require payor to obtain new policy *R.M. v N.M.*, 2014 BCSC 1755

Priority of child support, s. 173

- Section used to support order for review of spousal support in the event the child support payments require are reduced or terminated
  S.S. v P.W., 2014 BCPC 177

Arrears of support, s. 174

- Provisions of FLA "virtually the same" as FRA
  Jensen v Jensen, 2013 BCSC 1373
- Case law under FRA applies under FLA, including *Earle*, *Van Gool*, *Semancik* and *Luney*
  B.F. v J.F., 2014 BCSC 1892; *Beavis v Beavis*, 2014 BCSC 422

No case law

- Child support if parentage at issue, s. 151
- Agreements on spousal support, s. 163
- Setting aside agreements on spousal support, s. 164
- Reviews of spousal support, ss. 168 and 169
- Post mortem support applications, s. 171

Part 8

Children’s property

No case law

- Guardian not automatically entitled to receive child's property, s. 176
- Delivery of small property to child, s. 178
- Appointment of trustee, s. 179
- Delivery of large property to child, s. 181

Part 9

Family violence

“Family member”, s. 182

- Father qualifies as “at-risk family member” to obtain protection order with respect to his adult son *D.J.K. v J.J.K.*, 2013 BCPC 223
- Person is not an “at-risk family member” if not “physically threatened” and family violence not alleged (doubtful) *Whitelock v Whitelock*, 2014 BCSC 1184

Protection orders, s. 183

- Order will not be made in absence of finding that family violence is likely to occur *Hughes v Erickson*, 2014 BCSC 1952; *Cabezas v Maxim*, 2014 BCSC 767
- "Even a single act" of physical violence may suggest that violence is likely to occur in the future, "likely" should be interpreted bearing in mind the potential gravity of the violence *Dawson v Dawson*, 2014 BCSC 44

Protection orders, s. 183

- History of psychological and emotional abuse constitutes risk supporting protection order, even when probation order is in place *N.P. v I.V.*, 2014 BCSC 1323
- Evidence of interference with property and trespassing may support protection order, even without evidence as to identity of perpetrator *Pellowski v Wright*, 2014 BCSC 753

Making protection orders, s. 184

- Party's disappointment with result of application may increase the risk of violence, supporting protection order *Chancellor v Chancellor*, 2013 BCSC 1519
- Court must have evidence of one of s. 184 risk factors to determine if family violence likely to occur, applicant's assertion of risk or fear not sufficient *Hughes v Erickson*, 2014 BCSC 1952

No case law

- Additional considerations where child is a family member, s. 185
- Without notice orders, s. 186
- Changing or canceling protection orders, s. 187
- Enforcement of protection orders, s. 188
- Conflict between orders, s. 189
- Extraprovincial orders, s. 191

Part 10, selected bits

Court processes

Time limits, s. 198

- Spouses separating within two years of the FLA are "spouses" for the purposes of the FLA *Meservy v Field*, 2013 BCSC 2378
- Cannot amend an existing claim brought within the FRA time limits to claim property under the FLA if separation occurred more than two years of the FLA *P.N.K. v C.L.*, 2013 BCSC 18567

Conduct of proceedings, s. 199

- Section used to require party to take counselling and parenting courses (doubtful) *J.C.P. v J.B.*, 2013 BCPC 297
- … to support making of conduct order *C.P. v B.C.*, 2013 BCPC 112
- … to support levying of fine for non-disclosure *J.D.G. v J.J.V.*, 2014 BCSC 1274

Conduct of proceedings, s. 199

- … to support relaxing rules of evidence *D.M.P. v G.E.A.* 2013 BCPC 117
- … to support court's refusal to allow further adjournment of trial *McDermott v McDermott*, 2014 BCSC 1238

Children's lawyer, s. 203

- Applicant must establish that the degree of conflict is such that the parties' ability to act in children's best interests; however, inability to act reasonably in connection with another party's time with the children doesn't necessarily amount to significant impairment of ability to act in children's best interests
  K.L.K. v E.J.G.K., 2013 BCSC 2030

Leave to intervene, s. 204

- **Test**: proposed intervenor must have a broad representative base, a direct interest in the proceeding, the issue before the court is suitable for intervention *M.J.S. v A.D.*, 2013 BCPC 230
- See *Freldman v MacGarvie*, 2012 BCCA 109

Assessments, s. 211

- FLA focuses on assessment of child's circumstances rather than "family matter", but general principles of ordering assessments under s. 211 unchanged from ordering reports under FRA *T.N. v J.C.N.*, 2013 BCSC 1870
- Threshold justifying order for assessment is "quite low" *Smith v Smith*, 2014 BCSC 61; *Keith v MacMillan*, 2014 BCSC 1352

Assessments, s. 211

- Useful where conflicting evidence on parenting qualities, assessment helpful to obtain insight into parenting, child's wellbeing *C.M.L.S. v F.C.M.S.*, 2014 BCSC 1450
- … where parents' dysfunction leaves them unable to objectively perceive child's best interests *Keith v MacMillan*, 2014 BCSC 1352
- … where views of child report needed *M.J.A. v R.D.A.*, 2014 BCSC 1222

Assessments, s. 211

- … where objective view of child's best interests is needed *M.M. v C.J.*, 2014 BCSC 6
- … where necessary to determine child's preference as to residence *Fox v Fox*, 2013 BCSC 691
- … where necessary to determine child's preference as to parenting schedule *L.I.W. v T.R.W.*, 2014 BCSC 1748

Assessments, s. 211

- Court may "place much reliance on the findings and recommendations" *M.M. v C.J.*, 2014 BCSC 6
- Assessor must not decide ultimate question or recommend orders for parenting time *T.C. v S.C.*, 2013 BCPC 217
- Court may draw its own conclusions from information collected by assessor *T.C. v S.C.*, 2013 BCPC 217

Enforcing disclosure, s. 213

- Provision intended to equip court with more tools to address willful non- and late disclosure *J.D.G. v J.J.V.*, 2013 BCSC 1274
- Severity of order depends on degree of non-disclosure, reasons for non-disclosure and date when disclosure finally made *J.D.G. v J.J.V.*, 2013 BCSC 1274
- Court should not make anticipatory orders *Crerar v Crerar*, 2013 BCSC 2244

Enforcing disclosure, s. 213

- Fine of $500, disclosure of complex information made before hearing *J.D.G. v J.J.V.*, 2013 BCSC 1274
- Fine of $2,880 for failing to disclose basic income information, aggravated by wish to avoid child support; reduced from $4,000 because of limited financial resources *J.C.P. v J.B.*, 2014 BCPC 297

Enforcing disclosure, s. 213

- Fine of $2,500 because of delay of 11 months and failure to take even preliminary steps toward producing financial statement *Cully v Cully*, 2013 BCSC 2457
- Fine of $500, as disclosure made prior to hearing and respondent's lawyer's cause of some of delay *Doman v Ciccozzi*, 2014 BCSC 866

Enforcing disclosure, s. 213

- Fine of $2,000 ordered where information provided was “incomplete, false and misleading” *MacGrotty v MacGrotty*, 2014 BCSC 317
- Fine of $500 ordered where respondent breached order with deadline *M.L.D. v K.J.E.*, 2014 BCPC 221

Enforcing disclosure, s. 213

- Respondent must be given notice of intention to seek fine before a fine will be ordered
  T.M.T. v J.P.T., 2013 BCPC 352

Misuse of court process, s. 221

- Order amounts to finding that respondent is vexatious litigant *K.L.J. v E.J.G.K.*, 2103 BCSC 2030
- Relief more limited than under SCA s. 18 as cannot generally bar legal proceedings, just within an existing proceeding, but test is less stringent because doesn't require proof that respondent has habitually and persistently instituted vexatious proceedings *Dawson v Dawson*, 2014 BCSC 44

Misuse of court process, s. 221

- Order made against grandparents interfering the litigation, "resulting in extended litigation and numerous frivolous applications to the court," plus $2,000 fine *M.J.S. v A.D.*, 2013 BCPC 230
- … against party repeatedly attempting to revisit an issue, amounting to a misuse of process *Dawson v Dawson*, 2014 BCSC 44

Misuse of court process, s. 221

- … against both parties where litigation had lasted for four years and trial could have been completed in less than 20 days *J.C.P. v J.B.*, 2013 BCPC 297

Restricting communications, s. 225

- Order on court's motion requiring parties not to speak derogatorily about each other in front of the child, not to speak about proceeding with child, to communicate about the child by text or email *Ferguson v Ferguson*, 2014 BCSC 216
- Consent order restricting communication to text or email *Hughes v Erickson*, 2014 BCSC 1952

Restricting communications, s. 225

- Order on court's motion prohibiting direct communication and restricting to email on child-related subjects *L.D.M. v R.H.M.*, 2014 BCPC 98

Respecting residence, s. 226

- Although s. 226 not linked to family violence, finding of violence would be factor in application for exclusive occupancy *J.R.E. v 07----8 B.C. Ltd.*, 2013 BCSC 2038

Enforcing conduct orders, s. 228

- Section only applies to previously made conduct orders, order shouldn't be anticipatory *K.L.K. v E.J.G.K.*, 2013 BCSC 2030; *Crerar v Crerar*, 2013 BCSC 2244
- Fine of $5,000 ordered for breach of court order (doubtful) *Radford v Radford*, 2014 BCSC 791

Extraordinary enforcement, s. 231

- Following conclusion parenting time wrongfully withheld, order made for police apprehension in event of further withholding *Singh v Singh*, 2014 BCSC 651
- After parent removing child from daycare to accommodate work schedule without consent of other parent, parent ordered not to further remove child and arrest order made in event of breach *A.L. v K.H.*, 2013 BCSC 1943

Extraordinary enforcement, s. 231

- Applicant given liberty to apply under s. 231 in event of future breach of orders restricting respondent's communication with applicant's counsel *Dawson v Dawson*, 2014 BCSC 44

No case law

- Provincial court enforcement of supreme court orders, s. 195
- Lawyers' compliance with duties regarding family dispute resolution, s. 197
- Legal capacity of children, s. 201
- Receipt of children's evidence, s. 202
- Guardianship of treaty first nations children, ss. 208, 209

No case law

- Property disputes involving treaty first nations land, s. 210
- Orders respecting agreements, s. 214
- Orders on behalf of child, s. 220
- General enforcement provisions, s. 230

Part 13

Transitional provisions

Parenting transition rules, s. 251

- Interim FRA order addressing only access must not be read as order denying custody or guardianship where those issues had not been ruled on *J.C.P. v J.B.*, 2013 BCPC 94
- Order on primary residence not addressing custody or guardianship does not disturb s. 39 presumption of guardianship *S.T.H. v R.M.G.*, 2013 BCPC 114

Parenting transition rules, s. 251

- Ex parte interim order for sole custody and sole guardianship under FRA makes party child's only guardian under FLA until varied *L.A.M.G. v C.S.*, 2014 BCPC 172
- Order for sole custody with no reference to guardianship deprives parent without custody of status as guardian under FLA *P.A.G. v M.S.*, 2014 BCPC 158

Parenting transition rules, s. 251

- Coming into force of FLA not a change in circumstances justifying setting aside of agreement for sole custody *A.J.H. v L.C.H.*, 2014 BCSC 900

Effect of transition, s. 245

- IA s. 36 on repeal and replacement of legislation inapplicable to coming into force of FLA, not justifying application to vary FRA order to compliance with new terms on child support obligations of stepparents *K.H.M. v J.M.F.*, 2013 BCPC 56

Who is a guardian?

- Presumption of parental guardianship based on parents' cohabiting relationship with each other after child's birth, not on parents' relationships with child
- Parent never living with other parent and child not a guardian
- Parenting living with child and never living with other parent also not a guardian!

Who is a guardian?

39 (1) While a child's parents are living together and after the child's parents separate, each parent of the child is the child's guardian.

(3) A parent who has never resided with his or her child is not the child's guardian unless one of the following applies:

(a) section 30 *[parentage if other arrangement]* applies and the person is a parent under that section;

(b) the parent and all of the child's guardians make an agreement providing that the parent is also a guardian;

(c) the parent regularly cares for the child.

When can you sue for property?

- On separation, undivided one-half interest in all family property vests as tenant in common, s. 81(a)
- Spouse has two years from date of separation (unmarried) or divorce (married) to start a proceeding for an order under Part 5 to divide family property, s. 198(2)

When can you sue for property?

- Passing of two year limit doesn't remove tenant in common interest in family property
- Can't apply under FLA, but can apply under LTA, PPA, etc!
- Family property owned by one spouse impressed with trust in favour of non-owning spouse on separation, likely under fiduciary obligation to safeguard as trustee!

Sole custody but still a guardian

- FRA agreement providing parent with access but not custody or guardianship means access parent not guardian, s. 251
- Under FRA s. 27, when married parents are separated, parent normally caring for child has default sole guardianship of person of child, both parents have guardianship of estate of child

Sole custody but still a guardian

- FRA orders and agreements silent on guardianship don't strip married parents of standing as joint guardian of estate of child
- Access parent therefore guardian, with parental responsibilities limited to child's property under s. 41(k), with necessary responsibilities under s-ss. (h), (i) and (j) (doubtful) *Re Birth Registration No. 2004-59-020158*, 2014 BCCA 137

Sole custody but still a guardian

- Rights only available to guardians:
  - Parental responsibilities, s. 40
  - Parenting time with day-to-day care and control, s. 42
  - Apply to court for directions on matter concerning child, s. 49
  - Object to relocation, ss. 68 and 69

FLA & CFCSA

- CFCSA HAS NOT CAUGHT UP

- *"parent apparently entitled to custody"*

HOW YOUNG IS TOO YOUNG?

- http://www.canlii.org/en/bc/bcsc/doc/2015/2015bcsc1658/2015bcsc1658.pdf
- JP Boyd's analysis:
- http://bcfamilylawresource.blogspot.ca/

POSSESSION IS 9/10TH OF THE LAW

- BEWARE:
- **WITHOUT NOTICE ORDERS**
- **NO ORDERS or AGREEMENTS IN PLACE**

ACCESS TO JUSTICE

- Prov Crt vs Supreme Crt
  - Time
  - expense
- Section 211 reports
- ADR
  - Expense
  - Practitioner

ARBITRATION

- Would arbitration be a solution for remote communities where judges are available just once a month?
- Arbitration can be done by documents only submitted through email; by Skype or GoMeeting or some other electronic means; by conference calls; etc.
- Arbitration Awards are enforceable as court orders!!!!!

INFORMATION ON ARBITRATION PROCESS

- http://bclaws.ca/civix/document/id/complete/statreg/96055_01
- **Note section 2 of the *Arbitration Act***
- *For general info:*
- http://www.justicebc.ca/en/fam/help/arbitrators/
- *Where to find an arbitrator:*
- http://bcami.com/arbitration-or-mediation.html
- http://www.cbabc.org/For-the-Public/Lawyer-Referral-Service

AFTER HOURS APPLICATIONS

- Provincial Court:
- http://www.provincialcourt.bc.ca/downloads/Practice%20Directions/FAM%2006%20After-Hours%20Emergency%20Family%20Applications.pdf
- Supreme Court:
- http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/practice_directions/administrative_notices/AN%20-%202%20Emergency%20After-Hours%20Applications%20in%20Vancouver%20-%20Civil%20and%20Family.pdf

Women and Family Law: Parenting Time and Parenting Responsibilities

WEST COAST LEAF

Real women's lives

- **Tina** has been told she needs the signature of her abusive ex in order for her son to get a medical assessment
- **Suwei** has been ordered by the court to pay hundreds of dollars for a parenting coordinator – far more than she can afford
- **Reena** was declined for legal aid and is being pressured by her abusive ex to sign a parenting agreement and file it with the court
- **Jane** has dealt with over 100 court applications from her harassing ex-partner
- **Maria** has had her parenting ability called into question by a biased parenting assessment report

What you can expect from this workshop

- Understand some of the ways in which changes to family law in BC are impacting the parenting rights of women with abusive or harassing exes
- Be familiar with some common legal challenges around parenting rights faced by women in BC
- Identify legal tools and strategies that can be helpful to women who are facing these challenges
- Become more confident in supporting women as they navigate their own legal situations around parenting

Agenda

1) What we've observed in our own practice (10 minutes)
2) The laws and levels of court that deal with parenting issues in BC (20 minutes)
3) Determining the best interest of the child (25 minutes)
   - Scenario & strategy discussion: parenting assessments
4) Parental responsibilities & parenting arrangements (25 minutes)
   - Scenario & strategy discussion: parenting coordinators
5) Break (15 minutes)
6) Other conflict situations: denial of time with child, relocation, litigation abuse (25 minutes
   - Scenario & strategy discussion: litigation harassment
7) Strategies overview & final scenario discussion (35 minutes)
8) Feedback and reflection (20 minutes)

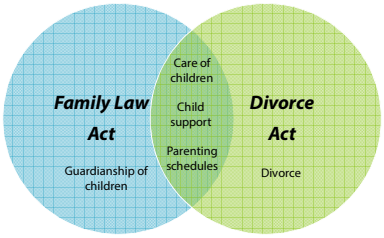
About West Coast LEAF

We're the first and only organization in BC dedicated to promoting women's equality through the law.

We envision a society in which women are full participants in all social, economic, and political activities. We believe that differences must be respected and supported by the law, and by social and institutional practices.

Litigation | Law Reform | Public Legal Education

Which two laws deal with parenting issues in BC?



Which two laws deal with parenting issues in BC?

DIVORCE ACT

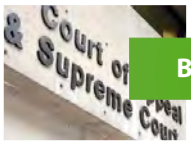
- Came into effect in 1985
- Federal (Canada-wide)
- Applies only to legally married spouses who have lived in the same province for at least a year

FAMILY LAW ACT

- Came into effect in 2013 (replaced the old Family Relations Act)
- Provincial (BC only)
- Applies to married AND unmarried couples, and to others who might have an interest in a child (like family members)

Which courts hear cases about parenting?

Most family law proceedings happen in the Provincial Court and the Supreme Court of BC.



BCSC

Provincial Court

Deals with…	Provincial	BCSC
Parenting issues?	YES	YES
Child support?	YES	YES
Spousal support?	YES	YES
Protection orders?	YES	YES
Declarations of children's parentage?	ONLY IF NEEDED FOR OTHER CLAIMS DEALT WITH BY THE COURT	YES
Divorce?	NO	YES
Division of family property and debts?	NO	YES
Management of children's property?	NO	YES
Financial restraining orders?	NO	YES
Exclusive occupancy of family home?	NO	YES

Provincial Court	BC Supreme Court
More straightforward rules; Provincial Court Family Rules are written in plain language	Complicated and strict rules
No filing fees	Fees are charged for many of the steps that might be required, like starting a court proceeding, making an application, or hearing a trial
Easier to access without a lawyer	Harder to access without being represented by a lawyer
More courthouses across the province	Fewer courthouses

Provincial Court	BC Supreme Court
Sometimes can make a booking with a shorter waiting period than at BCSC	Often books further in advance – in Lower Mainland, can be a year 's wait or more Any proceedings likely to take more than 2 hours must be set with trial scheduling
Family Duty Counsel will sometimes be present in the courtroom and you may be offered an opportunity to speak to one	Family Duty Counsel will probably not be in the courtroom
Has "pick list" of orders online - can help you get a sense of what family law orders are possible or commonplace: http://www.provincialcourt.bc.ca/downloads/pdf/Dars%20FLA%20Orders%20Bench%20Picklist%20-%20for%20website.pdf	No "pick list" of orders

Provincial Court	BC Supreme Court
For family law cases, Provincial Court often provides interpretation if you do not speak enough English to access justice	Does not provide interpretation
Fewer legal aid hours available than for BCSC cases	Currently 10 more legal aid hours available than for Provincial Court cases (Sept 2015)
Less document preparation required	A lot of documents must be prepared, which can use up a lot of lawyers' time
Judges will sometimes listen to people who talk to them about their legal situation with no documents and no representation	Judges are far less likely to have discussions with people without documentation or legal representation

Important terms under the *Divorce Act*

Custody

- The right to have the child with you, AND
- The right to make decisions about how the child will be cared for and brought up

Access

- Spending time with the child
- A parent who has access but not custody still has a right to information about the child's health, education, and well-being

Important terms under the *FLA*

Guardian

•A person who has **time** with the child AND **responsibility** for making decisions about the child's care and upbringing – *only* guardians have parenting time and parental responsibilities (s. 40)

•Parents are presumed guardians while living together and after separation, **unless** there is an agreement or order to contrary (s. 39)

•A parent who has never resided with the child is not a guardian **unless** there is an agreement to the contrary OR they regularly care for the child (s. 39)

•Any guardian can be required to pay child support

Important terms under the *FLA*

Parenting time

- The time a guardian spends with a child, during which they make decisions about the child's life and handle the everyday care and supervision of the child

Contact (ss. 1, 58)

- A child's time spent with a person who is not a guardian

Important terms under the *FLA*

Parental responsibilities

- A guardian's obligation to make decisions about the child's care and upbringing in the best interests of the child

Parenting arrangements

- Arrangements about how parenting time or responsibilities, or both, will be shared or divided up

Besides terminology, what else is new in the *Family Law Act*?

Under the *Family Law Act*, the parties and the court must consider **ONLY the best interests of the child** when making an agreement or court order.

So, how exactly are the best interests of the child determined?

All of the child's needs and circumstances must be considered, including the child's:

- Physical and emotional health
- Need for stability
- History of care
- Views about the situation
- Important relationships with others

So, how exactly are the best interests of the child determined?

And also:

- Parental capacity
- Legal proceedings relevant to the child's safety or well-being
- The impacts of any family violence on the child
- Whether it is appropriate to expect the child's guardians to cooperate as part of a parenting arrangement

Section 211 reports: parenting assessments and BIOC

To determine the best interest of the child, the court is allowed by law to **appoint an assessor** to prepare reports on the needs of the child and the views of the child.

The assessor must not have had any previous connection with the parties, unless they consent.

The court decides how the parties should divide up the cost of the assessment.

Defining family violence (s. 37)

The exact wording of the law:

(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,

[continued next slide]

Defining family violence (s. 37)

The exact wording of the law:

(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

How does violence factor into BIOC?

The court must consider all of the following (s. 38):

(a) the nature and seriousness of 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;

[continued next slide]

How does violence factor into BIOC?

The court must consider all of the following (s. 38):

(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.

Parental responsibilities (s. 41)

Daily **care** and supervision

Decision-making about:
- Living arrangements
- Education and extracurriculars
- Who the child will associate with
- Cultural, linguistic and spiritual upbringing
- Health treatments

Getting and responding to **notices** about the child

Requesting **information** about the child

*"Unless an agreement or order allocates parental responsibilities differently, **each child's guardian may exercise all parental responsibilities** with respect to the child in **consultation** with the child's other guardians, unless consultation would be unreasonable or inappropriate in the circumstances."*

According to the *FLA* s. 40…

Two ways to create formal parenting arrangements

1. Agreements

2. Court Orders

Two ways to create formal parenting arrangements

1. Agreements

Can cover:

- Allocation of parental responsibilities
- Parenting time
- How the agreement will be carried out
- Dispute resolution

Two ways to create formal parenting arrangements

1. Agreements

To file an agreement in Provincial Court:

- Make a copy of the signed agreement
- Have the clerk at the Family Court Registry check it, stamp it, and put it in the file for your case

Two ways to create formal parenting arrangements

Will be made only after an application from one or more guardians, or from a person applying for guardianship

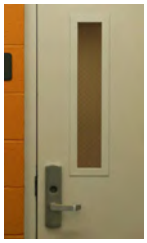
2. Court Orders

What if parenting arrangements are informal?

- Sometimes parenting arrangements are established through a child's routine rather than through a formal legal process
- Informal arrangements can't be changed without consulting with the other guardian(s), unless consulting would be inappropriate or unreasonable

Image credit: Din Jimenez, Creative Commons 2.0

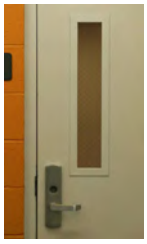
What if parenting time or contact is denied? (s. 61)



A person who is entitled to parenting time or contact with a child can apply to the court **within 12 months** of being denied this time or contact.

If the court finds that the child's guardian has wrongfully denied parenting time or contact, the court can make an order.

What if parenting time or contact is denied? (s. 61)



If the court finds that the denial of time was wrongful, it might make an order to:

- Assign counselling or dispute resolution
- Give extra time with the child to make up for the time that was denied
- Reimburse costs to the person who was denied time
- Name someone to supervise the transfer of the child
- Require a payment of up to $5,000

When is denial of time with a child potentially NOT wrongful? (s. 62)

Reasonable belief that:

- The child might experience violence
- The person seeking time with the child was drunk or high

The child was ill with a medical note

The person seeking time with the child:

- Repeatedly failed to exercise time with the child over the past year
- Said they weren't coming, then changed their plan without reasonable notice

Steps to avoid being accused of wrongful denial of time

Leave a note:

- You're leaving
- You want to work out parenting arrangements
- Contact info

If safe, offer alternatives:

- Skype
- Supervised visit
- Visit later

What if a parent or guardian wants to move with a child?

Unfortunately, this is a complicated question, and legal advice is strongly recommended.

Image credit: The Muuj, Creative Commons 2.0

What if the parties can't agree about how to carry out a parenting order or agreement?

The guardians can agree to appoint a **parenting coordinator** to help settle disagreements about how to carry out their parenting arrangement.

A court can also order that a parenting coordinator be appointed.

The guardians must pay for the parenting coordinator themselves.

Litigation abuse

- Using the court process to humiliate and traumatize
- Making up false evidence
- Trying to prevent access to lawyers or support workers
- Threatening people who are providing support
- Making the process as expensive as possible as a form of financial abuse
- Making excessive and inappropriate court applications

Litigation abuse

Legal strategies for dealing with an abusive or harassing ex-spouse

- Parenting orders
- Publication ban
- Cost orders
- Ask the court to declare the party a "vexatious litigant"
- Conduct orders
- Protection orders

Protection orders (s. 183-184)

Can be requested by an at-risk family member, by another person on their behalf, or by the court itself.

Terms can include:

- Restricting **communication or contact**
- Restricting a person from going to someone's **home, workplace, or school**
- **Directing the police to remove the person** from the family home or to **accompany them to remove their personal property**
- Requiring the person to **report to the court** or to another person

Protection orders (s. 183-184)

Remain in effect for one year, unless the order specifies a different duration

While the protection order is in effect, either party can apply to:

- **Extend or shorten** it
- **Change** its terms
- **End** it

Protection orders (s. 183-184)

When deciding whether to grant a protection order, the court must consider:

- **Family violence** in the past and present of the couple or ex-couple
- Whether the **child might be exposed to family violence** if a protection order is not made
- Whether a protection order is also needed to **protect the child from experiencing violence** directly

Conduct orders (s. 222/224)

These are special orders that can be made by the court in order to:

- **Help settle a dispute** in family law
- **Deal with behaviours** that are causing problems for an order or agreement
- Prevent **misuse of the court process**
- Help the parties **make arrangements** while they await the court's final determination

Conduct orders (s. 222/224)

Examples:

- Mandatory **counselling** or anger management
- Restricted **communication or contact**
- Payment of **costs of associated with the family home**
- **Supervised removal of belongings**
- Requiring a person **to give security or to report to the court or to another person** to ensure good behaviour

What if you need to get a court order about parenting very quickly?

Interim orders

- Temporary
- Can be obtained quickly
- Can grant the ability to make parenting decisions without consulting with your ex
- Can limit the amount of time children spend with your ex
- Legal help is recommended

What if you need to get a court order about parenting very quickly?

Without notice orders (formerly ex parte orders)

- Emergency orders, often with a short expiry date
- The other party does not need advance notice and does not need to appear in court
- Usually used for:
  - Protection orders
  - Emergency parenting arrangements
  - Financial restraining orders
  - Non-removal orders

"If family law does not contribute to women's equality, it will not ensure the best interest of the children."

-LAW PROFESSOR SUSAN BOYD

Thank you for joining us! We hope that you will share your feedback so that we can continue to improve this pilot workshop.

Keep in touch!

Shahnaz Rahman: familylaw@westcoastleaf.org
Alana Prochuk: education@westcoastleaf.org

www.westcoastleaf.org

@WestCoast_LEAF /westcoastleaf

Protective Orders

Family Law Act (FLA)

Sections183 – 191

Section 183(2) of the Family Law Act:

- Authorizes the court to make a protection order against a family member if determined that family violence is likely to occur
- Section 1 of the FLA defines “family member” as a
  - Spouse
  - Former spouse
  - Person’s child
  - Common law

Sections183 – 191

Section 1 of the Family Law Act defines “family violence” as:

- Physical abuse
- Sexual abuse
- Psychological/emotional abuse
  - Intimidation
  - Harassment
  - Coercion/threats
  - Stalking

Sections183 – 191

Section 184 of the Family Law Act:

- Contains a list of objective factors that the court assesses when determining whether a protection order is necessary

Section 184(f):

- A subjective factor that can play an important role in determining whether a protection order should be granted

Protection Order Case Law

Prasad v. Prasad

- Supreme court granted a permanent protection order after examining the history of violence between the two parties
    - Included threats of violence
        - Verbally and with weapons to actual instances of physical violence
    - The wife's fear of violence was realistic as the husband had a violent history

- The wife's subjective views were judged in light of the objective violent history of family violence
- The main focus the court considered in this case was not the length of time that the violence occurred over, but instead whether a history of violence existed and the likelihood of it occurring in the future

Protection Order Case Law

S.M. v. R.M.

- Family violence developed after the divorce proceedings and occurred over a period of two years
  - The respondent sent over 900 unwelcomed emails and text messages to his children and the complainant over a period of two years
    - The court recognized that these messages are a form of family violence as they contained all of the following:
      - Intimidation
      - Harassment
      - Coercion
      - Threats designed to instill fear
- The court granted a protection order because given the respondent's violent history, the behavior could very likely be repeated in the future

Protection Order Case Law

J.R.E.

- JRE: a principle that a sincerely held belief is not enough on its own to grant a protection order if there is no proof of past family violence

JRE v. 07

- The wife had a disorder that caused her to genuinely believe the allegations against her husband
  - There was no evidence that the allegations were true and her subjective beliefs alone were not enough
- Although the wife's fear of violence was sincerely held, the court refused to grant a protection order as there was no evidence of past family violence

Protection Order Case Law

Hughes v. Erickson

- The claimant moved for a protection order as she was fearful of violence in the future based upon the way the respondent had conducted himself during the relationship
- The court refused to grant a protection order because:
  - There was no history of family violence
  - The wife's belief was not sincerely held
- The court stated that both the nature of communication between the two parties and the claimant's suggestion to go through counselling did not show that she felt that the respondent posed a risk to her

Protection Order Case Law

LIW v. TRW

- The respondent had placed an angry phone call which was sufficient enough for him to be charged with uttering threats to cause death or bodily harm under the Criminal Code
  - This was out of character for the respondent and since then, he had taken actions to ensure the behavior was not repeated
  - Because of this, the court decided that a protection order was not necessary, as there was no evidence that family violence is likely to occur in the future

- Even if there is a history of family violence and a sincerely held belief that it will occur in the future, **unless** a court is satisfied that the violence is likely to reoccur, a protection order will **not** be granted

Conclusion

- A court reviewing a past history of actions that satisfy the definition of family violence under section 1 of the FLA which occur over a course of time will most likely determine that family violence will continue to occur in the future and that a protection order is necessary

VIEWS OF THE CHILD REPORTS

Under s. 37(1) of the *Family Law Act*, when the court or the parties are making orders and agreements about guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only. Under s. 37(2)(b), the child's views are to be takin into account when assessing the child's best interests. A ***views of the child report*** is an ***evaluative*** report prepared by an expert (like a social worker, registered clinical counsellor or psychologist or psychiatrist).is one way to get the views of a child before the court.

Section 211(1)(b) of the *Family Law Act* allows the court to appoint someone to assess the views of a child in relation to a family law dispute, and to make orders about how the report will be paid for. The finished report will present the child's views to the court along with the assessor's evaluation of the strength and consistency of the child's views and the extent to which what the child has said really reflects the child's actual preferences. These reports usually take two to three months to complete and cost between $2,500 and $5,000.

There are two main types of assessments under section 211 of the *Family Law Act*:

1. Those prepared by ***experts***, generally psychologists.
   Experts can provide an opinion and make recommendations to the court so as a result their reports are often ***evaluative***.

2. Those prepared by a broader category of people called ***family justice counsellors***, who are authorized by law to prepare these reports, but aren't necessarily experts.
   As a result, they cannot provide an opinion or make recommendation to the court and their reports are ***non-evaluative***.

It is important when asking for or agreeing to a "Views of the Child Report" that the parties and the assessor are clear about what kind of assessment is to be conducted: evaluative or non-evaluative.

Other ways of getting the child's views before the court:

(a) Child writing a letter to the judge;
(b) Independent lawyer prepare an affidavit for the child;
(c) Asking the judge to interview the child in his or her office.

RESOURCES:

1. How Do I get a Views of the Child Report?
   http://wiki.clicklaw.bc.ca/index.php/How_Do_I_Get_a_Views_of_the_Child_Report%3F

2. Children in Family Law Matters – Reports and Assessments
   http://wiki.clicklaw.bc.ca/index.php/Children_in_Family_Law_Matters

3. How to Get an Interim Family Order (Family or Supreme)
   http://www.familylaw.lss.bc.ca/guides/interim/agree/index.ph

NOTICE OF MOTION

In the Provincial Court of British Columbia

Court File No.: F1262
Court Location: NANAIMO
FMEP No.:

NOTICE OF MOTION

Case name as it appears on the application.

In the case between:
Linda Lee STRAND
NAME
And: Dexter Edward LUKAS a.k.a. Dex LUKAS
NAME

Filed by:
Linda Lee STRAND — NAME
May 27, 1976 — DATE OF BIRTH (MMM/DD/YYYY)
APPLICANT

Your current mailing address for service.

(Set out the street address of the address for service. One or both of a fax number and an e-mail address may be given as additional addresses for service.)

8 Hunter Street — ADDRESS FOR SERVICE
Vancouver — CITY
British Columbia — PROVINCE
V9R 2K6 — POSTAL CODE
(778) 523-2772 — PHONE
goodtimeswillroll@hotmail.com — E-MAIL
FAX

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

Notice to:
Dexter Edward LUKAS a.k.a. Dex LUKAS — NAME
Sep 23, 1986 — DATE OF BIRTH (MMM/DD/YYYY)
RESPONDENT
500 Fortune Avenue — ADDRESS FOR SERVICE
West Vancouver — CITY
British Columbia — PROVINCE
V7R 1X1 — POSTAL CODE
(604) 983-8178 — PHONE
dex@investwithme.com — E-MAIL
FAX

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

I NAME OF PERSON MAKING APPLICATION Linda Lee STRAND will apply to this court at
COURT LOCATION Robson Square

on Oct 19, 2015 (MMM/DD/YYYY) at 9:30 am (TIME) am/pm for:

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

- ☐ An order shortening or extending a time limit set out in the Provincial Court (Family) Rules
- ☐ An interim order under section 216 or 217 of the Family Law Act
- ☐ An order changing, suspending or terminating the attached order made in my absence
- ☐ An order settling the terms of an order made _____ (MMM/DD/YYYY)
- ☐ An order that a person not remove, or that a person be allowed to remove, a child from a geographical area
- ☐ An order to prohibit the relocation of a child
- ☐ An order for blood or tissue samples, for parentage tests, to be taken from _____ (NAMES)
- ☐ An order for service of _____ (IDENTIFY DOCUMENTS) by _____ (METHOD OF SERVICE)
- ☐ An order for access to information under section 242 of the Family Law Act
- ☐ An order for information to be disclosed by _____ (NAME)
- ☐ An order transferring this file to the court registry at: _____
- ☐ Directions on a procedural matter
- ☐ An order changing or setting aside the determination of a parenting coordinator dated _____ (MMM/DD/YYYY)
- ☐ An order to enforce:
  - ☐ the order made _____ (MMM/DD/YYYY)
  - ☐ the agreement dated _____ (MMM/DD/YYYY)
  - ☐ compliance with the determination of a parenting coordinator dated _____ (MMM/DD/YYYY)
- ☐ A review of a filed agreement or order respecting spousal support or maintenance under the Family Law Act or the Family Relations Act
- ☐ An order determining whether there are arrears owing under a support order made under the Family Law Act or under a support or maintenance order made under the Family Relations Act and, if so, the amount of those arrears
- ☑ Other order (SPECIFY) Views of the Child Report

Details of order(s) requested: That Dr. Michael Elterman conduct a Views of the Child Report including all children of the relationship, which report will be evaluative in nature and paid for by the parties in proportion to their respective guideline incomes.

For examples of these details see instruction sheet.

Note: Use of affidavit is optional.

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

- ☐ Any affidavits in support of this notice of motion are attached.

Sign your name, and state today's date.

Dated Oct 6, 2015 (MMM/DD/YYYY)

Signature

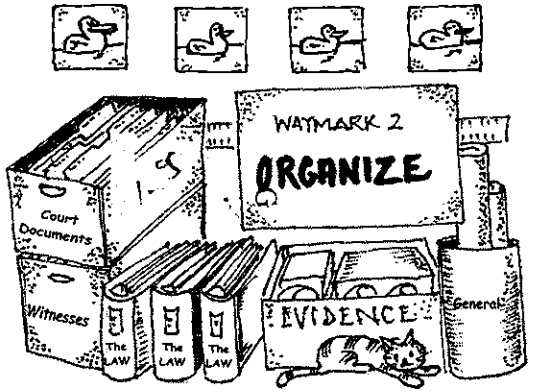
State name of lawyer, if any

Name of lawyer of party bringing this motion

PFA 048a 03/2013
Form 16
(OPC 7530854056)

COURT FILE

Gather up everything you think could be related to your case and put it in a box



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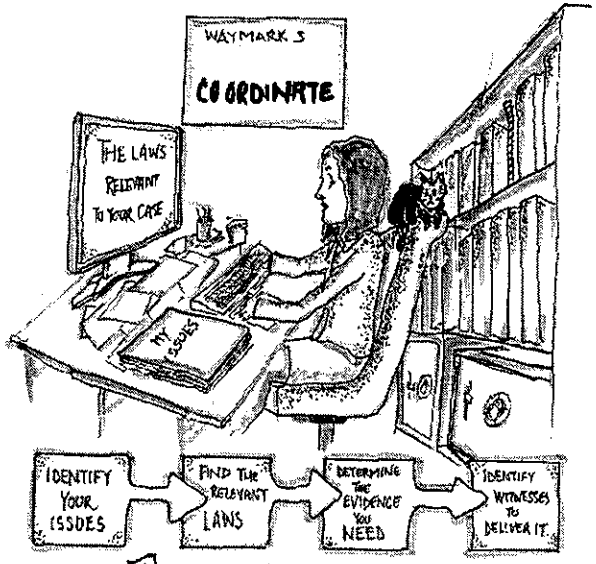
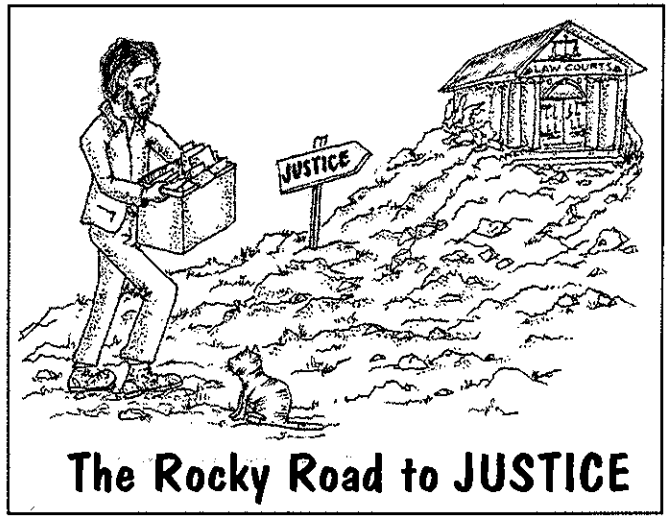
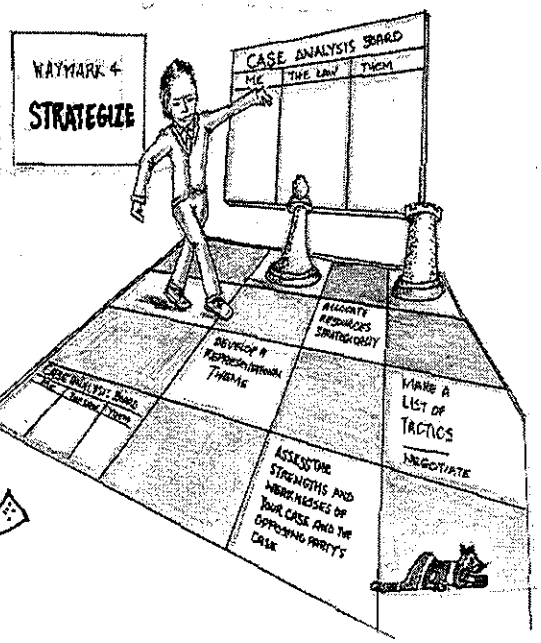
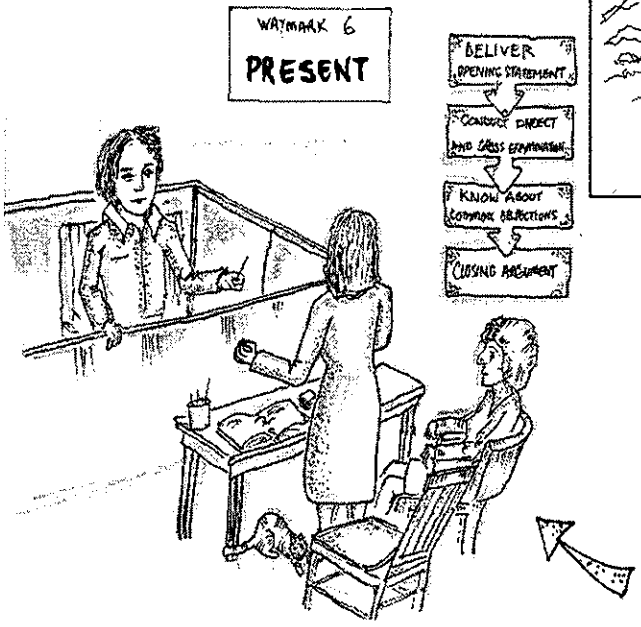
se categories

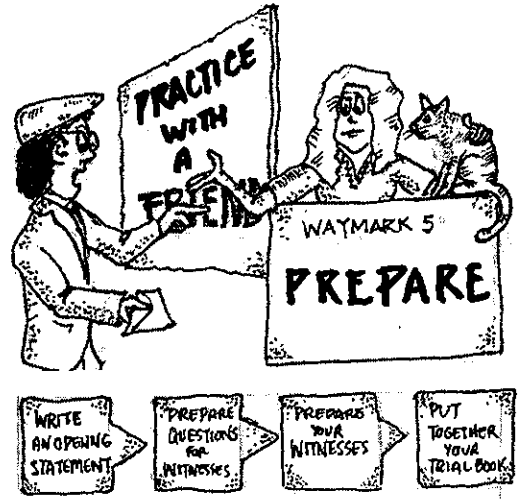




The Rocky Road to JUSTICE







THE WAYMARK 6-STEP SYSTEM FOR PREPARING AND PRESENTING YOUR CASE IN COURT

INTRODUCTION

- What judges say SRLs need to learn: Organized and relevant evidence
- Overall objective: Achieve a better quality of justice

OVERVIEW

WAYMARK 1: COLLECT

Gather up everything you think could be related to your case and put it in a box.

WAYMARK 2: ORGANIZE

Sort everything in the box into one of these categories:

(1) Court Documents; (2) The Law; (3) Evidence; (4) Witnesses; and (5) General

WAYMARK 3: CO-ORDINATE

Identify your issues and find the law which governs them; Use this law to determine what evidence you need and identify witnesses to deliver it.

WAYMARK 4: STRATEGIZE

Assess the strengths and weaknesses of your case and the opposing party's case; Develop a representational theme, allocate resources strategically and make a list of tactics.

WAYMARK 5: PREPARE

Write an opening statement; Prepare questions for examination and cross-examination of witnesses; Prepare witnesses; Put together your trial book.

WAYMARK 6: PRESENT

Deliver opening statement; Conduct direct and cross-examination; Know about common objections; Closing argument.

- System works for anyone in Canada who has a civil (not criminal) law problem
- Could not possibly cover the specific law you need to know, procedural rules you have to follow or time limits you must meet (how to find that information is discussed in Waymark 3: Co-ordinate
- You will learn the basics of how to prepare and present your case in court
-

WAYMARK 3 - CO-ORDINATE

- 5 separate piles = categories
- Now learn how each one builds on the other

1. ***Pick the orders out of your documents and create an Index of Orders chart.***

- Where to find the function of a document
- pick out all court documents that are ORDERS
- create a summary of ALL the ordrs that have been made, by filling in Chart #1
- Will become the first section of your trial book
- Look for the date on which the judge made the order = date on which it vecame effective

- Start with the oldest order first, then add each one chronologically after it, filling in the other columns on the chart as you go
- Missing an order? - go to the court registry where your court file is located - copy it and add it to the chart
- Have now traced the footprints of its history
- Ready to identify what remains outstanding for the court to decide

CHART #1

INDEX OF ORDERS (#)

(state the number of orders which have been made)

PAGES	DATE ORDER MADE	NAME OF JUDGE	DESCRIPTION	SUMMARY

2. ***Separate the pleadings from your other court documents and organize them chronologically in the Index of Pleadings chart***

- Documents which set out both the applicant's and respondent's position in the case and ask the court to grant what they have requested
- Find all the pleadings in your court documents and put them in chronological order with the oldest pleading first
- Organize your pleadings in chart form
- Look carefully at the "Status" column
- Resolved = order already made about any of the relief sought by any party
- Outstanding = no order yet made

CHART #2

INDEX OF PLEADINGS

PAGES	NAME OF PLEADING	DATE FILED	RELIEF SOUGHT	STATUS

3. (a) Using the Index of Pleadings, collect all of the issues that have not yet been resolved and organize them in the Summary of Outstanding Issues chart

- Collection of thjose issues isted in the pleadings which are oautstanding and you need the court to resolve
- This is where the hard work starts
- Let's you know exactly what it is you want the judge to decide and can the go ahead and research the law which applies to each issue

CHART #3

SUMMARY OF OUTSTANDING ISSUES

#	ISSUE	SOURCE
1		
2		
3		
4		

3. (b) If there is an issue you want a decision about that's not on the chart, bring another application to add it

- Judge does not have the power to made a decision about an issue which neither party has asked the court to determine

4.(a) Find out how the legislation defines and governs the legal issues you have, copy it and put it into your "Law" file

- Find those parts of it that give your issues a definition
- Find those parts of it that set out what you have to prove (or disprove) in order to convince the judge to rule in your favour
- Copy and print this information and add it to your "Law" file
- Go through this process with every outstanding issue
- Legislative framework or your case defined

4.(b) Find out how any regulations to the legislation, case law, rules of court, practice directions or leading cases impact your case

5. Use the law you have found to determine what evidence is relevant to your case, put everything you've got so far in your "Evidence" file, and start thinking about what else you could get which might be relevant

- Stick to the legislation in deciding what evidence you are going to bring to court = relevant evidence
- Evidence you need to convince the judge to decide in your favour may not be the evidence you think is important

6. Make a list of people who can deliver your relevant evidence along with what they can say and keep it in your "Witness" file. Add to it whenever you think of someone else

- Consider what witnesses you want to deliver your evidence
- Not all witnesses are equal

  (a) Expert witnesses - permitted to testify because of special knowledge or proficiency in a particular field that is relevant to the case

  - special rules about how to get an expert witness to testify

  - can be powerful witnesses when used appropriately but regardless of the number of letters after their names, does not guarantee the outcome of your case - use them sparingly

  (b) Independent third-party witnesses

  (c) Not-so-independent third-party-witnesses

  (d) Parties to the proceeding as witnesses

- Get out a piece of paper and jot down the names of anyone you think might be able to give evidence in support of your case along with what eviednece you think they've got which is relevant
- Put it into your "Witness" file

Working with Self-Represented Family Clients: Tips for Effective Advocacy & Support

Examination for Discovery

Legal Advocacy Training Conference

October 6-8, 2015

Legal Services Society

THE LAW FOUNDATION OF BRITISH COLUMBIA

Prepared and Presented by

Rhona M. Lichtenwald

Lawyer & Mediator

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Examination for Discovery
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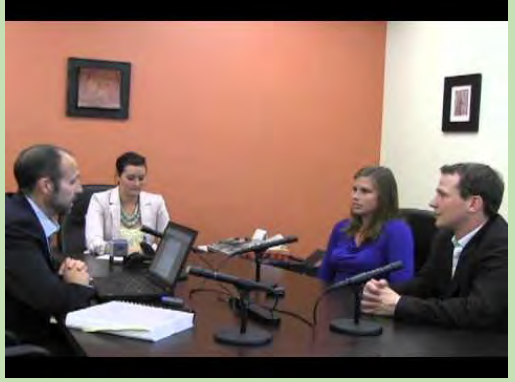
What is the Discovery Process?

BC Supreme court only – not available in Provincial court
Used in Family and Civil law cases
Supreme Court Family Rules (SCFR):

Examination and production of documents – Rule 9-1
Examination for Discovery – Rule 9-2
Discovery by Interrogatories (written questions) – Rule 9-3
Pre-Trial Examination of Witnesses – Rule 9-4
Physical Examination and Inspection – Rule 9-5
Admissions – Rule 9-6
Depositions – Rule 9-7

Examinations for Discovery
Rule 9-2 Summary



- Each party in a family law case MUST make themselves available for examinations for discovery by parties “adverse in interest”
- A few exceptions: if the party is not an individual (i.e. a corporation), or if the party is an infant, mentally incompetent or a trustee, a representative must be available
- The examination is oral and under oath, before an official court reporter
- The examination is not to exceed 5 hours (unless a court order is obtained for more time)

How does it work?

- The party wanting to examine the other must serve an appointment in Form F21 on the party to be examined and give 7 days notice
- Witness fees as set out in the SCFR must also be provided
- The exam must take place within 30 kms of where the person to be examined resides, or if the person is outside of BC, an application can be brought for an order for a location for the discovery
- If the person to be examined is a representative of a party, they must bring to the examination all documents relating to the proceeding that are not privileged

What happens at the examination for discovery?

- The examination is the same as a cross-examination
- The person examined can be re-examined on his/her own behalf (usually if they have their own lawyer present), or can be re-examined by a party not adverse in interest (if there was another party)
- The person being examined must answer all of the questions regarding anything relating the case that is not privileged and must provide the names and addresses of all persons who might have knowledge about the case.

What happens?

- If the person being examined does not know the answer, they may be required to inform themselves and the discovery can be adjourned or a letter can be sent to that person listing the questions from the exam that require further information and any responses are part of the examination
- Objections – a person being examined can object and that will be noted by the court reporter and a court may determine if it is a valid objection
- The examination is made under oath and is recorded by an official court reporter - the questions and answers numbered for reference
- Both parties can order copies of the transcript

What is the purpose?

- To learn the other side's case
- To gain admissions
- To use the transcript at trial to "impeach" the party who was examined

Learn the other side's case

- This can help you prepare your case for trial.
- It may be the basis to request further documents.
- It could help to lead to a settlement – especially if you see that the other side has a good case or you get a better idea of what they are looking for.

Obtain admissions

- If the person being examined admits to certain facts, then they don't have to be proved in court.
- If you are the claimant, you have to prove your case as set out in your Notice of Family Claim – if the respondent "admits" some of the facts that you need to prove to make your claim, you do not need to call evidence at trial to prove this.
- If you are the respondent and have a counter-claim, same thing, you won't need to prove those facts.
- Portions of the transcript of the examination for discovery containing admissions can be read to the judge at the trial and the court must accept those facts as proven.
- A respondent who has not filed a counter-claim is not proving a claim, so they would not read in admissions.

“Impeachment” – huh?

- No, it’s not fruit! “Impeachment” is a rule in evidence that can be used at the trial – it allows the person being examined at trial to have their credibility (believability/honesty) or their reliability (their ability to recall facts/details) put into question. This is done by using a prior sworn statement that is inconsistent with their live testimony at trial.
- When a party testifying at trial states something inconsistent to the evidence they gave at the examination for discovery, the transcript from the discovery can be used to challenge their credibility or reliability and thus raise doubts about their testimony.

What kinds of questions can be asked?

- As the examination for discovery is in the form of a cross-examination, broad, narrow and leading questions can be asked.
- The examiner can ask any kind of “leading question” – a leading question is one where the examiner frames the question so as to limit the answer and the examiner can control the answer – often trying to pin the witness down to a “yes or no” response
- An “open” question is broad and gathers a wider range of information, but gives less control to the examiner and does not tend to be used
- A “narrow” question is somewhat leading, but may still gather information

Examples of questions

Open/broad: What were you doing in 2013?

Open/narrow: What kind of work did you do in 2013?

Narrow : How much did you earn at job X in 2013?

Leading: You earned $35,500 from January 1 to December 31, 2013, correct?

If you are the Examiner:

- Read all of the documents in the file – start with the Notice of Family Claim and the Response – what are the issues? If you are the Claimant, what do you have to prove to make your case?
- Thoroughly read all of the other documents – Financial Statements, Affidavits, any financial documents, reports, all of the correspondence
- Know your case – what do you have to prove/disprove

Topic questions

Think about the topics that you want to ask questions on – this will depend on the issues in the case, i.e:

- ✓Children
- ✓Spouse
- ✓Finances – income/expenses
- ✓Finances – property/debts
- ✓Other relevant issues

What is your purpose?

Decide what you want to achieve in each topic:

- What admissions do you hope to obtain?
- What information do you have that you want more information about?
- What documents do you want to ask questions about?
- What do you NOT know that you want to try to get information about?
- Are there contradictions in the case that you can ask questions on?

Be organized

- Organize your questions under topic areas and have a checklist
- Include all your documents that you want to ask questions about – have them in a binder with tabs so you can easily find them
- Prepare a list of sample questions – for a self-represented party, a script might be the best, although at times be flexible
- You only have one chance at this, so be prepared!

Asking questions

- Be polite – do not be hostile, but be prepared that the examinee may be hostile
- Ask one question at a time – do not have “double-barrelled questions
- Wait for the answer and LISTEN to the response
- Sequence questions – a good sequence is “open”, and then ask “narrow” questions and then “leading” questions – although you can mix it up so as not to appear predictable
- You cannot ask a question that assumes something not yet established (example – “Does your new girlfriend pay you rent at your apartment?”, when you have not established there’s a new girlfriend)

Asking questions

- If you obtain an admission that you want, move on and do not give the witness time to correct their response
- Keep in mind you want a “clean” transcript – so if you want to “read in” admissions at the trial, the admission has to stand alone…if the witness says something different before or after the admission, there will be an objection raised at the trial.
- You are entitled to a response to a question, so repeat if necessary
- For documents – have them marked as “exhibits” by the court reporter so that can be included in the record
- If the examinee does not know an answer, but could if obtained further information, you can have the question noted by the court reporter

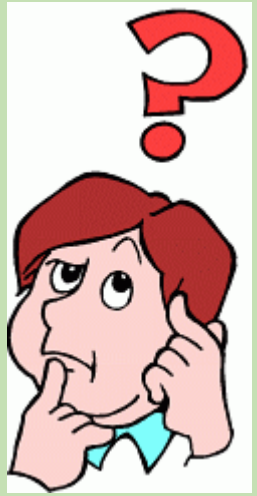
If you are being examined: be prepared!

- Read and know the entire file – all of the documents, letters, reports, affidavits, any other statements
- Think about the topic areas you KNOW are sticky points and questions are going to be asked
- Be prepared for leading questions
- Be honest in your responses
- Ask for a question to be repeated if you don't understand it
- If you don't know the answer say so
- Do not volunteer answers
- Avoid being hostile and angry

Objections

If you are being examined, you can object to a question as follows:

- If you do not understand the question being asked.
- The question is confusing, vague, or overly broad.
- The question is repetitive.
- The question is misleading.
- The question asks for your opinion.
- The question is not relevant to the issues.



However you cannot use objections to interrupt the flow and for the most part, the examination should proceed.

What happens when the discovery is done?

- When it is done, the examining party will usually order a transcript and both parties get copies (it's expensive!)
- If you were the examiner, there may be a list of questions that you asked the examinee to get further information on (the list will be in the transcript) – send a letter to the examinee requesting responses – those questions and answers will be considered under oath and be part of the discovery
- If you are preparing for trial, read the transcript carefully! Trial preparation is another topic!!

Facts for mock examination for discovery

Parties: Jennifer (age 36) and John (age 40)

Children: Steve (age 10) and Susan (age 8)

- Parties lived together for 2 years before getting married 12 years ago.
- John is an engineer and earns $85K
- Jennifer returned to work recently as a library clerk and earns $28K for a 3 day week.
- The parties own their home in Victoria. Other assets include bank accounts, RRSPs and vehicles. They have a mortgage and some debts.
- They separated just under a year ago, in September 2014.

Jennifer's claim

Jennifer filed a Notice of Family Claim a few months after the separation. She is claiming:

- Joint custody with primary residence of the children with her
- Child support
- Spousal support – it's a long term marriage and she cannot be economically independent for the foreseeable future – she also needs to be flexible for the kids.
- Unequal division of the property and debts - Jennifer feels an equal division would be "significantly unfair" - Jennifer stayed at home with the children while John pursued his career. Jennifer wants to keep the house for the children. She feels that she should get more than 50% of the assets so she can keep the house. She will not be able to buy out John's share of the house if it's a 50/50 split.

John's response

- John filed a Response to Family Claim. He is not opposed to joint custody or spousal support, but his position is:

  - the parents should share custody
  - John should pay less than the Guideline amount for child support because he'll have the children at least 40% of the time
  - Jennifer needs to get a better plan in place for work so he won't have to pay spousal support for as long – she is capable of working more and for better pay and the kids are already in after school care.
  - The property and debts should be equally divided. The house will likely have to be sold and Jennifer can get a townhouse, as can he.

Both parties filed Form 8 Financial Statements

- John's lawyer is doing an examination for discovery of Jennifer.
- Jennifer's Financial Statement is in the materials (without attachments)
- We will do an examination for discovery of Jennifer based on her Financial Statement
- Think about what the examiner wants to achieve – what would John want to disprove? What topics might be covered? What kinds of questions might the examiner use?

Examination for Discovery – discussion

Did the examiner obtain evidence that might disprove Jennifer's claim?

Did the examiner obtain evidence that might assist John's position?

How effective was the questioning technique?

How effective was Jennifer at responding?

Is there any evidence obtained that might be used to "impeach" Jennifer at the trial?

Is there any evidence obtained that might be helpful for settlement?

Overall, was this helpful so that you can explain to self-represented clients how the process works and what they might expect?

Resources

http://www.familylaw.lss.bc.ca/resources/fact_sheets/discovery/ExaminationForDiscovery.php

https://www.cle.bc.ca/PracticePoints/FAM/11-ExaminationForDiscovery.pdf

http://www.supremecourtbc.ca/family-law

Justice Education Society:
http://www.justiceeducation.ca/resources/SupremeCourtBC

The Law Society of BC – PLTC Practice Materials – Civil – Ch. 2 Discovery:
http://www.lawsociety.bc.ca/docs/becoming/material/Civil.pdf

Rule 9-2 — Examinations for Discovery

Examination of parties
(1)Subject to subrule (2), each party to a family law case must

(a) make himself or herself available, or

(b) if any of subrules (5) to (9) apply, make a person referred to in that subrule available,

for examinations for discovery by the parties to the family law case who are adverse in interest to the party subject to examination.

Limitations
(2)Unless the court otherwise orders, the examinations for discovery, including all examinations under subrules (16), (18) and (20), conducted under this rule of a party, including any such examinations conducted of a person referred to in subrule (1) (b) who is examined in relation to that party, by any other party who is adverse in interest must not, in total, exceed in duration

(a) 5 hours, or

(b) any greater period to which the person to be examined consents.

Considerations of the court
(3)In an application under subrule (2) to extend the examination for discovery period, the court must consider the following:

(a) the conduct of a person who has been or is to be examined, including

(i) the person's unresponsiveness in any examination for discovery held in the family law case,

(ii) the person's failure to provide complete answers to questions, or

(iii) the person's provision of answers that are evasive, irrelevant, unresponsive or unduly lengthy;

(b) any denial or refusal to admit, by a person who has been or is to be examined, anything that should have been admitted;

(c) the conduct of the examining party;

(d) whether or not it is reasonably practicable to complete the examinations for discovery within the period provided under subrule (2);

(e) the number of parties and examinations for discovery and the proximity of the various interests of those parties.

Oral examination on oath
(4)An examination for discovery is an oral examination on oath.

Examination of party that is not an individual
(5)Unless the court otherwise orders, if a party to be examined for discovery is not an individual,

(a) the examining party may examine one representative of the party to be examined,

(b) the party to be examined must nominate as its representative an individual, who is knowledgeable concerning the matters in question in the family law case, to be examined on behalf of that party, and

(c) the examining party may examine

(i) the representative nominated under paragraph (b), or

(ii) any other person the examining party considers appropriate and who is or has been a director, officer, employee, agent or external auditor of the party to be examined.

Examination of person for whose benefit family law case brought
(6)Subject to subrule (8), a person for whose immediate benefit a family law case is brought or defended may be examined for discovery.

Examination of guardian and infants
(7)Unless the court otherwise orders, if a party to be examined for discovery is an infant, the infant, his or her guardian and his or her litigation guardian may be examined for discovery.

[am. B.C. Reg. 119/2010, Sch. B, s. 6.]

Examination of mentally incompetent person
(8)If a party to be examined for discovery is a mentally incompetent person, his or her litigation guardian and his or her committee may be examined for discovery, but the mentally incompetent person must not be examined without leave of the court.

Examination of bankrupt
(9)If a party to be examined for discovery is a trustee in bankruptcy, the bankrupt may be examined for discovery.

Place
(10)Unless the court otherwise orders or the parties to the examination for discovery otherwise agree, an examination for discovery must take place at a location within 30 kilometres of the registry that is nearest to the place where the person to be examined resides.

Examination before reporter
(11)An examination for discovery must be conducted before an official reporter who is empowered to administer the oath.

Service of notice
(12)Before conducting an examination for discovery under this rule, the party wishing to conduct that examination for discovery must do the following:

(a) if the person to be examined is a party to, and has a lawyer in, the family law case, ensure that, at least 7 days before the examination for discovery,

(i) an appointment in Form F21 is served on that lawyer, and

(ii) witness fees in the amount required under Schedule 3 of Appendix C are tendered to that lawyer;

(b) in any other case, ensure that, at least 7 days before the examination for discovery,

(i) an appointment in Form F21 is served on the person to be examined, and

(ii) witness fees in the amount required under Schedule 3 of Appendix C are tendered to the person to be examined;

(c) at least 7 days before the examination for discovery, serve a copy of the appointment on all parties.

[am. B.C. Reg. 112/2012, Sch. B, s. 1.]

Person must attend examination
(13)A person to be examined for discovery must attend and submit to examination for discovery if the party wishing to conduct that examination for discovery has complied with subrule (12) (a) or (b), as the case may be.

Fees must not be attached
(14)If a lawyer receives witness fees under subrule (12) (a), those fees must not be attached.

Production of documents
(15)Unless the court otherwise orders, if the person to be examined for discovery is a person referred to in subrule (6), (7), (8) or (9), the person must produce for inspection on the examination for discovery all documents in his or her possession or control, not privileged, relating to the matters in question in the family law case.

Examination and re-examination
(16)The examination for discovery of a person is in the nature of a cross-examination, and the person examined for discovery may be re-examined on his or her own behalf or on behalf of a party not adverse in interest to him or her in relation to any matter respecting which he or she has been examined.

Scope of examination
(17)Unless the court otherwise orders, a person being examined for discovery

(a) must answer any question within his or her knowledge or means of knowledge regarding any matter, not privileged, relating to a matter in question in the family law case, and

(b) is compellable to give the names and addresses of all persons who reasonably might be expected to have knowledge relating to any matter in question in the family law case.

Person must inform self
(18)In order to comply with subrule (17), a person being examined for discovery may be required to inform himself or herself and the examination may be adjourned for that purpose.

Response may be provided by letter
(19)If a person is required to inform himself or herself under subrule (18) in order to respond to one or more questions posed on the examination for discovery, the examining party may request the person to provide the responses by letter.

If letter provided
(20)If the examining party receives a letter under subrule (19),

(a) the questions set out in the letter and the answers given in response to those questions are deemed for all purposes to be questions asked and answers given under oath in the examination for discovery, and

(b) the examining party may, subject to subrule (2), continue the examination for discovery.

Objections
(21)If a person under examination objects to answering a question put to him or her, the question and the objection must be taken down by the official reporter and the court may

(a) decide the validity of the objection, and

(b) order the person to submit to further examination and set a maximum duration for that further examination.

How recorded
(22)An examination for discovery is to be taken down in the form of question and answer, and copies of the transcript may be obtained on payment of the proper fee by

(a) any party,

(b) the person examined, or

(c) any other person as the court for special reason may permit.

Application to persons outside British Columbia
(23)So far as is practicable, this rule applies to a person residing outside British Columbia, and the court, on application on notice to the person, may order the examination for discovery of the person at a place and in the manner the court considers appropriate.

Service of order and notice
(24)Unless the court otherwise orders, if an order is made under subrule (23) for the examination for discovery of a person,

(a) the order and the notice of appointment may be served on, and

(b) the witness fees referred to in subrule (12) may be paid to

the lawyer for the person.

Working with
Self-Represented Family Clients:
Tips for Effective Advocacy & Support
Examination for Discovery

Legal Advocacy Training Conference
October 6-8, 2015

Prepared and Presented by
Rhona M. Lichtenwald
Lawyer & Mediator
Hillcrest Law & Mediation

What is the Discovery Process?
BC Supreme court only – not available in Provincial court
Used in Family and Civil law cases
Supreme Court Family Rules (SCFR):

Examination and production of documents – Rule 9-1
Examination for Discovery – Rule 9-2
Discovery by Interrogatories (written questions) – Rule 9-3
Pre-Trial Examination of Witnesses – Rule 9-4
Physical Examination and Inspection – Rule 9-5
Admissions – Rule 9-6
Depositions – Rule 9-7

Examinations for Discovery
Rule 9-2 Summary
Each party in a family law case MUST make themselves available for examinations for discovery by parties "adverse in interest"
A few exceptions: if the party is not an individual (i.e. a corporation), or if the party is an infant, mentally incompetent or a trustee, a representative must be available
The examination is oral and under oath, before an official court reporter
The examination is not to exceed 5 hours (unless a court order is obtained for more time)

Rule 9-2
How does it work?
The party wanting to examine the other must serve an appointment in Form F21 on the party to be examined and give 7 days notice
Witness fees as set out in the SCFR must also be provided
The exam must take place within 30 kms of where the person to be examined resides, or if the person is outside of BC, an application can be brought for an order for a location for the discovery
If the person to be examined is a representative of a party, they must bring to the examination all documents relating to the proceeding that are not privileged

What happens at the examination for discovery?
The examination is the same as a cross-examination
The person examined can be re-examined on his/her own behalf (usually if they have their own lawyer present), or can be re-examined by a party not adverse in interest (if there was another party)
The person being examined must answer all of the questions regarding anything relating the case that is not privileged and must provide the names and addresses of all persons who might have knowledge about the case.

What happens?
If the person being examined does not know the answer, they may be required to inform themselves and the discovery can be adjourned or a letter can be sent to that person listing the questions from the exam that require further information and any responses are part of the examination
Objections – a person being examined can object and that will be noted by the court reporter and a court may determine if it is a valid objection
The examination is made under oath and is recorded by an official court reporter - the questions and answers numbered for reference
Both parties can order copies of the transcript

What is the purpose?
To learn the other side's case
To gain admissions
To use the transcript at trial to "impeach" the party who was examined

Learn the other side's case
This can help you prepare your case for trial.
It may be the basis to request further documents.
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Open/narrow: What kind of work did you do in 2013?

Narrow : How much did you earn at job X in 2013?

Leading: You earned $35,500 from January 1 to December 31, 2013, correct?

If you are the Examiner:
Read all of the documents in the file – start with the Notice of Family Claim and the Response – what are the issues? If you are the Claimant, what do you have to prove to make your case?
Thoroughly read all of the other documents – Financial Statements, Affidavits, any financial documents, reports, all of the correspondence
Know your case – what do you have to prove/disprove

Topic questions
Think about the topics that you want to ask questions on – this will depend on the issues in the case, i.e:

Children
Spouse
Finances – income/expenses
Finances – property/debts
Other relevant issues

What is your purpose?
Decide what you want to achieve in each topic:
- What admissions do you hope to obtain?
What information do you have that you want more information about?
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Read and know the entire file – all of the documents, letters, reports, affidavits, any other statements
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If you do not understand the question being asked.
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If you are preparing for trial, read the transcript carefully! Trial preparation is another topic!!

Facts for mock examination for discovery

Parties: Jennifer (age 36) and John (age 40)
Children: Steve (age 10) and Susan (age 8)
Parties lived together for 2 years before getting married 12 years ago.
John is an engineer and earns $85K
Jennifer returned to work recently as a library clerk and earns $28K for a 3 day week.
The parties own their home in Victoria. Other assets include bank accounts, RRSPs and vehicles. They have a mortgage and some debts.
They separated just under a year ago, in September 2014.

Jennifer's claim
Jennifer filed a Notice of Family Claim a few months after the separation. She is claiming:
Joint custody with primary residence of the children with her
Child support
Spousal support – it's a long term marriage and she cannot be economically independent for the foreseeable future – she also needs to be flexible for the kids.
Unequal division of the property and debts - Jennifer feels an equal division would be "significantly unfair" - Jennifer stayed at home with the children while John pursued his career. Jennifer wants to keep the house for the children. She feels that she should get more than 50% of the assets so she can keep the house. She will not be able to buy out John's share of the house if it's a 50/50 split.

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John filed a Response to Family Claim. He is not opposed to joint custody or spousal support, but his position is:
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Jennifer's Financial Statement is in the materials (without attachments)
We will do an examination for discovery of Jennifer based on her Financial Statement
Think about what the examiner wants to achieve – what would John want to disprove? What topics might be covered? What kinds of questions might the examiner use?

Examination for Discovery – discussion
Did the examiner obtain evidence that might disprove Jennifer's claim?
Did the examiner obtain evidence that might assist John's position?
How effective was the questioning technique?
How effective was Jennifer at responding?
Is there any evidence obtained that might be used to "impeach" Jennifer at the trial?
Is there any evidence obtained that might be helpful for settlement?
Overall, was this helpful so that you can explain to self-represented clients how the process works and what they might expect?

Resources

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http://www.supremecourtbc.ca/family-law

Justice Education Society:
http://www.justiceeducation.ca/resources/SupremeCourtBC

The Law Society of BC – PLTC Practice Materials – Civil – Ch. 2 Discovery:
http://www.lawsociety.bc.ca/docs/becoming/material/Civil.pdf

Form F21 (Rule 9-2(12))

Court File No.: VIC009
Court Registry: Victoria

In the Supreme Court of British Columbia

Claimant: Jennifer Julianna McMillan

Respondent: John James McMillan

APPOINTMENT TO EXAMINE FOR DISCOVERY

[Rule 21-1 of the Supreme Court Family Rules applies to all forms.]

To: Jennifer Julianna McMillan

TAKE NOTICE that you are required to attend for your examination for discovery at the place, date and time set out below. If you are not a named party, or a representative of a named party, to this family law case, you must, unless the court otherwise orders, bring with you all documents in your possession or control, not privileged, relating to the matters in question in this family law case.

Place: Crown Court Reporting
595 Blanchard Street
Victoria, BC V6V 7W9

Date: 06/08/2015

Time: 10:00 a.m.

Date: 01/09/2015

M. P. Lawyer

Signature of
[ ] party wishing to conduct examination
[**x**] lawyer for party(ies) wishing to conduct examination

Meany P. Lawyer
#666 – 666 Devil's Road
Victoria, BC V9 3L2

Form F8 (Rule 5-1 and 7-1(8), 10) and (11))

This is the 1st affidavit of Jennifer McMillan in this case
And was made on 01/06/2015

Court File No.: VIC009
Court Registry: Victoria

In the Supreme Court of British Columbia

Claimant: Jennifer Julianna McMillan

Respondent: John James McMillan

FINANCIAL STATEMENT

INSTRUCTIONS FOR COMPLETION

You do not need to complete this form if ALL of the following apply:

(a) you are applying for child support but are making no claim for any other kind of support;

(b) the child support is for children who are not stepchildren;

(c) none of the children for whom child support is claimed is 19 years of age or older;

(d) the income of the party being asked to pay child support is under $150 000 per year;

(e) you are not applying for special expenses under section 7 of the child support guidelines;

(f) you are not applying for an order under section 8 of the child support guidelines;

(g) you are not applying for an order under section 9 of the child support guidelines;

(h) you are not making a claim based on undue hardship under section 10 of the child support guidelines.

Unless ALL of the conditions above apply, you must swear the following affidavit and complete the Parts of this Form that the following chart indicates apply to you.

This Form has 6 Parts. You may not have to complete all Parts. Which Parts you have to complete depends on which categories of application apply to you as set out in the following chart.

Please check off each of the Items, 1 through 10, that apply to you and then complete the Parts that are noted for those Items. Each required Part need be completed only once regardless of the number of applicable Items for which it is required.

Item		Category	Part(s) 1	2	3	4	5	6
1	x	I am applying for spousal support.	●	●	●			
2		I am being asked to pay spousal support.	●	●	●			
3		I am being asked to pay child support and all of the following conditions apply: (a) there is no claim for special expenses under section 7 of the child support guidelines; (b) the child support is only for children who are not stepchildren; (c) none of the children for whom child support is claimed is 19 years of age or older; (d) there is no application for an order under section 9 of the child support guidelines; (e) my income is under $150,000 per year; (f) there is no claim based on undue hardship under section 10 of the child support guidelines.	●					

Item		Category	Part(s) 1	2	3	4	5	6
4	☐	I am applying for or being asked to pay child support and one or more of the following conditions may apply: (a) one or more of the children is a stepchild; (b) one or more of the children for whom child support is claimed is 19 years of age or older; (c) there is an application for an order under section 9 of the child support guidelines; (d) the income of the party being asked to pay child support is more than $150,000 per year.	●	●	●			
5	☐	I am being asked to pay child support and I intend to make a hardship claim under the child support guidelines.	●	●	●		●	●
6	☐	I am applying for child support and the opposite party intends to make a hardship claim under the child support guidelines.	●	●	●			●
7	☒	Either I claim child support or I am being asked to pay child support and there is a claim for special expenses under section 7 of the child support guidelines.	●	●	●	●		
8	☒	I am making or responding to a property claim under Part 5 of the *Family Law Act*.			●			
Include parts			**1**	**2**	**3**	**4**		

I, Jennifer Julianna McMillan, of 3996 Foul Bay Road, Victoria, BC, V5C 2S2, SWEAR (OR AFFIRM) THAT:

1. The information set out in this financial statement is true and complete to the best of my knowledge.

[Check whichever of the following boxes is correct and complete any required information.]

2. [X] I do not anticipate any significant changes in the information set out in this financial statement.

[ ] I anticipate the following significant changes in the information set out in this financial statement:

SWORN/AFFIRMED BEFORE ME at
Victoria
British Columbia
on 01/06/2015

JJ Bean

A Commissioner for taking affidavits for British Columbia
JJ Bean
Notary Public
#330 – 295 Government Street
Victoria, BC V5V 4K4
Tel: 250-350-9999
Fax: 250-350-8888

Jennifer McMillan

Jennifer Julianna McMillan

PART 1 – INCOME

A. Employer information:

[X] I am employed by Victoria Municipal Library, #56-3535 Fort Street, Victoria, BC, V8W 2P2

[ ] I am self employed as [trade or occupation]

[ ] I operate an unincorporated business, the name and address of which is [name and address of business]

B. Documentation supplied:

I have attached to this statement or serve with it a copy of each of the following applicable income documents: *(Check the first 2 boxes and check each other box that applies to you and provide the documents referred to beside each checked box)*

[**x**] every personal income tax return, including all attachments, that I have filed for each of the 3 most recent taxation years;

[**x**] every income tax notice of assessment or reassessment I have received for each of the 3 most recent taxation years;

[**X**] *(if you are an employee)* my most recent statement of earnings indicating the total earnings paid in the year to date, including overtime, or, if such a statement is not provided by my employer, a letter from my employer setting out that information, including my rate of annual salary or remuneration;

[ ] *(if you are receiving Employment Insurance benefits)* my 3 most recent EI benefit statements;

[ ] *(if you are receiving Workers' Compensation benefits)* my 3 most recent WCB benefit statements;

[ ] *(if you are receiving social assistance)* a statement confirming the amount of social assistance that I receive;

[ ] *(if you are self-employed)* for the 3 most recent taxation years

(i) the financial statements of my business or professional practice, other than a partnership, and

(ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom I do not deal at arm's length;

[ ] *(if you are a partner in a partnership)* confirmation of my income and draw from, and capital in, the partnership for its 3 most recent taxation years;

[ ] *(if you control a corporation)* for the corporation's 3 most recent taxation years

(i) the financial statements of the corporation and its subsidiaries, and

(ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the corporation and every related corporation does not deal at arm's length;

[ ] *(if you are a beneficiary under a trust)* the trust settlement agreement and the trust's 3 most recent financial statements;

[X] *(if you own or have an interest in real property)* the most recent assessment notice issued from an assessment authority for the property.

NOTE: If the applicable income documents are not attached to or served with this financial statement, they must nonetheless be provided to the other party if and as required by Rule 5-1 of the Supreme Court Family Rules.

C. ANNUAL INCOME

If line 150 (total income) of your most recent federal income tax return sets out what you expect your income will be for this year and you are not obliged under Note 1 below to complete Schedule A of this Form, ignore lines 1 to 7 below and record the number from line 150 of your most recent federal income tax return at line 8 below. Otherwise, record what you expect your income for this year to be from each of the following sources of income that applies to you. Record gross annual amounts.

LINE	GUIDELINE INCOME FOR BASIC CHILD SUPPORT CLAIM		
	Sources and amounts of annual income		
1	Employment income $1,166.67 paid: ☐ monthly ☒ twice each month ☐ every 2 weeks ☐ weekly ☐ annually	+	$28,000.08
2	Employment insurance benefits	+	
3	Workers' compensation benefits	+	
4	Interest and investment income	+	
5	Pension income	+	
6	Social assistance income relating to self	+	
7	Other income (attach Schedule A) – see Note 1	+	$0.00
8	**Child support guidelines income before adjustments** *(If you are required to complete lines 1 through 7 above, total the amounts of those lines here. Otherwise, record the number from line 150 of your most recent federal income tax return)* $28,000.00 *Line 150 Income (if applicable)*	►	$28,000.00
	Adjustments to income		
9	Subtract union and professional dues	-	
10	Adjustments in accordance with Schedule III of the Guidelines per line 8 of Schedule B (attached) – see Note 2	+	$0.00
11	**Child support guidelines income for basic child support** *(line 8 as adjusted by lines 9 and 10)*	=	**$28,000.00**

	CHILD SUPPORT GUIDELINE INCOME TO DETERMINE SPECIAL EXPENSES		
	Child support guideline income (from line 11 of this table)	+	$28,000.00
12	Add spousal support received from the other party to the family law case	+	
13	Subtract spousal support paid to the other party to the family law case	-	
14	Add Universal Child Care Benefits relating to children for whom special or extraordinary expenses are sought	+	
15	**Child support guidelines income to determine special expenses** *(line 11 as adjusted by lines 12, 13 and 14)*	=	**$28,000.00**

	INCOME TO BE INCLUDED FOR SPOUSAL SUPPORT CLAIM		
	Child support guideline income (from line 11 of this table)	+	$28,000.00
16	Total child support received	+	
17	Social assistance received for other members of household	+	
18	Child Tax Benefit and BC Family Bonus	+	
19	**Total income to be used for a spousal support claim** *(line 11 plus lines 16, 17 and 18)*	=	**$28,000.00**

Note: 1. You must complete Schedule A of this Form and include, at line 7 above, the total income recorded at line 11 of Schedule A, if you expect to receive income this year from any of the following sources:

- *(a) taxable dividends from Canadian corporations;*
- *(b) net partnership income (limited or non-active partners only);*
- *(c) rental income;*
- *(d) taxable capital gains;*
- *(e) registered retirement savings income;*
- *(f) self-employment income;*
- *(g) any other taxable income that is not included in paragraphs (a) to (f) or in lines 1 to 5 of Schedule A.*

2. If there are any adjustments as set out in Schedule III of the child support guidelines that apply to you, you must

- *(a) complete Schedule B of this Form, and*
- *(b) include at line 10 above, the amount recorded at line 8 of that completed Schedule B.*

SCHEDULE A – OTHER INCOME

LINE	OTHER SOURCES OF INCOME		
1	Self employment income: Gross = ... Net = *Note: Provide financial statements of the business, including any statement of business activities filed as part of your income tax return*	+	
2	Other employment income	+	
3	Net partnership income: limited or non-active partners only	+	
4	Rental income: Gross = ... Net =	+	
5	Total amount of dividends from Taxable Canadian Corporations	+	
6	Total capital gains minus total capital losses - ..... =	+	$0.00
7	Spousal support from another relationship or marriage	+	
8	Registered retirement savings plan income	+	
9	Net federal supplements	+	
10	Any other income	+	
11	**Total of lines 1 through 10**	**=**	**$0.00**

SCHEDULE B – ADJUSTMENTS TO INCOME

LINE	DEDUCTIONS		
1	Employment expenses, other than union or professional dues, claimed under Schedule III of the Child Support Guidelines *(list)* .... Total	- -	 $0.00
2	Actual business investment losses during the year	-	
3	Carrying charges and interest expenses paid and deductible under *the Income Tax Act* (Canada): *(list)* .... Total	 -	 $0.00
4	Prior period earnings minus reserves - ..... =	- -	 $0.00
5	Portion of partnership and sole proprietorship income required to be reinvested	-	
	ADDITIONS		
6	Capital cost allowance for real property	+	
7	Employee stock options in Canadian-controlled private corporations exercised: value of shares when options exercised minus amount paid for shares - minus amount paid to acquire option - ..... =	 +	 $0.00
8	**Total adjustments**		**$0.00**

PART 2 – EXPENSES

	Monthly	
Compulsory deductions		
CPP contributions	$101.06	
EI premiums	$43.86	
Income Taxes	$232.66	
Employee pension contributions		
Other (specify)		
Compulsory Deductions Sub-total		**$377.58**
Housing		
Rent or mortgage	$1,495.00	
Property taxes	$186.66	
Property insurance	$85.00	
Water, sewer, garbage	$21.00	
Strata fees		
House repairs and maintenance	$250.00	
Other (specify)		
Housing Sub-total		**$2,037.66**
Utilities		
Heat and electricity	$145.00	
Telephone	$43.00	
Cable TV	$65.00	
Other (specify) internet	$39.99	
Cell phone	$55.00	
Utilities Sub-total		**$347.99**
Household expenses		
Food	$600.00	
Household supplies	$85.00	
Meals outside the home	$100.00	
Furnishings and equipment	$45.00	
Other (specify)		
Household expenses Sub-total		**$830.00**
Transportation		
Public transit, taxis	$50.00	
Gas and oil	$200.00	
Car insurance and license	$150.00	
Parking	$25.00	
Repairs and maintenance	$100.00	
Lease payments		
Other (specify)		
Transportation Sub-total		**$525.00**
Other		
Charitable donations	$10.00	
Vacation	$165.00	
Pet care	$25.00	
Newspapers, publications		
Other (specify)		

	Other Sub-total	**$200.00**
Health		
MSP premiums		
Extended health premiums		
Dental plan premiums		
Health care (net of coverage)	$25.00	
Drugs (net of coverage)	$45.00	
Dental care (net of coverage)	$35.00	
Other (specify)		
	Health Sub-total	**$105.00**
Personal		
Clothing	$100.00	
Hair care	$25.00	
Toiletries, cosmetics	$20.00	
Education (specify)		
Life insurance		
Dry cleaning/laundry		
Entertainment/recreation	$75.00	
Gifts	$25.00	
Other (specify)		
	Personal Sub-total	**$245.00**
Children		
Child care	$666.67	
Clothing	$100.00	
Hair care	$20.00	
School fees and supplies	$50.00	
Entertainment/recreation	$60.00	
Activities and lessons	$65.00	
Gifts	$35.00	
Insurance		
Other (specify)		
	Children Sub-total	**$996.67**
Savings		
RRSP		
RESP	$200.00	
Other (specify)		
	Savings Sub-total	**$200.00**
Support payments to others *(specify)*		
	Support payments to others Sub-total	**$0.00**
Debt payments *(specify)*		
Scotia credit line	$200.00	
Credit cards	$500.00	
	Debt payments Sub-total	**$700.00**
	TOTAL MONTHLY EXPENSES	**$6,564.90**
	TOTAL ANNUAL EXPENSES *(multiply TOTAL MONTHLY EXPENSES BY 12)*	**$78,778.80**

PART 3 – PROPERTY

ASSETS

1. Real Estate • *Attach a copy of the most recent assessment notice for any property that you own or in which you have an interest.* • *Provide details, including address or legal description and nature of interest, of any interest you have in land, including leasehold interests and mortgages, whether or not you are registered as owner.* • *Record the estimated market value of your interest without deducting encumbrances or costs of disposition.* *(Record encumbrances under DEBTS below.)*			
Details	**Date Acquired**	**Value**	
3996 Foul Bay Road, Victoria, BC	February 5, 2010	$650,000.00	
PID 010-116-979, Lot C of Lot 15, Block 4, Plan 2604			
Joint tenancy			
		Real estate Sub-total	**$650,000.00**
2. Vehicles • *List cars, trucks, motorcycles, trailers, motor homes, boats, etc.*			
2013 Toyota Camry registered to John McMillan	2013	$16,000.00	
2009 Dodge Caravan registered to Jennifer McMillan	2011	$3,500.00	
		Vehicles Sub-total	**$19,500.00**
3. Financial assets • *List savings and chequing accounts, term deposits, GIC's, stocks, bonds, Canada Savings Bonds, mutual funds, insurance policies (indicate beneficiaries), accounts receivable, etc.* • *Record account number and name of institution where accounts are held.*			
Scotiabank account #278425-1 in Jennifer's name	September 2014	$3,050.00	
Scotiabank savings account #2785299-2 jointly	2001	$7,400.00	
Scotiabank account #8872-01 in John's name	2014	unknown	
RESP Canada Scholarship Trust account 776592	2005	$15,000.00	
		Financial assets Sub-total	**$25,450.00**
4. Pensions and RRSP's • *Record name of institution where accounts are held, name and address of pension plan and pension details.*			
Scotiabank RRSP #RSP743 in John's name	2000	$42,000.00	
Canada Pension Plan credits		unknown	
		Pensions and RRSP's Sub-total	**$42,000.00**
5. Business Interests • *List any interest you hold, directly or indirectly, in any unincorporated business, including partnerships, trusts and joint ventures.* • *List any interests you hold in incorporated businesses.* • *Record the name and address of the company.*			
		Business interests Sub-total	**$0.00**
6. Other • *Include precious metals, collections, works of art and any jewellery or household items of extraordinary value.* • *Include location of safety deposit boxes.*			
		Other Sub-total	**$0.00**
		TOTAL	**$736,950.00**

DEBTS

Show your debts & other liabilities, whether arising from personal or business dealings, by category, such as mortgages, charges, liens, notes, credit cards, accounts payable and tax arrears. Include contingent liabilities such as guarantees and indicate that they are contingent.

Secured Debt Details *(list mortgages and other secured debts)*	**Date Incurred**	**Amount**	
ScotiaBank mortgage registered on 3996 Foul Bay Road, Victoria, BC	February 5, 2010	$325,000.00	
Toyota Finance Co. Auto loan 3452-005 Toyota Camry	2013	$15,000.00	
		Secured debts Sub-total	**$340,000.00**
Unsecured Debt Details *(list bank loans, personal loans, credit cards and other unsecured debts)*			
ScotiaBank credit line #27-987600	2012	$5,875.00	
HBC Credit card #87654098	2010	$833.00	
ScotiaVisa card 41010876499	2010	$1,541.45	
Sears credit card #783827653	2009	$563.00	
		Unsecured debts Sub-total	**$8,812.45**
		TOTAL	**$348,812.45**

DISPOSAL OF PROPERTY

(List all property disposed of during the 2 years preceding this statement or, if the parties married within that 2 year period, since the date of marriage.)

Description *(describe the property disposed of)*	**Date of Disposal** *(month, day, year)*	**Value**
	Total	**$0.00**

PART 4 – SPECIAL OR EXTRAORDINARY EXPENSES

Note:
1. *Provide a separate statement under this Part 4 for each child for whom a claim is made.*
2. *To calculate a net amount, subtract, from the gross amount, subsidies, benefits, income tax deductions or credits relating to the expense.*

Name of child: Steve William McMillan	**Annual Gross**	**Annual Net**	**Monthly Gross**	**Monthly Net**
Child care expense	$4,000.00			
Medical/dental insurance premiums attributable to child				
Health related expenses that exceed insurance reimbursement by at least $100	$425.00			
Extraordinary expenses for primary or secondary school				
Post secondary education expenses				
Extraordinary extracurricular expenses *(list)*				
Basketball	$500.00			
Subtract contributions from child				
Total	**$4,925.00**	**$0.00**	**$0.00**	**$0.00**

Name of child: Susan Andrea McMillan	**Annual Gross**	**Annual Net**	**Monthly Gross**	**Monthly Net**
Child care expense	$4,000.00			
Medical/dental insurance premiums attributable to child				
Health related expenses that exceed insurance reimbursement by at least $100	$425.00			
Extraordinary expenses for primary or secondary school				
Post secondary education expenses				
Extraordinary extracurricular expenses *(list)*				
Subtract contributions from child				
Total	**$4,425.00**	**$0.00**	**$0.00**	**$0.00**

Name of child:	**Annual Gross**	**Annual Net**	**Monthly Gross**	**Monthly Net**
Child care expense				
Medical/dental insurance premiums attributable to child				
Health related expenses that exceed insurance reimbursement by at least $100				
Extraordinary expenses for primary or secondary school				
Post secondary education expenses				
Extraordinary extracurricular expenses *(list)*				
Subtract contributions from child				
Total	**$0.00**	**$0.00**	**$0.00**	**$0.00**

Name of child:	**Annual Gross**	**Annual Net**	**Monthly Gross**	**Monthly Net**
Child care expense				
Medical/dental insurance premiums attributable to child				
Health related expenses that exceed insurance reimbursement by at least $100				
Extraordinary expenses for primary or secondary school				
Post secondary education expenses				
Extraordinary extracurricular expenses *(list)*				
Subtract contributions from child				
Total	**$0.00**	**$0.00**	**$0.00**	**$0.00**

Name of child:	Annual Gross	Annual Net	Monthly Gross	Monthly Net
Child care expense				
Medical/dental insurance premiums attributable to child				
Health related expenses that exceed insurance reimbursement by at least $100				
Extraordinary expenses for primary or secondary school				
Post secondary education expenses				
Extraordinary extracurricular expenses *(list)*				
Subtract contributions from child				
Total	**$0.00**	**$0.00**	**$0.00**	**$0.00**

Name of child:	Annual Gross	Annual Net	Monthly Gross	Monthly Net
Child care expense				
Medical/dental insurance premiums attributable to child				
Health related expenses that exceed insurance reimbursement by at least $100				
Extraordinary expenses for primary or secondary school				
Post secondary education expenses				
Extraordinary extracurricular expenses *(list)*				
Subtract contributions from child				
Total	**$0.00**	**$0.00**	**$0.00**	**$0.00**

Total Gross Annual Special or Extraordinary Expenses for all children	A	$9,350.00
Total annual change in value of applicable subsidies and/or benefits *(including Canada Child Tax Benefit and B.C. Family Bonus)* related to the Special or Extraordinary Expenses	-B	
Total annual change in income tax deductions and/or credits related to the Special or Extraordinary Expenses	-C	
Total Net Annual Special or Extraordinary Expenses for all children (A-B-C)	**=**	**$9,350.00**

Total Net Monthly Special or Extraordinary Expenses for all children (Annual / 12)	**$779.17**

PART 5 – UNDUE HARDSHIP

1. Responsibility for unusually high debts reasonably incurred to support the family prior to separation or in order to earn a living

Owed to:	Terms of debt:	Monthly Amount
	Total	**$0.00**

2. Unusually high expenses for exercising parenting time or contact with, or access to, a child

Details of expense	Monthly Amount
Total	**$0.00**

3. Legal duty under a court order or separation agreement to support another person

Name of person	Relationship	Nature of duty	Amount
		Total	**$0.00**

4. Legal duty to support a child, other than a child for whom support is claimed in this application, who is

(a) under age 19, or
(b) 19 or older but unable to support himself or herself because of illness, disability or other cause

Name of person	Relationship	Nature of duty	Amount
		Total	**$0.00**

5. Legal duty to support a person who is unable to support himself or herself because of illness or disability

Name of person	Relationship	Nature of duty	Amount
		Total	**$0.00**

6. Other undue hardship circumstances (provide full particulars)

PART 6 – INCOME OF OTHER PERSONS IN HOUSEHOLD

Name of Person	Annual Income
Total	**$0.00**

DIVORCEMATE SOFTWARE

Tools One 2015

McMillan: Jennifer & John
Prepared by:
September 25 2015

Calculation Input	Annual $
John	*, 40, Resident of BC*
Income	
Employment income	85,000
Jennifer	*, 36, Resident of BC*
Income	
Employment income	28,000
Special Expenses (s.7)	
Child care expenses *(after school care)*	8,000
Child's portion of medical expenses	850
Extraordinary extracurricular expenses *(Steve basketball)*	500
Tax Deductions	
Child care expenses (deductible portion)	8,000
Tax Credits	
Children's fitness amount *(basketball)*	500
Medical expenses	850

Children	Age	Lives with	Table Amt	Claimed by
Steve	10	Jennifer	Yes	Jennifer
Susan	8	Jennifer	Yes	Jennifer

Youngest child finishes high school 10 years from the date of separation.

Dependant credit claimed by Jennifer.

Child Support Guidelines (CSG)	Monthly $	
	John	Jennifer
Annual Guidelines Income	85,000	28,000
Child Support (Table)	**1,278**	**0**
Special Expenses (s.7)	0	779
Child Support (s.7 Payment)	*See Support Scenarios*	

Spousal Support Advisory Guidelines (SSAG)

Monthly $

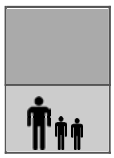
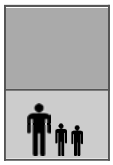
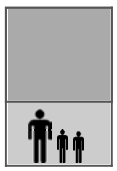
Length of marriage/cohabitation: 14 years
Recipient's age at separation: 35 years

"With Child Support" Formula

Low	Mid	High
120	**456**	**786**

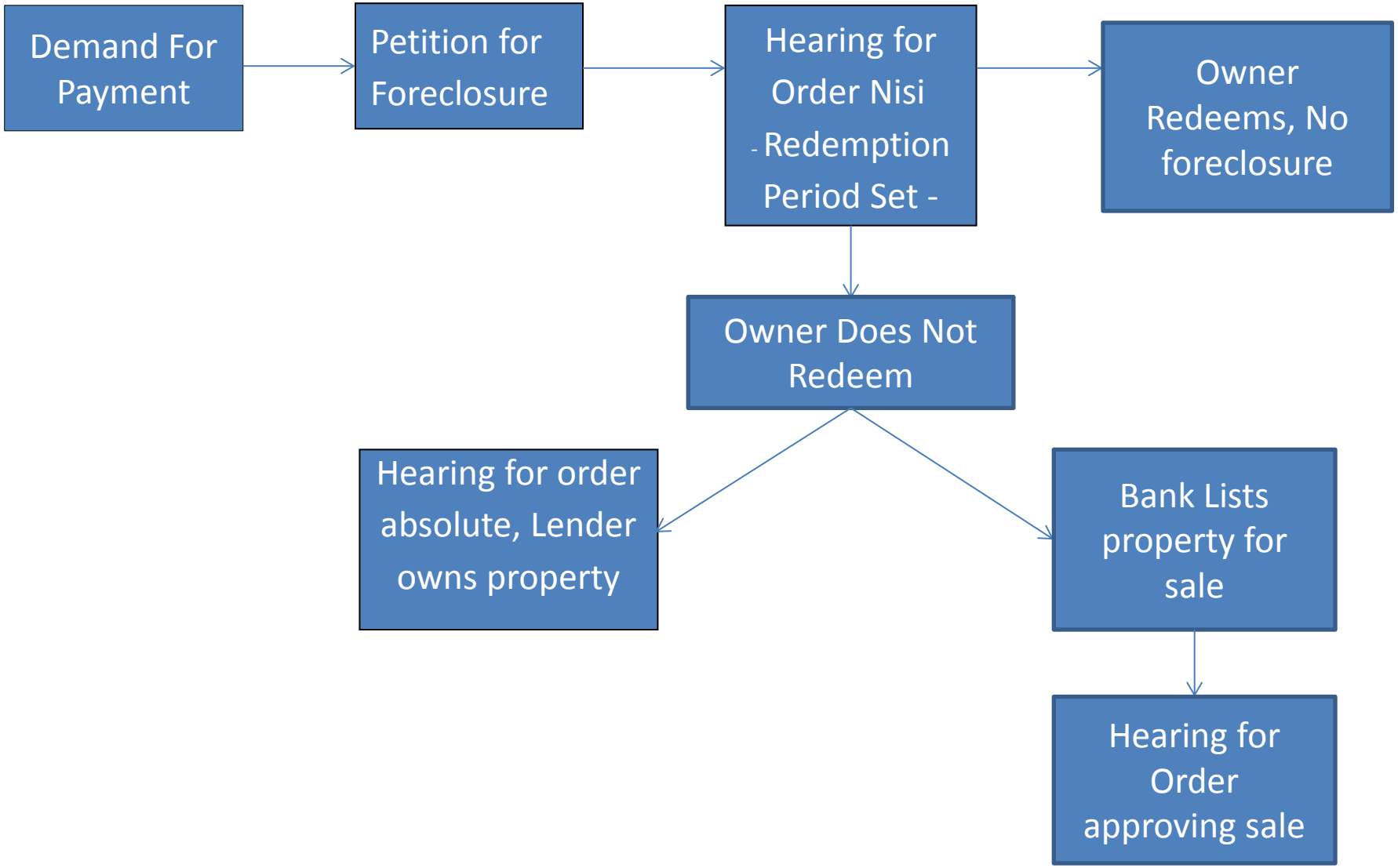
The formula results in a range for spousal support of $120 to $786 per month for an indefinite (unspecified) duration, subject to variation and possibly review, with a minimum duration of 7 years and a maximum duration of 14 years from the date of separation.

***SSAG Considerations**: The results of the SSAG formula must be interpreted with regard to: Entitlement; Location within the Ranges; Restructuring; Ceilings and Floors; and Exceptions.*

Support Scenarios *Monthly $*	A. SSAG Low		B. SSAG Mid		C. SSAG High	
	John	Jennifer	John	Jennifer	John	Jennifer
Gross Income	7,083	2,453	7,083	2,453	7,083	2,453
Taxes and Deductions	(1,772)	(135)	(1,662)	(172)	(1,556)	(250)
Benefits and Credits	0	694	0	677	0	601
Special Expenses (s.7)	0	(779)	0	(779)	0	(779)
Spousal Support	**(120)**	**120**	**(456)**	**456**	**(786)**	**786**
Child Support (Table)	**(1,278)**	**1,278**	**(1,278)**	**1,278**	**(1,278)**	**1,278**
Child Support (s.7 Payment)	**(413)**	**413**	**(329)**	**329**	**(308)**	**308**
Net Disposable Income (NDI)	3,500	4,044	3,358	4,242	3,155	4,397
adult in household child in household shared/summer child in household Payor's NDI/Contribution						
Percent of NDI	**46.4%**	**53.6%**	**44.2%**	**55.8%**	**41.8%**	**58.2%**
CSG Special Expenses Apportioning %	73.0%	27.0%	69.5%	30.5%	66.0%	34.0%

Tenants and Foreclosure

Foreclosure Overview



Demand For Payment

- Lender sends letter telling property owner to pay up.
- Lender can demand EVERYTHING owing on the mortgage, not just missed payments.
- If owner can keep making payments, lender may agree to reinstate mortgage if owner just pays arrears.
- Tenants likely won’t see this letter.

Petition for Foreclosure

- Lender files in BC Supreme Court.
- All tenants must be named as a party on the petition and be served with court documents.
- Everyone has 21 days to file a response to petition if they want to get future court documents and notice of the hearing.

Order Nisi

- Order setting out, among other things:
  - That owner is in default,
  - What the owner owes (or how to figure it out), and
  - How the lender can collect the debt.

…BUT HOLD ON

Redemption Period

- The court will give the owner time to “redeem” or payoff the WHOLE mortgage plus other costs, interest etc.
- Usually six months, but could be more or less.
- Concerning trend towards shorter periods. Shorter periods will be ordered for:
  - properties in disrepair,
  - abandoned properties, or
  - if property worth less than the debt.
- If owner redeems, owner keeps the property, all is well.

What if Owner Does Not Redeem?

- Generally one of two things will happen:

  - Lender will use “conduct of sale” to sell property; or
  - Lender will apply for “order absolute”.

Conduct of Sale

- Most common remedy.
- Lender gets to list and sell the property.
- Court must approve the sale.
- Debts paid off, anything leftover goes to the former owner.

Order Absolute

- Final order of foreclosure. Transfers the property to the lender.

- This does not happen very often; most lenders elect to sell the property instead.

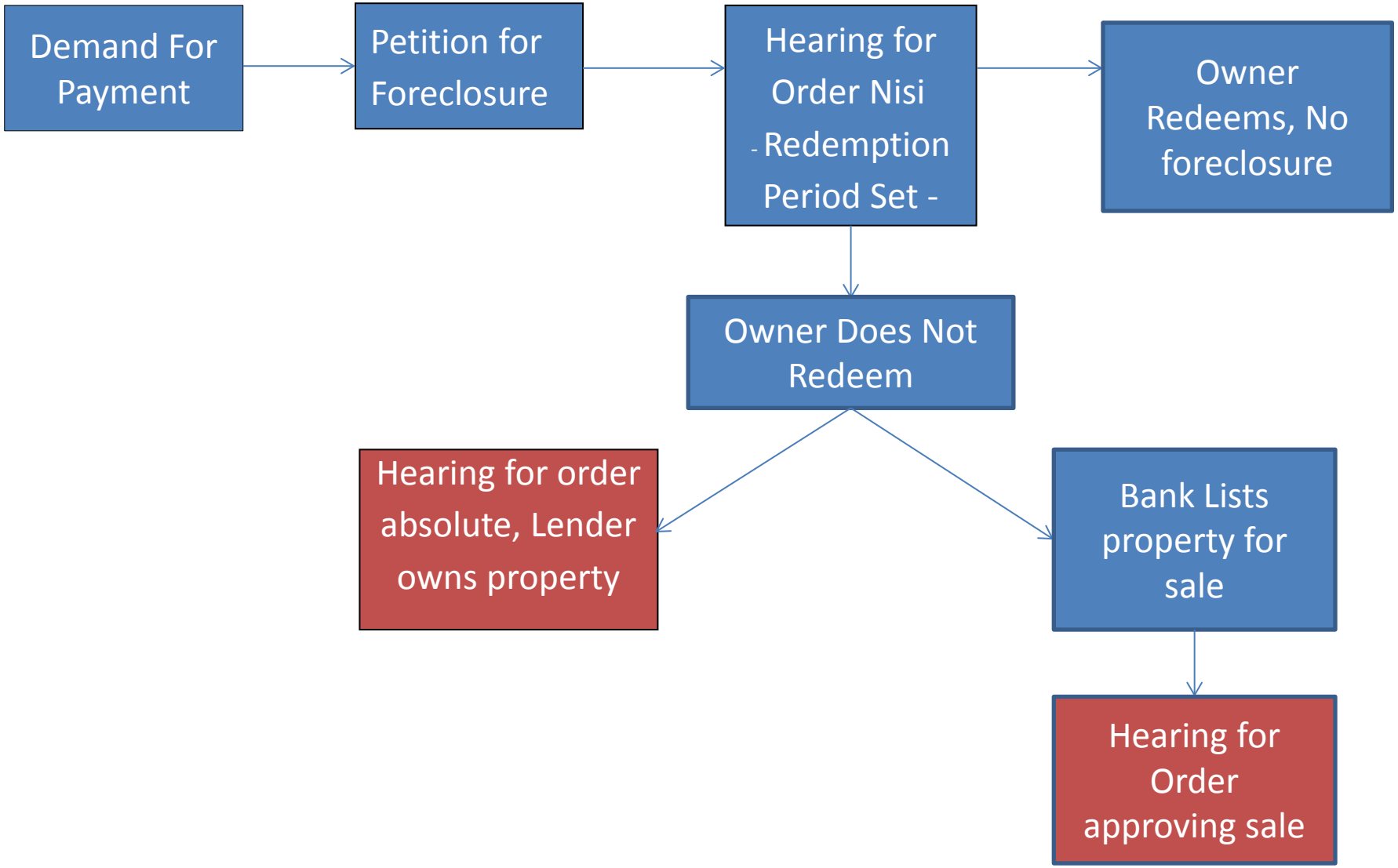
Can Foreclosure End a Tenancy?

- Law is unclear.
- *Residential Tenancy Act*, s. 44 – seems not. Exhaustive list of what ends a tenancy, and foreclosure is not listed.
- But, in practice BC Supreme Court orders in a foreclosure proceeding often end tenancies.

When will Tenancy End?

- Generally order approving sale will order vacant possession be given to purchaser.
- i.e., tenant should not have to vacate until the end of foreclosure proceedings, but…
- If tenant is obstructing sale or damaging property, lender can apply to BC Supreme Court for an order of possession earlier.

When will Tenancy End?



What if the tenants are not named?

Residential Tenancy Act

Court proceedings affecting tenants

94 Despite any other enactment, no order of a court in a proceeding involving a foreclosure, an estate or a matrimonial dispute or another proceeding that affects possession of a rental unit is enforceable against a tenant of the rental unit unless the tenant was a party to the proceeding.

What does *RTA* s. 94 mean?

- Plain reading: if tenant is not named in the petition initiating the foreclosure proceedings, the order for vacant possession doesn't apply to them and their tenancy transfers from the landlord who was foreclosed on to the new owner of the property.
  - Courts have been very reluctant to read this section that way.

Court Interpretations of *RTA* s. 94

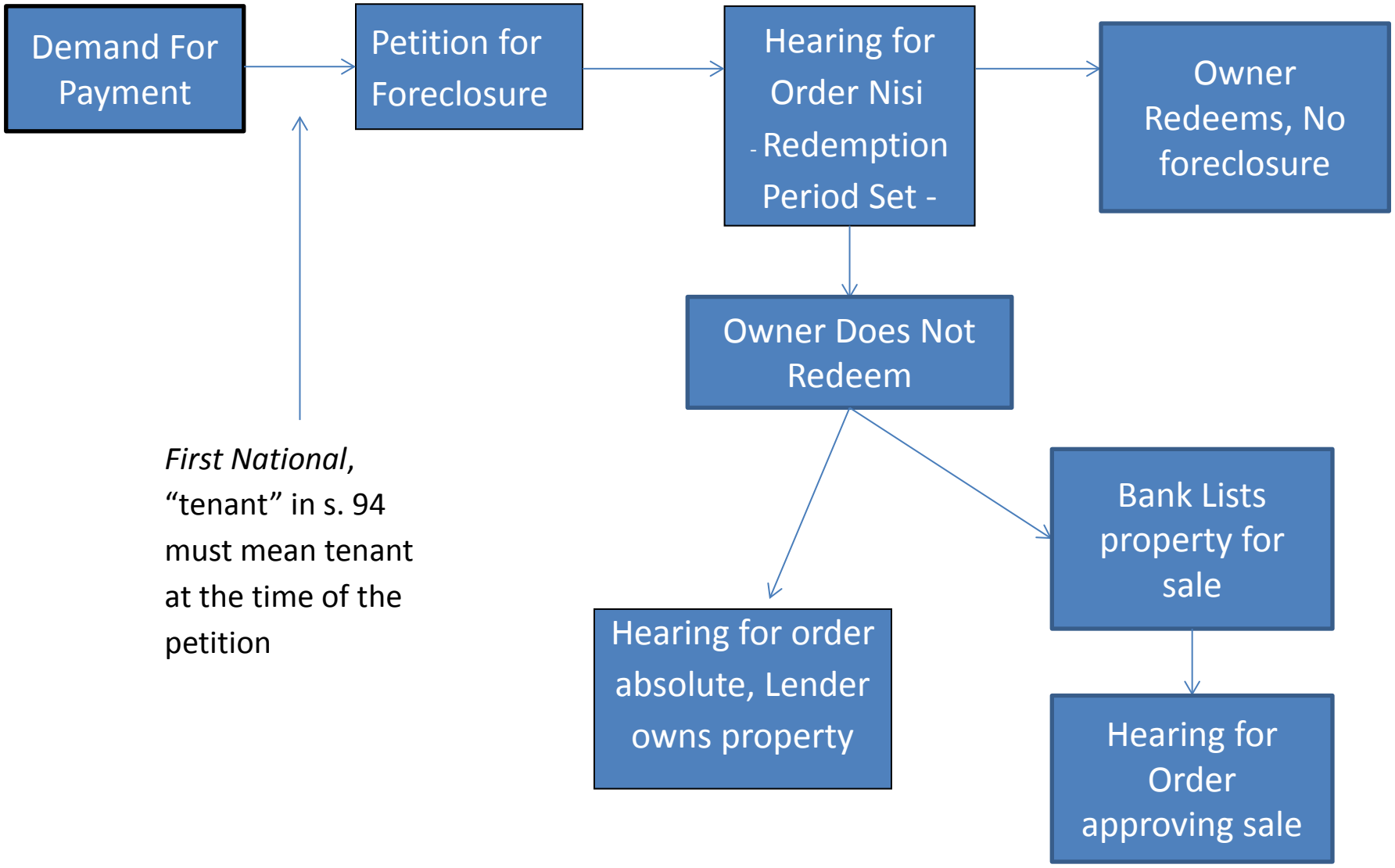
Canadian Imperial Bank of Commerce v Garneau, BC Supreme Court Judge, 1986:

- The tenancy started after the Order Nisi was made and tenants were not named in foreclosure proceeding. Decision: to benefit from the protection of this section, tenancy must have been in place at the time the Order Nisi is made.

First National Financial GP Corp v Sirotka, BC Supreme Court Master, 2011:

- The tenancy started before the Order Nisi was made, but after the petition and certificate of pending litigation ("CPL") were filed. The tenants were not named in foreclosure proceeding. Decision: to benefit from the protection of this section, tenancy must have been in place at the time the CPL is registered.

Court Interpretations of *RTA* s. 94



Court Interpretations of *RTA* s. 94

- Master Young in *First National* commented his decision "does not, however, grant a licence to the bank to dig their heads in the sand and ignore the occupancy of the lands. They still have a responsibility to advise a clearly interested person, such as a person in possession, whether they are a party or not and to advise the court of the existence of an interested person."

Court Interpretations of *RTA* s. 94: Take-Away Messages

- If a tenancy begins before the foreclosure proceedings begins, the tenant must be named as a party in the petition.
  - What if the tenant is not named? Unclear.
- If the tenancy begins after the foreclosure proceedings begin, lenders do not have to name the tenants in the petition, but…
  - A tenant should still get some notice and be able to participate in the proceedings.

Advantages to Filing a Response to a Petition for Foreclosure

Tenant does not have to file a response to petition, but there can be advantages:

- She will receive all subsequent court documents and be better informed of timeline;
- She can ask the court to make orders relating to her tenancy by arguing the dispute is substantially linked to a matter before the court – complicated – call CLAS.

What if the tenant is not named? An example

- All the tenants in an apartment building with mixed SROs and market rental units were being pressured out after a foreclosure proceeding.
- There were 5 tenants remaining, at least 2 had tenancies pre-dating the foreclosure petition.
- No tenants were named in the petition. The tenants seemed to have no notice of foreclosure and only went to advocates for help after the final order approving sale was made.

What if the tenant is not named? An example

- The new owner initially provided the remaining tenants with applications for tenancies, accepted someone's payment of rent, but then tried to return it, and refused all the other tenants' attempts to pay rent.
- The new owner served the tenants with notices to end tenancy for non-payment of rent. At least 2 of the tenants filed for dispute resolution. They were going to be represented at their upcoming RTB hearing by an advocate.
  - Good argument to make at the RTB that new owner had created/reinstated a tenancy with their actions.

What if the tenant is not named? An example

- Advocate connected tenants to us for advice on the foreclosure component.
- CLAS could have tried BC Supreme Court application to argue order of possession didn't apply to tenants because they weren't named.
- Could have proceeded with their advocates to RTB hearing to argue there was a new tenancy.
- The tenants decided to negotiate with the new owner – settled for a move out date approximately 6 weeks away, several months' free rent, and 1 month rent to be paid out as a moving allowance on leaving. They agreed to withdraw their RTB disputes and move out.

Practical Realities for Tenants

- Even if they succeed in establishing their tenancy transfers from the landlord that was foreclosed on to the new buyer, that new buyer can serve them a Notice to End Tenancy for Landlord's Use of Property.
- The best opportunity for the tenants may be negotiating for reduced rent or compensation in exchange for voluntarily leaving.

Paying Rent in a Property Subject to Foreclosure Proceedings

- If the tenant is still living on the property they legally have to pay rent.
- Mortgage agreements say during foreclosure the lender takes rent owed to the landlord. BC Supreme Court will usually make an order directing the tenant where to pay rent.
- Lenders insist they are <u>not</u> the landlord – how could lenders enforce non-payment?
- The landlord could, but has little incentive to, enforce non-payment of rent.

Responsibility for maintaining the rental property during the foreclosure proceedings

- Lenders insist they are not the landlord.
- Difficult for tenants who need repairs and maintenance if landlord being foreclosed on cannot/will not make repairs/maintenance.
  - Can apply to Residential Tenancy Branch for remedies usually available to tenants.

Damage Deposit

- Lenders insist they are not the landlord.
- Definitely can seek return of damage deposit from landlord who was foreclosed on, but they may have nothing to collect against.
- Less clear whether tenant would be successful seeking return of damage deposit from foreclosing lender or new owner.

Damage Deposit

- Consider when the tenancy ends. If the tenancy ended before the new purchaser taking title there is no tenancy to "run with the land"

Obligations pass with transfer or assignment of land

s. 93 The obligations of a landlord under this Act with respect to a security deposit or a pet damage deposit run with the land or reversion.

Damage Deposit: Take Away

- Always try to collect damage deposit from former landlord.
- When appropriate, try collecting damage deposit from foreclosing lender or new owner.
- Collection options:
  - Write a letter demanding refund of damage deposit.
  - Apply to Residential Tenancy Branch.

Damage Deposit: An example

- Tenant living in property that was subject to foreclosure proceedings was ordered to pay her rent in trust to the lender's lawyers.
- Tenancy ended while foreclosure was in progress and before an order approving sale of the property.
- Who could she claim against?
  - Landlord that was foreclosed on – yes.
  - Foreclosing lender – unclear?
  - New purchaser of land – unclear?

Negotiation Options

If tenant wants to leave during foreclosure proceedings:

- Could approach lender to ask for rent reduction/waiver, moving costs, or damage deposit in exchange for leaving voluntarily.

If the tenant wants to leave after foreclosure proceedings:

- Could approach purchaser to ask for rent reduction/waiver, moving costs, or damage deposit in exchange for leaving voluntarily.

If the tenant wants to stay:

- Could approach purchaser either before or after order approving sale to negotiate.

Form 66 (Rules 16-1(2) and 21-5(14))

NO._____
KELOWNA REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE TORONTO-DOMINION BANK

PETITIONER

AND:

HOMĒ TRUST COMPANY
JOHN DOE
JANE DOE

RESPONDENTS

PETITION TO THE COURT

[Rule 22-3 of the Supreme Court Civil Rules applies to all forms.]

This proceeding has been started by the Petitioner for the relief set out in Part 1 below.

If you intend to respond to this Petition, you or your lawyer must

(a) file a response to Petition in Form 67 in the above-named registry of this Court within the time for response to Petition described below, and

(b) serve on the Petitioner
  (i) 2 copies of the filed Response to Petition, and
  (ii) 2 copies of each filed Affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

TIME FOR RESPONSE TO PETITION

A Response to Petition must be filed and served on the Petitioner,

(a) if you were served with the Petition anywhere in Canada, within 21 days after that service,

(b) if you were served with the Petition anywhere in the United States of America, within 35 days after that service,

(c) if you were served with the Petition anywhere else, within 49 days after that service, or

(d) if the time for Response has been set by order of the court, within that time:

	The address of the registry is: 1355 Water Street, Kelowna, BC V1Y 9R3
	The ADDRESS FOR SERVICE of the Petitioner is: Farris Vaughan Wills & Murphy LLP Barristers and Solicitors 2500-700 W. Georgia Street Vancouver BC V7Y 1B3 Fax number address for service (if any) of the Petitioner: 604-661-9349 E-mail address for service (if any) of the Petitioner: rsloman@farris.com
	The name and office address of the Petitioner's lawyer is: Robert P. Sloman Farris Vaughan Wills & Murphy LLP Barristers and Solicitors 2500-700 W. Georgia Street Vancouver BC V7Y 1B3

Form 11

(Rule 4-5(2))

ENDORSEMENT ON ORIGINATING PROCESS FOR SERVICE OUTSIDE BRITISH COLUMBIA

[Rule 22-3 of the Supreme Court Civil Rules applies to all forms]

The Petitioner, claims the right to serve this Petition on the Respondent, or any of them, outside British Columbia on the ground that the proceeding is brought to enforce, assert, declare, or determine proprietary or possessory rights or a security interest in property in British Columbia, pursuant to Rule 4-5(1) and s. 10(a) of the *Court Jurisdiction and Proceedings Transfer Act*.

CLAIM OF THE PETITIONER

PART 1: ORDERS SOUGHT

1. a declaration that a Mortgage (the "Mortgage") dated June 9, 2008 which was registered in the Kamloops Land Title Office on June 11, 2008 under numbeı is a charge on the following lands and premises;

   Parcel Identifier No.

   Strata Lot District Lot Osoyoos Division Yale District Strata Plan K90 together with an interest in the common property in proportion to the unit entitlement of the Strata Lot as shown on Form 1

   (the "Lands"),

   ranking in priority to the interests in the Lands of the Respondents and the heirs, executors, administrators, trustees, successors, and assigns of the Respondents and all persons claiming by, through, or under them; except the interest in the Lands of The Owners, Strata Plan K90 which ranks in priority to the mortgage under s. 116 of the *Strata Property Act*, SBC 1998, c. 43;

2. a declaration that the Mortgage is in default;

3. a summary accounting of the amount of money due and owing to the Petitioner pursuant to the Mortgage, and a declaration of the amount of money required to redeem the Lands, including legal costs, and other costs reasonable pursuant to the Mortgage ("the Amount Required to Redeem");

4. an order that the redemption period be set at a period to be determined by this Honourable Court upon application by the Petitioner;

5. an order that, on the Respondents or any of them paying into court or to the solicitors for the Petitioner prior to the pronouncement of an order absolute or an order approving a sale of the Lands the Amount Required to Redeem, then the Petitioner shall reconvey the Lands free and clear of encumbrances in favour of it or by any person claiming by, through, or under it, and shall deliver up all documents in the Petitioner's custody relating to the Lands to the Respondents who made payment;

6. an order that, if the Lands are not redeemed, the Petitioner shall be at liberty to apply for an order absolute, and on pronouncement of an order absolute, then the Respondents and the heirs, executors, trustees, administrators, successors, and assigns of the Respondents and all persons claiming by, through, or under them shall be foreclosed of all right, title, interest, estate, and equity of redemption in and to the Lands, and shall immediately deliver to the Petitioner vacant possession of the Lands;

7. an order that the Petitioner be at liberty to apply for a further summary accounting of any amounts of money that may become due to the Petitioner pursuant to the Mortgage;

8. upon application, an order that the Lands be listed for sale, and that the Petitioner have exclusive conduct of sale;

9. judgment in favour of the Petitioner against the

in the Amount Required to Redeem;

10. an order that the Petitioner be granted its costs of and in connection with this proceeding together with liberty to make application to increase the legal costs to be received by the Petitioner;

11. an Order that, in the event that the Lands are vacant or become vacant at any time during the course of this proceeding, the Petitioner or any duly authorized agent of the Petitioner be entitled to enter onto the Lands and into the buildings on the Lands, and to change the locks in order to preserve and secure the Lands and to do all things reasonably incidental thereto, and that the Petitioner not be deemed to be a mortgagee in possession by virtue thereof;

12. a Certificate of Pending Litigation;

13. an order for any further relief that to this Honourable Court may seem just;

PART 2: FACTUAL BASIS

1. The Petitioner is a chartered Bank of Canada, having an address for delivery in this proceeding located at 2500 – 700 West Georgia Street, Vancouver, British Columbia.

2. By the Mortgage, the Respondent

ortgaged the Lands to the Petitioner.

3. The Mortgage was registered in the Kamloops Land Title Office on June 11, 2008 under number A copy of the Mortgage is attached as Exhibit "A" to the Affidavit of filed with this Petition.

4. A copy of the Standard Mortgage Terms for the Mortgage is attached as Exhibit "B" to the Affidavit of filed with this Petition.

5. The Respondent is the registered owner of the Lands.

6. The payments required to be made pursuant to the Mortgage are in default.

7. Pursuant to the Mortgage, the principal, interest, and all other costs, charges, and expenses secured and payable thereby become due and payable on default of any payment required to be made thereby, and are now due and payable and have not been paid.

8. Demand has been made for the payment of the money owing to the Petitioner and secured by the Mortgage, but this money has not been paid, and as of October 16, 2013, there was due and owing to the Petitioner pursuant to the Mortgage the sum of $111,656.11 plus interest thereafter at the rate of 5.490% interest per annum, calculated half-yearly, not in advance, being a daily rate that day of $16.12 and costs.

9. The Respondent Home Trust Company is the holder of the following charges registered against the Lands in the Kamloops Land Title Office on the following dates under the following numbers, which charges rank in priority behind the interest of the Petitioner in the Lands:

RESPONDENT	CHARGE	REGISTRATION DATE	REGISTRATION NUMBER
Home Trust Company	Mortgage	March 8, 2010	

10. A copy of the B.C. Online search of the title of the Lands in the Land Title Office records is attached as Exhibit "C" to the Affidavit of filed with this Petition.

11. John Doe and Jane Doe are named as Respondents in this proceeding as they may be residing as tenants or occupants on the Lands.

PART 3: LEGAL BASIS

1. The Petitioner will rely on, *inter alia*, Rule 21-7 of the Supreme Court Civil Rules.

PART 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of made November 1st, 2013.

The Petitioner estimates that the hearing of the Petition will take **5 minutes**.

Dated: November 5, 2013

Signature

☐ Applicant ☒ Lawyer for Petitioner

Robert P. Sloman

THIS Petition is prepared and delivered by Robert P. Sloman of the firm Farris, Vaughan, Wills & Murphy LLP, Barristers & Solicitors, whose place of business and address for service is 2500 – 700 West Georgia Street, Vancouver, British Columbia, V7Y 1B3. Telephone: (604) 684-9151. Facsimile: (604) 661-9349. **Attention: Robert P. Sloman (20-9838)**

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs _____ of Part 1 of this petition.

[ ] with the following variations and additional terms:

_____

_____

Dated:

Signature of

[ ] Judge [ ] Master

SUPREME COURT
OF
BRITISH COLUMBIA
SEAL
07-Aug-14
Kelowna
REGISTRY

NO.
KELOWNA REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE TORONTO-DOMINION BANK

PETITIONER

AND:

HOME TRUST COMPANY
JOHN DOE
JANE DOE

RESPONDENTS

ORDER MADE AFTER APPLICATION

BEFORE	MASTER YOUNG		JULY 16, 2014

ON THE APPLICATION of the Petitioner coming on for hearing at Kelowna, BC on July 16, 2014 and on hearing Chris Filipchuk, of lawyer for the Petitioner;

THIS COURT ORDERS THAT:

1. a form of mortgage (the "Mortgage") dated June 9, 2008, between as mortgagor and The Toronto-Dominion Bank as mortgagee, which was registered in the Kamloops Land Title Office on June 11, 2008 under numbe is a charge on the following lands and premises;

   PID:
   Strata Lot District Lot Osoyoos Division Yale District Strata Plan K90 together with an interest in the common property in proportion to the unit entitlement of the Strata Lot as shown on Form 1

   (the "Lands")

   ranking in priority to the interests in the Lands of the respondents and each of them and their respective heirs, executors, trustees, administrators, successors and assigns and all

persons claiming by, through or under them except the interests in the Lands of The Owners Strata Plan K90, which rank in priority to the Mortgage under s. 116 of the *Strata Property Act*, SBC 1998, c. 43;

THIS COURT DECLARES AND ORDERS THAT:

2. there has been default under the Mortgage and that the last date for redemption shall be January 16, 2015 (the "Redemption Date");

3. the amount of money due and owing under the Mortgage and the amount of money required to redeem the Lands on this day is $115,529.76 plus interest thereon at the rate of 5.490% per annum, calculated half-yearly, not in advance, being a daily rate this day of $16.12 (currently) from this date to and including the date of payment, plus the assessed costs of the Petitioner of and in connection with this proceeding (the "Amount Required to Redeem") with the Respondent ;

at liberty to apply to this Court for an accounting to adjust the Redemption Amount;

THIS COURT ORDERS THAT:

4. upon the Respondents or any of them paying into the Court Registry of this court at 1355 Water Street, Kelowna, BC, or to the solicitors for the Petitioner or if no such solicitor exists to the Petitioner, the Amount Required to Redeem before pronouncement of an order absolute or an order approving a sale of the Lands, then the Petitioner shall reconvey the Lands free and clear of all encumbrances in favour of it or by any person claiming by, through or under it, and shall deliver up all documents in the Petitioner's custody relating to the Lands to the Respondent or Respondents who made payment;

5. if the Lands not be redeemed, the Petitioner shall be at liberty to apply for an order absolute and upon pronouncement of order absolute then the Respondents and the heirs, executors, trustees, administrators, successors and assigns of the Respondents and all persons claiming by, through or under them shall thenceforth stand absolutely debarred and foreclosed of and from all right, title, interest, and equity of redemption in or to the Lands, and shall immediately deliver to the petitioner vacant possession of the Lands;

6. the Respondent

to pay to the Petitioner the sum of $115,529.76 plus the Petitioner's assessed costs of and in connection with this proceeding;

7. the parties are at liberty to apply to this court for an Order directing an inquiry, assessment or accounting to be held of any amounts due to the Petitioner pursuant to the mortgage for principal, simple or compound interest, taxes, utilities, insurance expenses, legal or collection expenses, costs, charges, or changes in interest rate, whether such amounts become due before or after the date of pronouncement of this Order, and for an Order varying the Amount Required to Redeem and the Judgment in this Order accordingly;

8. approval as to the form of the Order made herein by the Respondent and is hereby dispensed with;

9. the assessed costs of and in connection with this proceeding are awarded to the Petitioner;

10. the Petitioner's costs to and including this Order will be assessed on a party and party scale A basis, and the Petitioner is at liberty to apply for an Order that any of its costs after this Order will be assessed on a different basis.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Signature of
[ ] party [x] Lawyer for the Petitioner
Robert P. Sloman

BY THE COURT

Digitally signed by von Schulmann, Beatrice

District Registrar

SUPREME COURT
OF
BRITISH COLUMBIA
SEAL
30-Jul-15

Kelowna
REGISTRY

NO.
KELOWNA REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE TORONTO-DOMINION BANK

PETITIONER

AND:

HOME TRUST COMPANY
JOHN DOE
JANE DOE

RESPONDENTS

ORDER MADE AFTER APPLICATION

BEFORE	MASTER MCDIARMID	July 29, 2015

ON THE APPLICATION of the Petitioner coming on for hearing at Kelowna, BC on July 29, 2015; and on hearing Scott Murray, agent for Robert. P. Sloman, lawyer for the Petitioner and the Respondent,

THIS COURT ORDERS that:

1. the lands and premises known and described as:

   PID:
   Strata Lot District Lot Osoyoos Division Yale District Strata Plan K90 together with an interest in the common property in proportion to the unit entitlement of the strata lot as shown on Form 1

   (the "Lands")

   be offered for sale immediately by private sale, free and clear of all encumbrances except the reservations and conditions in the original grant thereof from the Crown;

2. the Petitioner have exclusive conduct of the sale and be at liberty to list the Lands for sale immediately until further Order of this Court and to do all things reasonably incidental thereto including paying to any real estate agent or firm retained by the Petitioner pursuant to this Order a commission of not more than 7% of the first $100,000.00 of the gross selling price and not more than 2½% of the balance of the gross selling price, plus GST, that commission to be paid from the proceeds of the sale;

3. any person or persons in possession of the Lands, including any tenant or tenants, to permit any duly authorized agent of the Petitioner to inspect or appraise the Lands and the interior thereof and show the Lands and the interior thereof to prospective purchasers between the hours of 10:00 a.m. and 8:00 p.m. on any day including Sundays and statutory holidays, and to post signs on the Lands indicating that the Lands are offered for sale;

4. any sale shall be subject to the approval of this Honourable Court unless agreed to by all parties;

5. the assessed costs of and in connection with this application are awarded to the Petitioner, at Scale A;

6. the approval as to form of this order by _____ also is not required.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BYCONSENT:

Signature of
[ ] party [x] Lawyer for the Petitioner
Robert P. Sloman

BY THE COURT

Digitally signed by von Schulmann, Beatrice

District Registrar

No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

PETITIONER

AND:

and

RESPONDENTS

ORDER MADE AFTER APPLICATION
(Order Approving Sale)

BEFORE MASTER MUIR) Thursday, the 22nd day of January, 2015
)

THE APPLICATION of the Respondents, and , coming on for hearing on this day at 800 Smithe Street, Vancouver, British Columbia; and upon hearing Martin C. Sennott, lawyer for the Respondents, and , and upon hearing Steven Dvorak, lawyer for the Petitioner, and appearing on behalf of her own behalf and no one appearing for the remaining parties, although given notice in accordance with the Rules of the Court, and upon reading the material filed;

THIS COURT ORDERS that:

1. the sale of the following lands and premises:

City of Vancouver
Parcel Identifier:
Lot of Lots and Block District Lot Plan

(the "Lands")

to , (the "Purchaser") or if amended or assigned by the Purchaser and agreed to by the Respondents, and as set out in a letter from the solicitors for the Respondents, and on the terms and conditions set out in the Offer to Purchase dated January 21, 2015, for the sum of $1,228,000.00 is hereby approved;

2. upon filing a certified copy of this Order in the New Westminster Land Title Office, together with a letter from the Respondents, and 's solicitor authorizing such registration and subject to the terms of this Order, the Lands be conveyed to and vest in the Purchaser in fee simple, free and clear of any estate, right, title, interest, equity of redemption, and other claims of the parties, except the reservations, limitations, exceptions and conditions expressed in the original grant(s) thereof from the Crown;

3. the completion, adjustment and possession dates be set at February 23, 2015 or so soon before or so soon thereafter as the Respondents, and and the Purchaser shall agree;

4. the net purchase price after adjustments shall be paid to Boughton Law Corporation, in trust, and shall be paid out in accordance with the following priorities without further order:

   (a) any arrears of taxes, water and sewer rates, interest and penalties thereon;

   (b) net GST, if payable;

   (c) in payment of real estate commission calculated at the rate of not more than 7% on the first $100,000 and 3% on the balance, of the gross selling price as reduced by any deposit held by the real estate agent;

   (d) to the amount required to pay the outstanding balance of his first mortgage plus interest plus costs;

   (e) to the amount required to pay the outstanding balance of his second mortgage plus interest plus costs;

   (f) to and the amount required to pay the outstanding balance of their mortgage plus interest plus costs;

   (g) the balance, if any, then remaining of the proceeds of the sale, to be paid into Court to the credit of this proceeding and to be held pending further Order of this Court;

5. for the purpose of issuing title and in respect of the Lands, the following charges, liens, encumbrances, caveats, mortgages and certificates of pending litigation be cancelled insofar as they apply to the Lands:

CHARGE HOLDER	CHARGE	REGISTRATION NUMBER
	Mortgage	B
	Assignment of Rents	B
	Mortgage	C
	Assignment of Rents	C
	Mortgage	B

Assignment of Rents	B
Mortgage	C
Assignment of Rents	C
CPL	B
CPL	B

together with any other charges, liens, encumbrances, caveats, or certificates of pending litigation registered against the Lands subsequent to the Petitioner's Certificate of Pending Litigation No. B

6. the Respondents, and , their heirs, executors and assigns, or any person or persons on behalf of the Respondents, and including any person or persons in possession of the Lands deliver up to the Respondents, , and , or to who they shall appoint in writing, possession of the Lands or such part thereof as may be in the possession of the Respondents, and on February 22, 2015.

7. the parties may apply for such further direction as may be necessary to carry out this Order.

8. the approval as to the form of this Order by be and the same is hereby dispensed with.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Signature of Lawyer for the Respondents, and Martin C. Sennott

Signature of Lawyer for the Petitioner

By the Court

Registrar

VANCOUVER HOUSING INITIATIVE

A CITY EVERYONE CAN CALL HOME

Vancouver's Rental Housing Policies, Regulations and Tools to Support Tenants

Celine Mauboules
Senior Planner, Housing Policy and Projects

Law Foundation Conference
October 6, 2015

CITY OF VANCOUVER

Presentation Overview

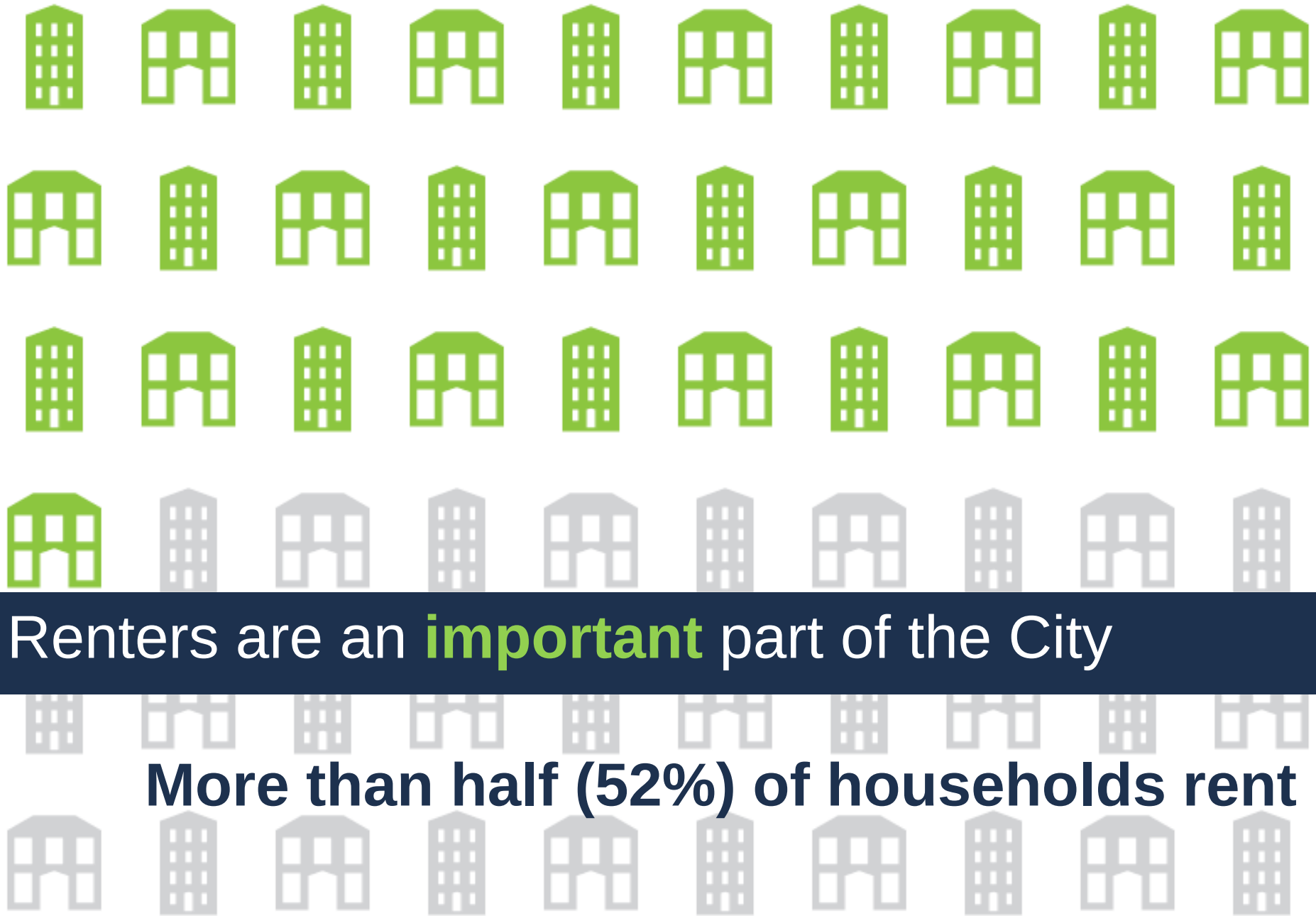
- Background
  - Vancouver's housing context
  - Housing and Homelessness Strategy
- Single Room Occupancy (SRO) Hotels
- Single Room Accommodation (SRA) By-law
- SRO Task Force
- Integrated Enforcement Team
- Standards of Maintenance By-law
- Rental Housing Official Development Plan
- Rental Properties Standards Database
- Conclusion

Affordable Housing is essential for a **healthy** & **vibrant City**

VANCOUVER HOUSING INITIATIVE

A CITY EVERYONE CAN CALL HOME

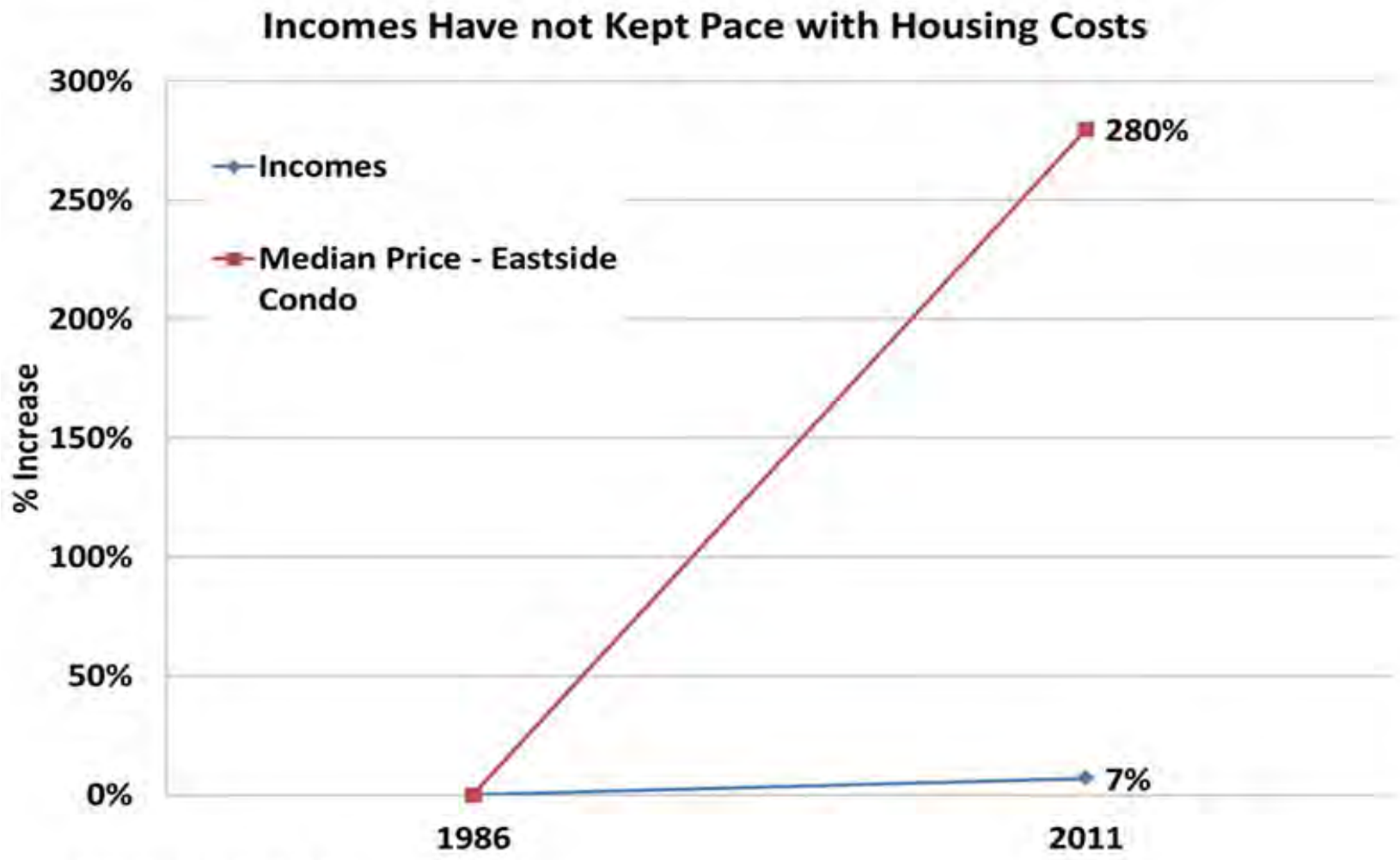
CITY OF VANCOUVER



Renters are an **important** part of the City

More than half (52%) of households rent

Vancouver's Challenge:
Incomes Vs. House Prices



Vancouver's Median Income: Renters Vs. Owners

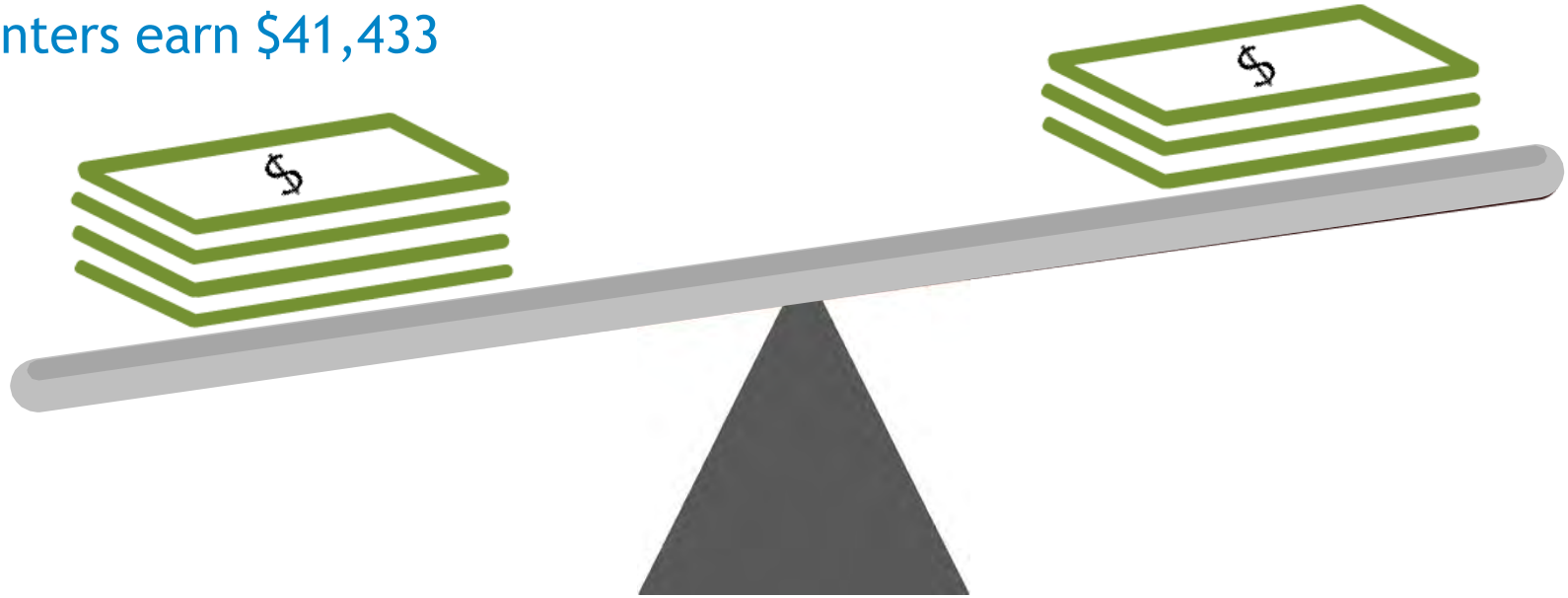
VANCOUVER HOUSING INITIATIVE

A CITY EVERYONE CAN CALL HOME

***Income of owners are significantly higher than renters**

Owners earn $77,753

Renters earn $41,433



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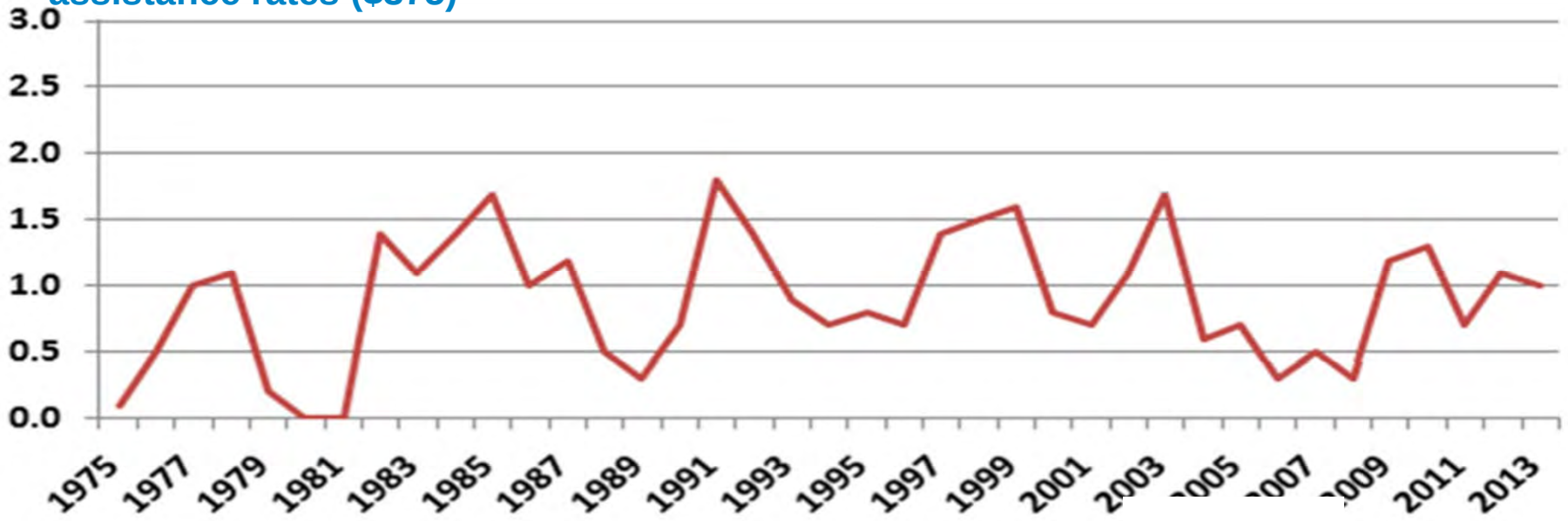
Challenges:
Rental Affordability & Availability

- Low vacancy rates (averages 0.9% over the past 30+ years)
- Around 40% of renters paying more than 30% of income on housing
- 15% of renters paying more than 50% of their income on housing
- Single Room Occupancy Hotel rents are increasing - 24% of rooms rent at shelter assistance rates ($375)



Market Apartment Vacancy Rate - Vancouver City (CMHC)

Vancouver's Housing & Homelessness Strategy 2012-2021

Strategic Directions:

Increase the supply of affordable housing

Enable New Affordable Rental Supply

Encourage a housing mix across all neighbourhoods that enhances quality of life

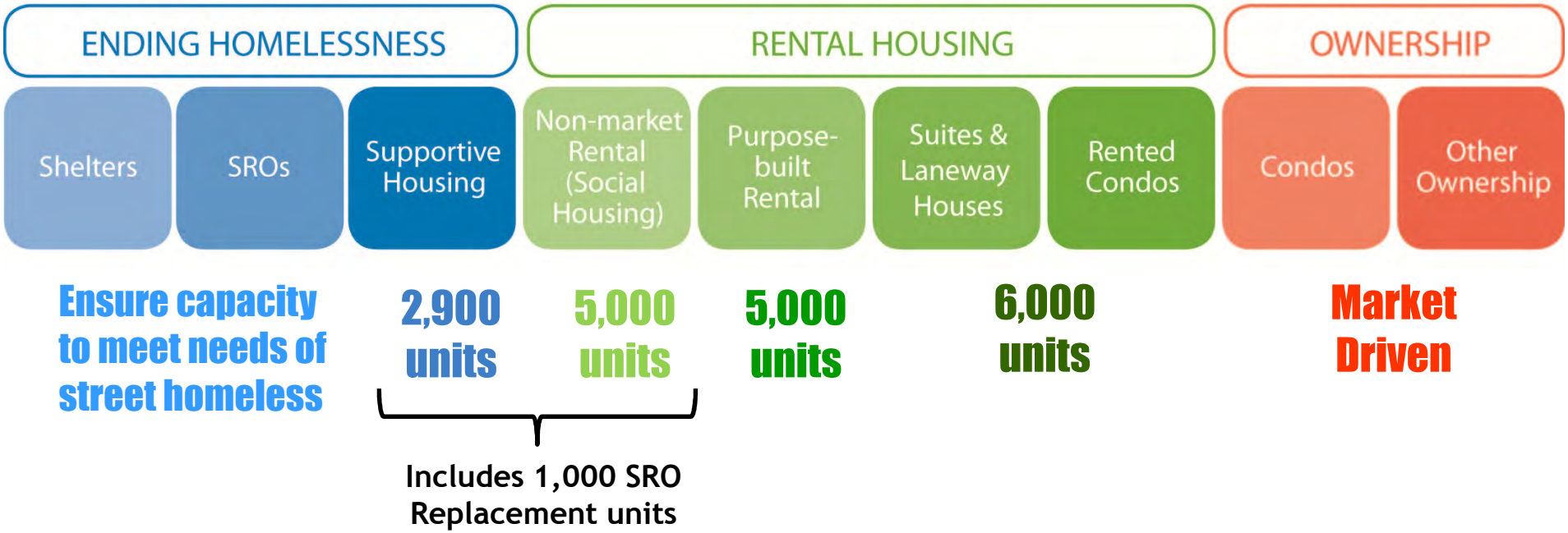
Protect Existing Rental Supply & Renter Households

Provide strong leadership and support partners to enhance housing stability

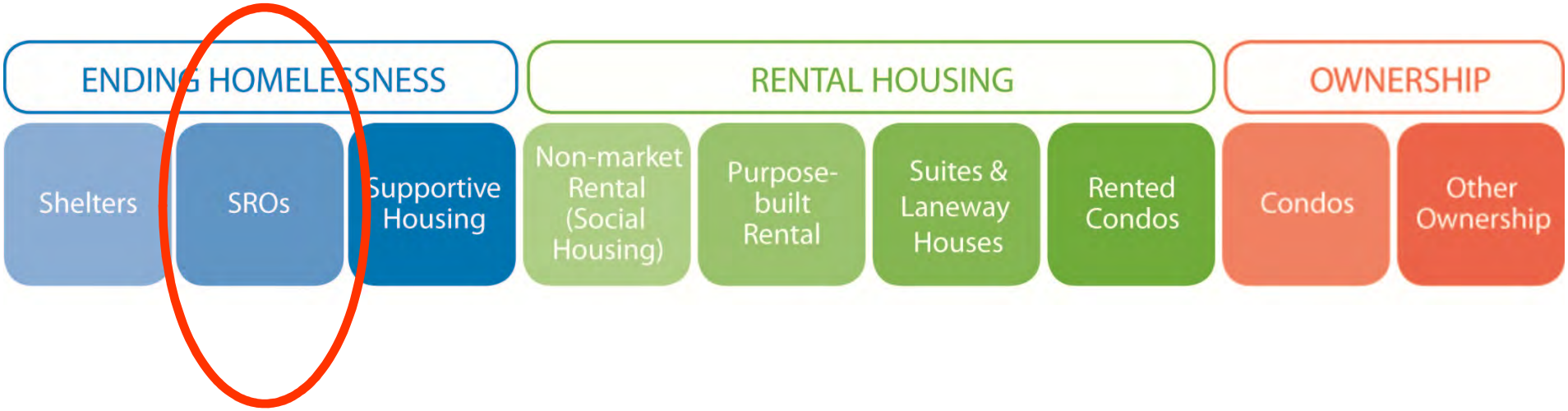
Leadership on Housing issues

Vancouver's Housing & Homelessness Strategy 2012-2021

Ten Year Housing Targets

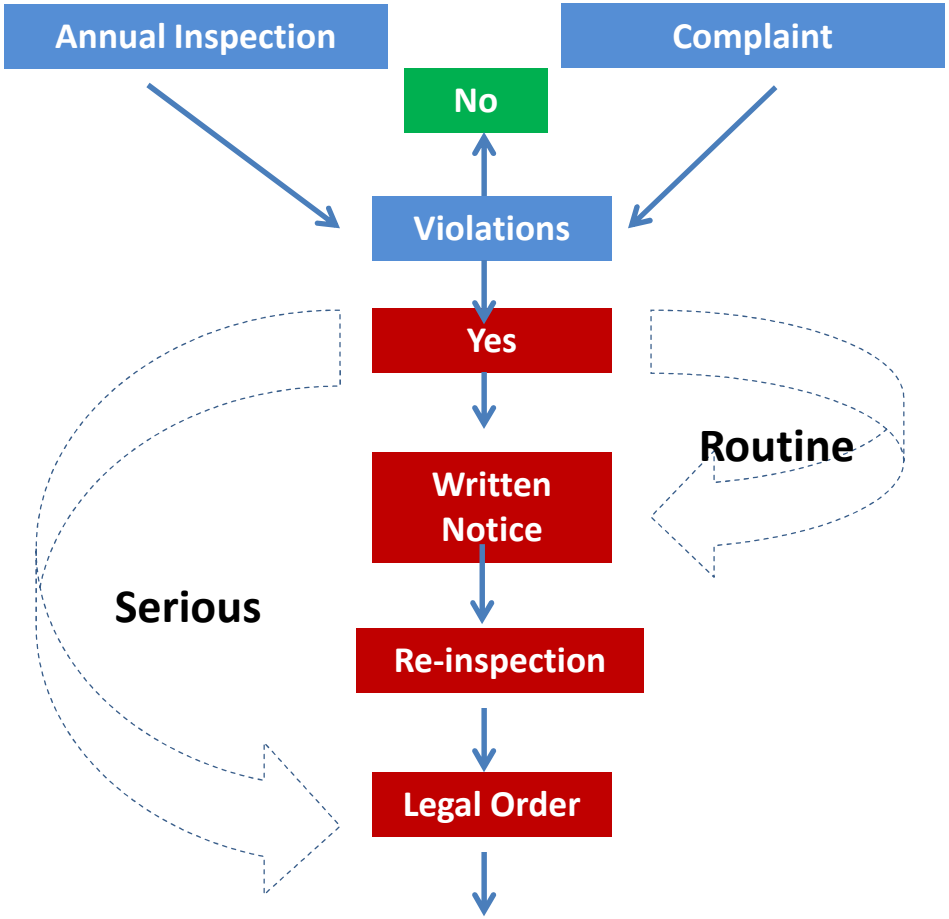


Single Room Occupancy (SRO) Hotels



Single Room Occupancy (SRO) Hotels

- 155 buildings, 7,000 rooms
- Remain the lowest cost housing in the city
- Maintaining SROs key focus to ensure affordability over next decade
- Buildings in Vancouver are very old and in poor repair
  - Government and Non-profit operated SROs are in better repair and more affordable
- Annually inspected



1. 60 day notice to complete work
2. Prosecution
3. Injunction
4. Notice on Title

Protecting the SRO Stock: Single Room Accommodation By-law (2003)

SRA By-law (2003) enacted in 2003 to slow loss of stock via demolition and conversion to tourist hostels/ hotels

SRA By-law

SRA Permit required if:

- Material change to a room (addition of new fixtures, bathroom or cooking facilities)
- Loss of room(s)
- Minor repairs that result in tenant displacement

Refuse

Approve

No Conditions

Conditions may include any of the following:

- Tenant Relocation Plan
- Housing Agreement (secure affordability)
- Section 219 Covenant (secure tenure)
- Heritage Revitalization Agreement
- $125,000/room if permanently removed from SRA by-law

Pursue Injunctions (2011)

- Private owned SROs- deplorable conditions and building management
- Direction from Council to aggressively pursue standards of maintenance through legal action when necessary
- Since 2011, Council has approved 4 injunctions against SRO owners

Wonder Rooms (50 E. Cordova)

Single Room Occupancy (SRO) Task Force (2011)

Terms of Reference:

- Identify actions to improve living standards for all SRO tenants
- Included DTES community organizations, SRO tenants, and government partners
- Targeted privately owned and non-market SROs (large and small buildings)
- 12 SRO Tenant Workshops (almost 160 participants)
- Workshop themes:
  - Standards of Maintenance
  - Residential Tenancy Act
  - Women's safety
- SRO Tenant Survey
- DTES Plan and SRA By-law amendments

Integrated Enforcement Team (2011)

- Cross City Membership:
  - Building and Property Use Inspectors,
  - By-law Enforcement,
  - Legal Services,
  - Vancouver Fire Department,
  - Vancouver Police Department and
  - Housing Policy staff
- Prioritize problem buildings and coordinate enforcement actions (Integrated Enforcement Team)
- SROs inspected annually
- Goal: bring owners into compliance without need to seek legal action

Standards of Maintenance By-law amendments (1981)

- Prescribes standards for the maintenance and occupancy of SROs rooming and lodging houses
- Objective is to ensure that such buildings and sites are free from hazard and are maintained continuously in conformity with accepted health, fire and building requirements

Standards of Maintenance By-law amendments (1981)

- Amended 2015 to expedite ability to achieve compliance with most common SoM issues:
  - Pest management
  - Holes in walls and ceilings
  - Worn and soiled flooring
  - Damaged doors and door frames
  - Plugged toilets
  - Inoperable bathing facilities
  - Broken windows
  - Missing or damaged radiators

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Standards of Maintenance By-law - CBO Orders and Injunctions

- Standards of Maintenance By-law
  - Repairs to drainage on the site, including gutters
  - Repairs to the roof
  - Repairs to lighting equipment
  - Repairs to a foundation or exterior façade/brick work or masonry
  - Repairs to elevators
- Other By-laws
  - Other structural repairs
  - Repairs or upgrades to a fire alarm system
  - Repairs or upgrades to electrical, gas, plumbing systems

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2014 - Standards of Maintenance By-law amendments

- Scope: common conditions (non-structural)
- Delegate Council authority to the Chief Building official, in consultation with GM of Community Services to issue 60 days notice of work to be done
- If violation not remedied after 60 days, City have work done at the owners expense
- Expedites timeframe in which City could begin work by 2-4 weeks.

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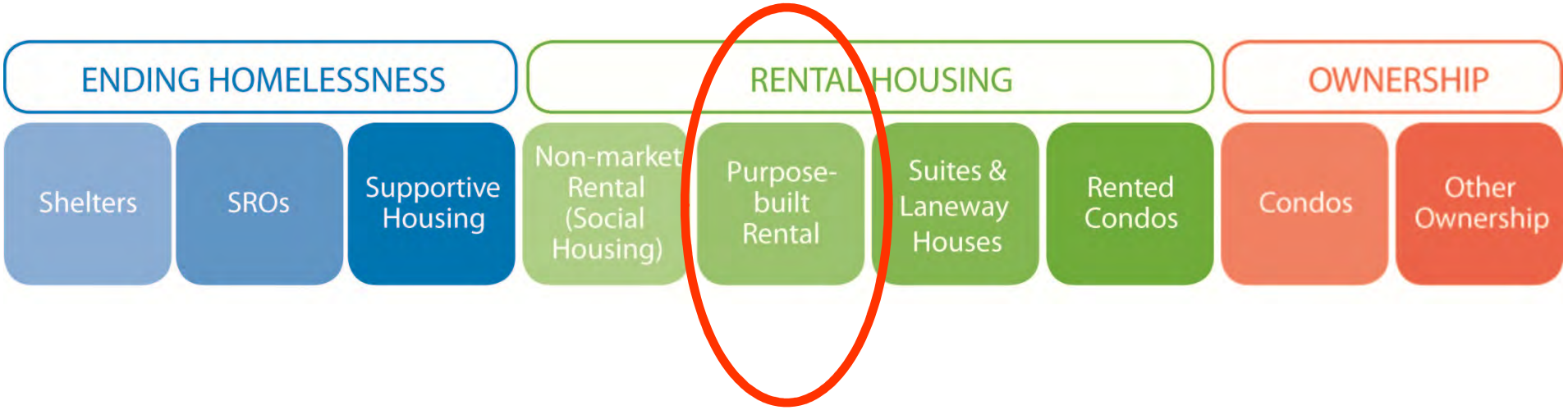
Rental Housing



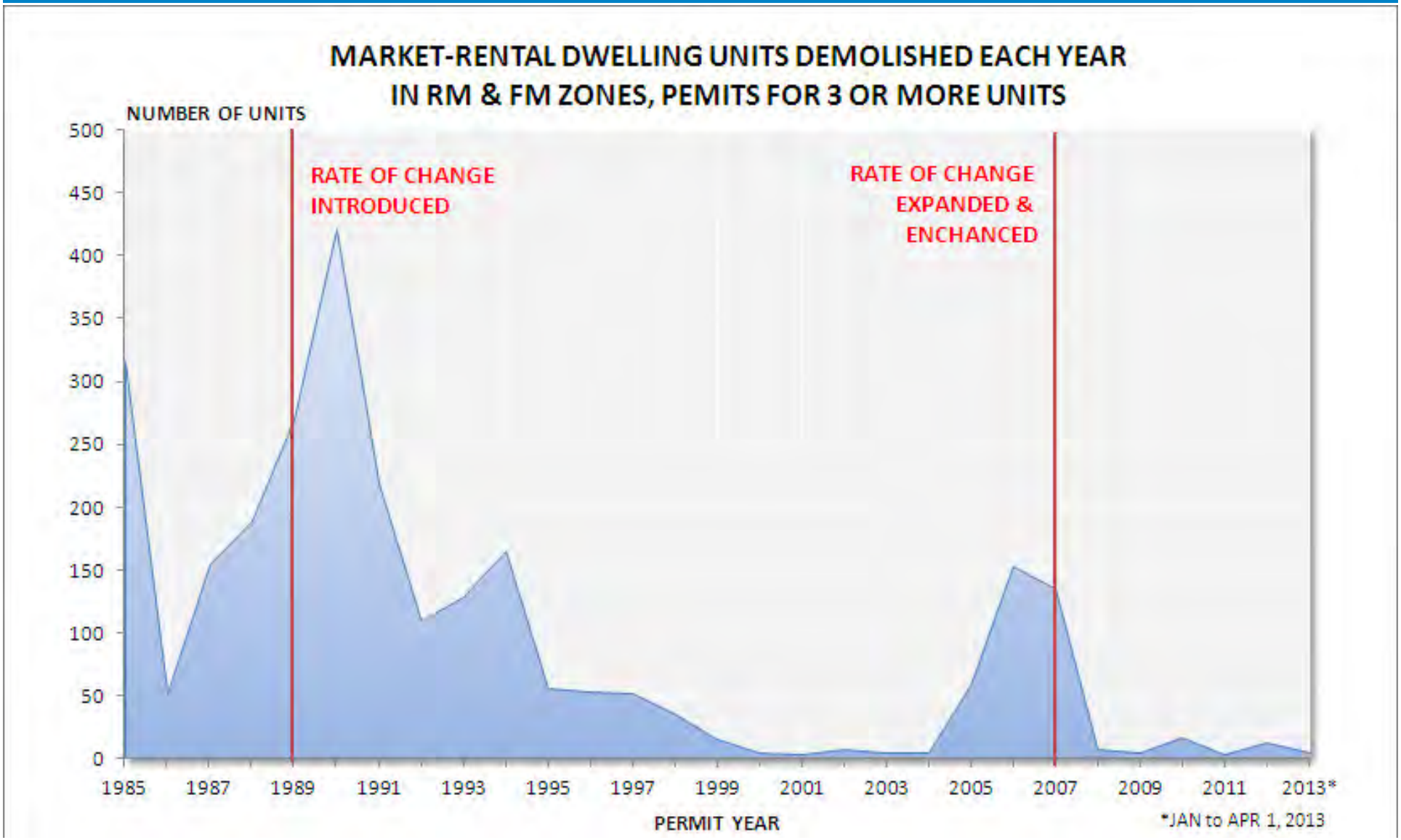
Protecting the Existing Market Rental Stock

- Rental Housing Stock ODP (2007) “Rate of Change Regulations”
- All re-development of six or more units in “Rate of Change” areas must replace rental units on a 1 for 1 basis in new development
- No requirements to maintain unit types, sizes or rents
- Tenant relocation plans required

  Highlights:
  - 2 months free rent
  - moving expenses
  - assistance in finding alternate accommodation
  - right of first refusal



Protecting the Existing Market Rental Stock



Rental Properties Standards Database (2012)

January 17, 2012 Council Motion:

- Create online, searchable database of rental apartments in Vancouver utilizing:
  - existing publicly available information collected by the City
  - information such as building owner, outstanding work orders, and any property violations.

Objectives

- Motivate property owners and landlords to keep their properties in good order for renters
- Assist renters in making more informed decisions about rental properties in the city

2012 - Rental Properties Standards Database

Data Sharing – Best Practices

- Many North American cities provide on-line permit, inspections and violation information. Common practice is an “information dump” – little interpretation

- **Best practices** - Toronto and New York. Information is presented in a manner that is easier for the average person to interpret.

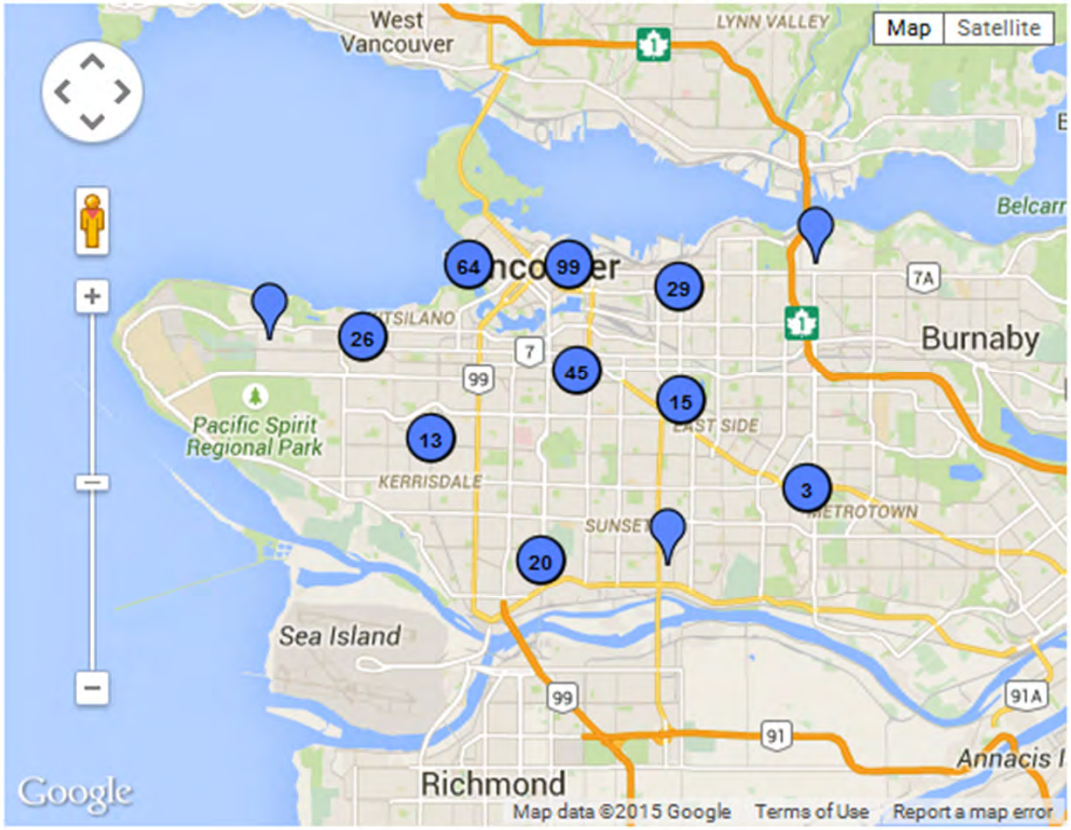
2012 - Rental Property Standards

- Buildings: licensed rental buildings - five or more residential units (includes publicly and privately owned buildings)
- By-law violations: Standards of Maintenance, Fire, Building, Electrical, Plumbing, Gas, Sewer, Sign, Tree Protection, Untidy Premises, Zoning & Development
- Pre-launch:
  - Communicate with impacted landlord/stakeholders. Give them opportunity to clean up outstanding violations prior to go-live
  - Usability testing with public and other stakeholders
  - Communicate public launch details to tenants in “top 25” buildings

2013 Launch - Rental Property Standards

- Search parameters: by building address and by buildings with open by-law violations
- Information available: property address; landlord or property owner name; open (unresolved) and closed (resolved) violations
- Approximately 70,000 of Vancouver's 131,000 rental units are currently included in the scope of the Rental Property Standards database

Buildings With Current Issues



The number of issues does not indicate the safety condition of the building. If the building is not safe to live in the City takes steps to close the building.

Address ▼	Units ▼	Landlord and/or owner ▼	Current issues ▼	
396 POWELL ST	110	The Lookout Emergency Aid Society	103	Details
1125 GRANVILLE ST	73	0887678 BC Ltd	76	Details
518 RICHARDS ST	148	Provincial Rental Housing Corporation	71	Details
8619 CARTIER ST	8	531559 B C Ltd	44	Details
488 CARRALL ST	92	0955802 BC Ltd	43	Details
52 E HASTINGS ST	55	Provincial Rental Housing Corporation	38	Details

604-873-7000

Speak your own language

9-1-1 Emergencies | 7-1-1 TTY

More ways to contact us →

Is there an emergency at your building? Call 9-1-1.

If you or someone else in your building is in danger - or a crime is being committed - please call 9-1-1 now to get help right away.

Search the database for an exact address

Find out if a specific building has any health or safety issues.

Search →

Do you have questions about the database?

Learn more about the rental standards database, including the types of buildings that are included, what the building

Note: Landlord/owner information is from business licence

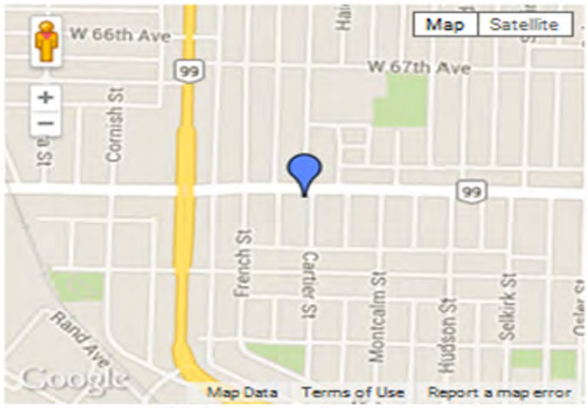
8619 CARTIER ST

Vancouver, BC

Number of units: 8

Landlord and/or Owner:
531559 B C Ltd

Current issues: 44
Completed issues: 8



Click for a larger Google map

The number of issues does not indicate the safety condition of the building. If the building is not safe to live in the City takes steps to close the building.

Description of the issues found	Current	Found	Completed	On
▸ Fire By-law				
• - FD47 (No Entry)		Nov 2013	1	Dec 2014
• Exit lights/signs must be illuminated		Feb 2015	1	Feb 2015
• Inspect test and tag all emergency lights		Jan 2014	1	Feb 2015
• Inspect Test and Tag all extinguishers		Jan 2014	1	Feb 2015
• Inspect Test and Tag fire alarm system		Feb 2014	1	Feb 2015
• Lower the amount of stored combustible pallets		Feb 2015	1	Mar 2015
• Maintain fire watch during all system repairs		Feb 2015	1	Mar 2015
• Maintenance		Feb 2015	1	Mar 2015
▸ Standards of Maintenance By-law				
• Work Required	22	Mar 2015		
▸ Zoning & Development By-law				
• Issue related to Zoning Regulations and Land Use	22	Apr 2015		

This building is on the list of buildings that have current issues.

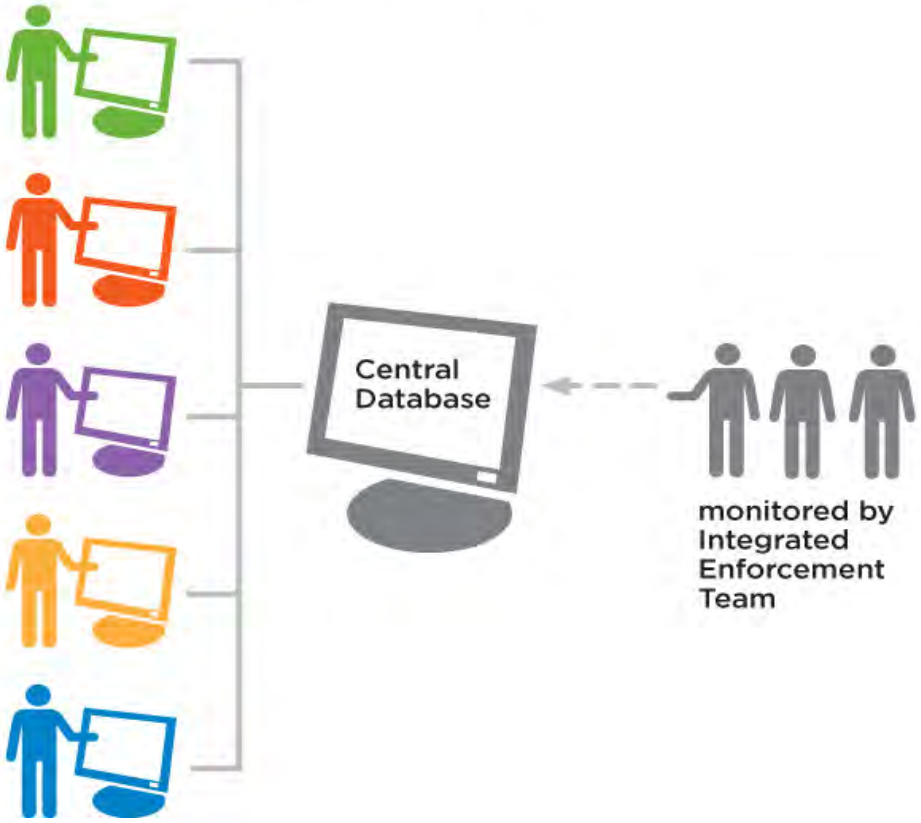
Would you like more information about the property database?

- Visit our main project page

Results

Before Database:
Systems work independently

After Database:
Systems connected to the central database.



80% reduction in number of violations between 2012 and the April 2015 (from 7,210 to 1,450)

Conclusion

Total Number of By-law Violations

	Initial Number of Violations	Reduction in Violations		Reduction in Violations		Reduction in Violations		Total Reduction in Violations	
	2012	2012-2013		2013-2014		2014-2015		2012-2015	
	#	#	%	#	%	#	%	#	%
Total number of health and safety by-law violations	7,210	-4,070	-56%	-1,565	-50%	-125	-8%	-5,760	-80%

Conclusion

- Continue working with owners to seek compliance without tenant displacement
- Continue encouraging non-profit management for SRO owners with ongoing by-law violations
- Rate of Change and Rental Housing Official Development Plan By-law review

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Thank you!
Questions?

Applications Involving Tenant Relocation – Application Form

This form must be submitted with your rezoning or development application.

Step 1:	Understand your rights and responsibilities as a landlord Please review the documents in Section 1 as it pertains to relocating tenants
Step 2:	Complete Section 2 – Rental Statistics
Step 3:	Complete Section 3 – Draft Tenant Relocation Plan

Section 1: Rights and Responsibilities of Landlord and Tenants

The rights and responsibilities of landlords and tenants is regulated by the Province and is set out in the Residential Tenancy Act: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_02078_01

For more information, about the City's rental housing protection policies, please refer to the following documents:

Rental Housing Stock ODP: http://vancouver.ca/files/cov/rate-of-change.pdf
Rate of Change Guidelines: http://former.vancouver.ca/commsvcs/guidelines/R021.pdf
SRA Bylaw: http://vancouver.ca/people-programs/protecting-single-room-accommodations.aspx

Section 2: Rental Statistics

A. Proposed Project Statistics

Date:		**Applicant:**		**Owner:**			
Phone:		**Email:**					
Building#:		**Street:**		**City:**		**Postal Code:**	
Legal description of site:							
Current Zoning:		**Proposed Zoning:**					
Proposed Project (Describe):							

(Double click the checkbox)

Does the proposed project have new or replacement rental units?	☐ **Y** ☐ **N**
Is this a proposed renovation of existing rental unit(s)?	☐ **Y** ☐ **N**
If No to both, please skip to section B: Existing Rental Units	

Proposed rental units:

Unit Type	Number	Average Size	Size Range	Initial Average Rents	Initial Rent Range
Studio					
1 bed					
2 bed					
3 bed					
Other:					
Total					

Click Here to Insert New Row (OR PRESS TAB)

B. Existing Rental Units:

Unit Type	Total Number	Number Currently Occupied
Studio		
1 bed		
2 bed		
3 bed		
Other e.g. 4 bed+, housekeeping or sleeping units:		
Total		

Click Here to Insert New Row (OR PRESS TAB)

C. Existing Tenants

Please provide a rent roll of the existing tenants on site.

Name	Unit#	Length of Tenancy(include start date here)	Bedroom Type	Size of Unit	Existing Rent

Click Here to Insert New Row (OR PRESS TAB)

Section 3: Draft Tenant Relocation Plan

Please complete the "Draft TRP Details" column in the following chart. The notes in the shaded column correspond to the expectations under the City's rental housing protection policies and indicate both minimum requirements and typical scenarios encountered. Staff will assess the proposed Tenant Relocation Plan and provide comments during the application phase.

Insert New Column

Relocation Plan Components	Draft TRP Details *(to be completed with Rezoning or DE application submission)*	City Staff Comments *(to be completed during Application Review)*	FINAL/REVISED TRP
	Date:	Date:	Date:
Describe existing project compared to new project	• *Existing units vs. new units* • *Existing rents vs. new rents* • *Existing unit mix vs. new unit mix*	•	•
2 Months' Free Rent • For long-term tenants residing in the building more than 10 years, consider an additional month free rent.	•	•	•
Notification • A minimum of two months' notice to end tenancy must be provided. • A longer time frame may be offered.	•	•	•
Moving Expenses • A moving company may be hired by the applicant, with all arrangements and costs covered • A flat rate of $750 towards moving expenses and reconnection fees is acceptable.	•	•	•

Relocation Plan Components	**Draft TRP Details** *(to be completed with Rezoning or DE application submission)*	**City Staff Comments** *(to be completed during Application Review)*	**FINAL/REVISED TRP**
	Date:	**Date:**	**Date:**
Assistance in Finding Alternate Accommodation • Three options in Vancouver must be provided to the tenants, one of which must be in the same general area as their current home. • Note for projects in the West End, two options should be provided in the same general area as their current home. • All options must rent for no more than 10% above their current rental rate, unless otherwise agree to with the tenant (i.e. tenant may be looking for newer, bigger unit etc. and able to pay more for such).	•	•	•

Relocation Plan Components	Draft TRP Details *(to be completed with Rezoning or DE application submission)*	City Staff Comments *(to be completed during Application Review)*	FINAL/REVISED TRP
	Date:	**Date:**	**Date:**
First Right of Refusal • Where starting rents are anticipated to be higher than what the tenant currently pays, a discount for any returning tenants should be offered. E.g. 20% off starting rents. • In cases where starting rents are essentially on par with current rents, consider the current rent plus any allowable increases under the RTA during the period of construction as the proposed starting rent.	•	•	•
Other • Where a Building Manager is paying reduced rent in exchange for services, consider compensation at the same monthly rate as for a similar sized unit. • Consideration for any additional compensation for long-term building residents who may require assistance in some form.	•	•	•

Click Here to Insert New Row (OR PRESS TAB)

FOR OFFICE USE ONLY:	
Staff Comments:	
Final Tenant Relocation Plan Approval Date:	
Approved by:	

50¢

City of Vancouver *Land Use and Development Policies and Guidelines*
Community Services, 453 W. 12th Ave Vancouver, BC V5Y 1V4 604.873.7344 fax 604.873.7060
planning@vancouver.ca

RATE OF CHANGE GUIDELINES FOR CERTAIN RM, FM, AND CD-1 ZONING DISTRICTS

Adopted by City Council on May 24, 2007

1 Application and Intent

These Guidelines apply, under the RM-2, RM-3, RM-3A, RM-4 and 4N, RM-5, RM-5A, RM-5B and RM-5C, RM-6, FM-1, or CD-1 District or Districts Schedules of the Zoning and Development By-law, to a development application for a multiple dwelling consisting of six or more dwelling units that includes the demolition or change of use or occupancy of a rental housing unit.

For the purpose of these Guidelines, "rate of change" has the meaning set out in section 2 of the Zoning and Development By-law.

2 Development Permit Board Considerations

When reviewing a development application, the Development Permit Board is to consider:

(a) the rate of change in the applicable district;
(b) the opinions of tenants in the existing project who would be displaced by the development;
(c) the following information which the applicant must provide to the Board with the development application:
  (i) a list of setting out the name of each tenant, the number of the tenant's unit, and the rent the tenant pays, and
  (ii) a relocation plan that is to include providing each tenant with two months' free rent, reimbursement for receipted moving expenses, and the first right of refusal to re-locate into a replacement rental unit on the site, in the case of rental replacement opportunities, or a rental unit or other form of affordable housing the applicant makes available under a housing agreement;
(c) the extent to which the development application otherwise provides for alternate accommodation for tenants;
(d) the developer's proposal, which must accompany the development application, for a housing agreement with the City regarding the replacement of, or contribution to the replacement of, any rental housing units, on or off site, or the provision of another form of affordable housing, and security for the housing agreement; and
(e) any other factor related to the supply of rental housing which the Board considers relevant.

3 Opinions of Tenants

In submitting a development application for a multiple dwelling in which consideration shall be given to the opinions of tenants who would be displaced by the development, the applicant shall include the following:

(a) A letter stating the property address and legal description of the site and providing the names and mailing addresses of the persons occupying the building;
(b) A notarized declaration stating:
    (i) That each person occupying the building has been given written notice of the intent to redevelop the property; pursuant to Section 49(6) of the **Residential Tenancy Act**, tenants are NOT to be served with eviction notices at this time;
    (ii) The number of units occupied on the date of the notice;
    (iii) That notices have been posted in conspicuous places in the building, advising of the intent to redevelop the building; and
    (iv) Where a building is vacant at the time of application as a consequence of tenants having been given Notice to Vacate for the purpose of demolition following receipt of earlier permits for redevelopment [per Section 49(6)(a) of the **Residential Tenancy Act**], a notarized description and accompanying documentation is to be provided. Favourable consideration will not be given to a development to a development application seeking demolition for redevelopment where (i) a building is vacant as a consequence of vacant possession having been a condition of property purchase; or (ii) Notice to Vacate was issued for other purposes, such as for building renovation.

Upon receipt of the foregoing, the Director of Planning will, by notification letter, inform all persons occupying the building of applicable City by-law provisions and guidelines and provisions for notice under the **Residential Tenancy Act**.

Following notification as outlined above, the Planning Department will provide the applicant with response forms which are to be completed by every household in the building. (A household comprises a person or group of persons occupying a unit.) The applicant will return the forms to the Planning Department. In order that the application can be processed, the forms should be returned as quickly as possible.

Standards of Maintenance Bylaw: Sample Bylaw

2014 PDF Version of Original 1996 Sample Bylaw

Note to Reader: This is a PDF version of the Sample Bylaw was originally prepared in 1996 by the Ministry of Municipal Affairs and Housing and formerly available online as web pages. Apart from minor changes in format, the text remains the same as the online version. It is accompanied by a Standards of Maintenance Guide, also available in PDF.

Table of Contents

A MODEL STANDARDS OF MAINTENANCE BYLAW

Municipality of _____ Standards of Maintenance Bylaw

A bylaw to prescribe standards for the maintenance of rental residential premises.

Therefore, the Council of the Municipality of X pursuant to Section 734 (1) (n) of the Municipal Act in open meeting assembled, enacts as follows:

PART 1 - TITLE AND INTERPRETATION

1 - Title

This bylaw may be cited as the *Rental Premises Standards of Maintenance Bylaw No. xxx, 19xx*.

2 - Definitions

In this bylaw, unless the context otherwise requires, the definitions in the Municipal Act and Interpretation Act govern, and the following definitions apply:

bathroom means a room containing at least one toilet and toilet tank and one hand basin, one bathing fixture, and constructed so that complete privacy is available to the user;

bedding means sheets, blankets, pillows and pillow cases;

building means any structure used or intended for supporting or sheltering any use or occupancy;

Building Inspector means a person who has been assigned the responsibility for administering bylaws enacted to regulate the construction, alteration, repair or demolition of buildings and structures;

community kitchen means a room not part of a dwelling unit or housekeeping unit and designed or intended for the use of the preparation of food;

cooking facility means an approved appliance in or upon which food may be heated;

dwelling unit means one or more self-contained rooms provided with sleeping, cooking and sanitary facilities, intended for domestic use, and used or intended to be used permanently or semi-permanently as a residence;

hand basin means a plumbing fixture primarily intended for the washing of hands, with hot and cold water connected thereto;

hotel means a hotel, motel, inn, rooming house and apartment hotel and any prescribed class of premises, but does not include a facility

(a) owned or operated by a non-profit society incorporated under the Society Act, a municipality, a regional district, a college designated under the College and Institute Act or a university named in the University Act, or

(b) in which the landlord resides and which contains fewer than a total of 5 bedrooms or rooms used as bedrooms;

housekeeping unit means a sleeping unit containing a sink and cooking facility;

landlord includes lessor, sublessor, owner or other person permitting the occupation of residential premises, and his/her heirs, assigns, personal representatives and successors in title and a person, other than a tenant occupying the premises, entitled to possession of the residential premises;

municipality means the Municipality of _____;

owner in respect of real property means the registered owner as defined in the Municipal Act;

person includes a corporation, partnership or party, and the personal or other legal representatives of a person to whom the context can apply according to law;

rental accommodation means a residential premises subject to a tenancy agreement;

residential premises means a dwelling unit used for residential purposes, and includes, without limiting the above,

- a manufactured home
- a manufactured home pad
- a room or premises in a hotel occupied by a hotel tenant,
- caretaker's premises, and
- employment premises,

but does not include premises, under a single lease, occupied for business purposes with a dwelling unit attached;

repair includes replacing, making additions or alterations or taking action required for the premises to conform to the standards prescribed by this bylaw;

sanitary facilities means any toilet and toilet tank, urinal, bathtub, shower or hand basin;

sink means a plumbing fixture, primarily intended for the washing of dishes and utensils, with hot and cold water connected thereto;

sleeping unit means one or more rooms equipped to be used for sleeping and sitting purposes only, with no cooking or sanitary facilities;

tenancy agreement means an agreement, whether written or oral, express or implied, having a predetermined expiry date or not, between a landlord and tenant respecting possession of residential premises and occupation of a room or premises in a hotel;

tenant means a person or persons who have the right of exclusive possession of residential premises under a tenancy agreement.

PART 2 - ADMINISTRATION AND ENFORCEMENT

3 - Application

This bylaw applies to rental accommodation in the Municipality of X.

4 - Responsibility for Administration

The Building Inspector is authorized to administer this bylaw.

5 - Building Inspector's Right of Entry

The Building Inspector is authorized to enter, at all reasonable times on any property that is subject to this bylaw to ascertain whether the requirements of this bylaw are met. The Building Inspector shall, on request, show proper identification.

6 - Notice to Comply to Bylaw Standards

The Building Inspector may direct an owner whose rental accommodation fails to meet the requirements of this bylaw to remedy the non-compliance within the time stated by the Building Inspector in a written notice to comply delivered to the owner.

7 - Penalties

A person who contravenes this bylaw commits an offence and upon summary conviction, is punishable in accordance with the Offence Act.

8 - Owner's Duties and Obligations

An owner of rental accommodation shall maintain it in accordance with the standards prescribed in this bylaw.

9 - Severability

In the event that any portion of this bylaw is declared ultra vires by a Court of competent jurisdiction, then such portion shall be deemed to be severed from the bylaw to that extent and the remainder of the bylaw shall continue in force and effect.

10 - Compliance With Other Bylaws

Compliance with this bylaw does not excuse an owner or any person from the requirement to comply with all other municipal bylaws and regulations.

PART 3 - MAINTENANCE STANDARDS

11 - Structural Integrity

Buildings and their structural members shall be maintained in good repair and in a manner that provides sufficient structural integrity so as to safely sustain its own weight and any additional loads and influences to which it may be subjected through normal use.

12 - Foundations

Foundation walls and other supporting members shall be maintained in good repair and so as to control the entrance of moisture.

13 - Exterior Walls

(1) Exterior walls and their components shall be maintained;

(a) in good repair,

(b) weather tight,

(c) free from loose or unsecured objects and materials, and

(d) in a manner so as to prevent or retard deterioration due to weather or infestations.

(2) Canopies, marquees, awnings, screens, fire escapes, pipes, ducts, air conditioners and all other similar equipment, attachments, extensions and their supporting members shall be maintained in good repair, properly and safely anchored and protected against deterioration and decay.

(3) Exterior wall facings, projections, cornices and decorative features shall be maintained in good repair, safely and properly anchored.

(4) Mechanical ventilating systems and their supporting members shall be maintained in good repair and in a safe mechanical condition.

14 - Exterior Doors and Windows

(1) Exterior doors, and windows, skylights, and hatchways shall be maintained in good repair and weather tight.

(2) Openings in exterior walls, other than doors and windows, shall be effectively protected to prevent the entry of rodents, insects or vermin.

(3) Latching and locking devices on separate entrances to the rental accommodation, shall be maintained in good working order. Latching and locking devices on windows shall be maintained in good working order.

15 - Roofing

(1) The roof, including the flashing, fascia, soffit, and cornice shall be maintained in a weather-tight condition so as to prevent leakage of water into the residential premises.

16 - Stairs, Balconies and Porches

(1) Stairways, balconies or porches and landings shall be maintained;

(a) in a safe and clean condition,
(b) in good repair, and
(c) free from holes, cracks, excessive wear and warping, and hazardous obstructions.

17 - Basements

(1) Basement floor drains shall be maintained in good condition.

(2) Floors in a basement shall be kept dry and free from major cracks, breaks or similar conditions which would create an accident hazard or allow the entrance of water into the basement.

18 - Floors

(1) Floors shall be maintained in a clean condition, reasonably smooth and level and free of loose, warped or decayed boards, depressions, protrusions, deterioration or other defects which may create health, fire or accident hazards.

(2) Where floors are covered, the covering shall be maintained in a safe condition.

(3) Shower room floors, toilet room and bathroom floors shall be covered with moisture resistant floor finishes, and in such condition as to permit easy cleaning.

19 - Walls and Ceilings

(1) Interior walls and ceilings shall be maintained in good repair and free from holes, or loose or broken plaster that may create health, fire or accident hazards.

20 - Plumbing and Plumbing Fixtures

(1) All plumbing, including plumbing fixtures, drains, vents, water pipes, toilets and toilet tanks and connecting lines to the water and sewer system, shall be maintained in good working order and repair, free from leaks or other defects and protected from freezing.

(2) Every hand basin and bathtub, shower and sink shall have an adequate supply of hot and cold running water and every toilet and toilet tank shall have an adequate supply of running water. Hot water shall be supplied at minimum temperature of 45 C (113 F) and a maximum of 60 C (140 F).

21 - Gas Appliances and Systems

(1) All gas systems and appliances shall be maintained in safe working order and repair.

(2) All systems of appliance venting shall be maintained in safe working order so as to prevent the creation of a health, fire or accident hazard.

22 - Heating Systems

(1) Heating equipment shall be maintained in a safe and good working condition so as to be capable of safely attaining and maintaining an adequate temperature standard, free from fire and accident hazards and in all rental accommodation capable of maintaining every room at a temperature of 22 C (72 F) measured at a point 1.5 meters (5 feet) from the floor, and in the centre of the room.

(2) Where heating equipment or part of it or any auxiliary heating system burns solid or liquid fuel, a place or receptacle for the storage of such fuel shall be provided and safely maintained in a convenient location and so constructed as to be free from fire or accident hazards.

23 - Electrical System and Lighting

(1) Electrical wiring and lighting equipment, including circuits, fuses, circuit breakers, electrical equipment and electrical heating systems shall be maintained in good working order.

(2) Adequate levels of artificial lighting shall be maintained in good working order in all rental accommodation.

24 - Ventilation

(1) All systems of ventilation, mechanical or natural shall meet the manufacturers installation requirements, and be maintained in good working order.

25 - Interior Fire and Health Safety Hazards

(1) Walls, floors and roof constructions, including fire protective closures, sprinkler systems, including fire alarm, and detection systems and other means of fire protection, shall be maintained so that they continue to provide the fire resistive properties and protection for which they were designed.

26 - Maintenance Standards for Hotels

(1) In hotel rental accommodation;

(a) surfaces of interior walls and ceilings shall be maintained in a clean and sanitary condition, and
(b) sanitary facilities shall be maintained in a clean and sanitary condition and their walls and ceilings with a smooth surface reasonably impervious to water or chipping or cracking.

(2) Every hotel operator shall ensure that;

(a) in every room in a hotel containing any sanitary facilities serving more than one sleeping unit, housekeeping unit or housekeeping room, accessibility from a public hallway shall be maintained and locking mechanisms on the inside are maintained, and
(b) where provided in a community kitchen, the sink, cooking facility and food storage shall be maintained in safe and healthy working order.

(5) Except where it is specifically agreed to be provided by the tenant, every hotel operator who provides bedding, mattresses, mattress covers and towels shall maintain them in a clean and sanitary condition.

(6) Except where it is specifically agreed to be provided by the tenant, every hotel operator who provides furnished accommodations shall maintain such furnishings in a clean and reasonable condition of repair and maintenance.

PART 4 - EFFECTIVE DATE

27 - Effective Date

This bylaw shall come into effect upon its adoption.

Read a first time this _____ day of _____ (month), 19___.

Read a third time this _____ day of _____ (month), 19___.

Reconsidered, finally passed and adopted this _____ day of _____ (month), 19___.

_____

Mayor

_____

Clerk

Standards of Maintenance Guide

2014 PDF Version of Original 1996 Guide

Note to Reader: This is a PDF version of the Guide that was originally prepared in 1996 by the Ministry of Municipal Affairs and Housing and formerly available as a web page. It is accompanied by a Standards of Maintenance Sample Bylaw, also available in PDF.

Table of Contents

Acknowledgements

The Ministry of Municipal Affairs and Housing would like to acknowledge the valuable input received from local government building inspectors and community planners from municipalities across British Columbia, by staff at the Union of British Columbia Municipalities, by staff at the Rental Housing Council of British Columbia and by representatives of tenants advocate groups in preparing this model bylaw. Rabnett Makaroff Planning Consultants Ltd. provided assistance in preparing the model bylaw.

2014 Update

This is a PDF version of the Standards of Maintenance Guide was originally prepared in 1996 by the Ministry of Municipal Affairs and Housing and formerly available online as web pages. Apart from minor changes in format, the Guide content remains the same as the online version.

Introduction

Over the last few years, the provincial government has provided local government with several new planning powers to assist in planning and protecting affordable housing. As a result of amendments to the Municipal Act adopted in July 1994, local governments can now enact a standards of maintenance bylaw to enforce basic levels of maintenance for rental accommodation. Local governments will be able to use this bylaw to ensure that apartment buildings, secondary suites, houses and condominiums that are rented and any other types of rental housing meet minimum standards of comfort and safety.

A standards of maintenance bylaw provides local government with the ability to meet the needs of tenants who live in unsafe and unhealthy accommodation due to poor building maintenance. The province has heard from many tenants who are frustrated by the sub-standard and deteriorating housing conditions in which they find themselves. The 1992 report of the Provincial Commission on Housing Options noted that while the location and extent of poor housing was generally well known to community organizations and local government officials, there was no mechanism to allow local officials to require improvements. Local governments also indicated an interest in using a standards of maintenance bylaw to expand their authority to maintain the affordable housing stock in their community and protect it from premature demolition. The Commissioners concluded that most municipalities would be willing to enact minimum maintenance standards bylaws if they had the authority to do so.

Now that the authority to adopt a standards of maintenance bylaw exists, a model bylaw has been provided to serve as a starting point for use in drafting a bylaw suited to local conditions.

Customizing the Bylaw for Your Community

A model standards of maintenance bylaw makes up the last section of this guide. This section includes some points about how to ensure that the bylaw meets community needs.

Compliance with Other Local Regulations

A standards of maintenance bylaw will, of course, have to be consistent with current local regulations and municipal bylaws, such as the zoning bylaw, noise and nuisance bylaw, unsightly premises bylaw and refuse bylaw. Before passing a standards of maintenance bylaw, council may wish to evaluate existing regulations and decide whether the standards of maintenance bylaw can complement other enforcement activities. For example, the Fire Services Act, the Health Act and other bylaw provisions provided by the Municipal Act (such as Section 932, Nuisances and Disturbances) provide other opportunities to regulate specific aspects of rental accommodation.

In addition, section 1025 of the Municipal Act provides the possibility of broader powers for regulating the condition of rental properties that have heritage significance.

Public Consultation Process

Local governments may want to conduct some form of public consultation process to determine the level of need and support for a standards of maintenance bylaw. Organizations that may desire input and participation include property owners associations, tenant groups and neighbourhood planning committees.

Definitions

Prior to drafting a standards of maintenance bylaw, municipalities should review the definitions section of the model bylaw in light of the definitions that are used within the municipal zoning and other related bylaws. In section 2 of the model bylaw, provision is made for Municipal Act and the Interpretation Act definitions to apply when not specified in the bylaw.

Several of the definitions in the model bylaw have been taken directly from the Residential Tenancy Act. This is because the Municipal Act ties the provision for standards of maintenance to specific terms found in the Residential Tenancy Act. These definitions should only be changed following legal advice and a review of the Residential Tenancy Act.

Responsibility for Administration

The model bylaw assumes that the building inspector will administer the bylaw. There are parts of the model bylaw that assume technical knowledge of electrical, gas and plumbing building standards. Local governments should determine if they have the expertise available to inspect these parts of the home. Consideration should be given to excluding them if it is simply impractical to enforce these parts of the bylaw.

Notice to Comply

The bylaw can make a provision for the Building Inspector to serve a notice to comply and to state the consequences of failure to comply with the notice. The Building Inspector should follow the same procedures for notices under this bylaw as would be followed under other bylaws.
It is suggested that a procedures manual be prepared which addresses such issues as the service of notice. These procedures could be adopted as policies of council but not be incorporated into the actual bylaw itself.

The procedure manual should address how notice will be served to property owners who do not live in the community or where the property is held by a numbered company. The procedure manual could also include a process for keeping the tenant and complainant informed, subject to freedom of information legislation and privacy protection policies.

Penalties and Enforcement

There are a number of penalties or enforcement tools which a municipality may use to address situations where a property owner fails to comply with a standards of maintenance bylaw. Municipalities will want to consider the utility of the methods they currently use to enforce bylaws and the resources they have available in order to determine which tools will work best.

The Offence Act. The model bylaw assumes that the municipality will prosecute the property owner in court for contravening the bylaw. The maximum penalty currently allowed under the Offence Act is $2000. Should local governments adopt section 7, *Penalties* as in the model bylaw, no amendment needs to be made to the bylaw if and when the Offence Act limit is changed.

Municipal Tickets. As an alternative to seeking a summary conviction and penalties under the Offence Act, the municipality may want to consider implementing a Municipal Ticket Information Authorization Bylaw and deal with offences to the standards of maintenance bylaw by ticketing. The authority to use

ticketing as a means of enforcing bylaws and the fines that can be charged are found in section 934.1 of the Municipal Act.

Licence Remedies. If the property owner has a business licence to rent accommodation under section 498 of the Municipal Act, the municipality may want to consider suspending the licence under section 513 of the Municipal Act, if the owner has been convicted of an offence under the standards of maintenance bylaw. Another remedy under section 513 is revocation of the licence. This remedy is only available after a show cause hearing under section 513(3).

Notice on Title. A council may also, by resolution, decide to file a notice in the land titles office against the title of a property that does not comply with the standards of maintenance bylaw. This notice serves as a warning to future purchasers of the property and may serve as an immediate incentive to the current owner to comply. The process that council must follow is detailed in section 750.1 of the Municipal Act.

Bylaw Contravention Notice

Section 735 of the Municipal Act enables local government, by bylaw, to bring a building up to a standard specified in a bylaw where the building contravenes a bylaw. If this part of the Act is being used, the council must provide 30 days written notice to the owner, tenant or occupier of the real property. The owner, tenant or occupier of the real property have 10 days to make an appeal which would be heard in court where an order will be made.

Local Government Remedial Action. Section 299 of the Municipal Act gives council general authority to, by bylaw, take remedial action on a building that does not comply with a bylaw, if the property owner fails to take the action, following a municipal inspection. The local government may also recover the expenses, costs and interest incurred through this action by adding them to municipal taxes payable on that property.

Inclusion of Provisions to Regulate Hotels

Each community will have to decide whether or not to have specific regulations for hotels used as residential premises. The bylaw includes some of the basic categories for regulating hotels. Aspects not included in the model bylaw, such as minimum dimensions of housekeeping units, will vary between local governments depending upon municipal land use bylaws.

Other Considerations

In regions where ice, snow and freezing temperatures are common, municipalities may want to add specific standards of maintenance for 1) plumbing facilities, 2) heating systems, and 3) the provision of heating fuels. These standards would be intended to prevent the freezing of water lines, the failure of heating systems and the prevention of accidents and hazards.

Appeal Process

Each local government will have to decide on whether or not the bylaw should include a process for landlords or property owners to appeal a notice to comply with the bylaw.

There are a number of options which may be included in the appeal process. These include whether the process should:

- consist of an appeal to Council;
- consist of a set of maximum time frames in which the appeal will be considered (i.e. *... if submitted within 15 days of the serving of the Notice to Comply*.);
- include a list of reasons that may be considered valid for the appeal (i.e. the required works would exceed the standards of maintenance bylaw);
- include a process for dismissing an appeal.

Administrative fairness should be a principle in developing an appeal process. For example, the property owner should be given reasonable periods of time to make an appeal and be given ample opportunity to make a representation stating their case.

What The Legislation Says About Standards of Maintenance Section 734 (1) of the Municipal Act states that a council may, *for the health, safety and protection of persons and property, and subject to the Health Act and the Fire Services Act and their regulations, by bylaw .... (n) require the maintenance of residential premises* as defined in the Residential Tenancy Act that are subject to a *tenancy agreement* as defined in that Act, in accordance with the standards specified in the bylaw, to the extent that the standards do not exceed those established by the building code for the Province established by the Minister under section 740 (of the Municipal Act).

Tenancy Agreement

In the Residential Tenancy Act, a *tenancy agreement* means an agreement, whether written or oral, express or implied, having a predetermined expiry date or not, between a landlord and tenant respecting possession of residential premises and occupation of a room or premises in a hotel.

Residential Premises

Purpose built apartment buildings, secondary suites, housing complexes built with federal or provincial funds (social housing) and individual houses that are subject to a tenancy agreement would clearly be included as residential premises. The definition of a *residential premises* found in the Residential Tenancy Act also includes:

- a manufactured home
- a manufactured home pad
- a room or premises in a hotel occupied by a hotel tenant,
- caretakers premises, and
- employment premises,

but does not include premises, under a single lease, occupied for business purposes with a dwelling unit attached.

Hotel Accommodation

Residential premises includes a room or premises in a hotel occupied by a hotel tenant and in the Residential Tenancy Act hotel means:

a hotel, motel, inn, rooming house and apartment hotel and any prescribed class of premises, but does not include a facility

> *(a) owned or operated by a non-profit society incorporated under the Society Act, a municipality, a regional district, a college designated under the College and Institute Act or a university named in the University Act, or*
> *(b) in which the landlord resides and which contains fewer than a total of 5 bedrooms or rooms used as bedrooms*.

Therefore, a standards of maintenance bylaw would not apply in most boarding or lodging and shared accommodation situations or to commercial tenancies.

Hotel Tenants

In order for hotel accommodation to be subject to a standards of maintenance bylaw, the hotel unit must be occupied by a hotel tenant. As defined by the Residential Tenancy Act a hotel tenant means:
an individual who is

> (a) occupying a room or premises in a hotel where the hotel contains rooms or premises that the individual usually occupies as his residence, and
> (b) paying rent of less than a prescribed amount per day or, where no amount is prescribed, less than $20 per day

in circumstances where that occupation is considered, at common law, to be a licence to occupy land or premises, but does not include an individual who is occupying a room or premises in a hotel that has a peak season during which the daily rent for the room or premises has, in a peak season within the previous 12 months, exceeded the maximum amount of the daily rent that can be paid by a hotel tenant under paragraph (b).

Licensed and Unlicensed Community Care Facilities

There are a variety of licensed and unlicensed care facilities and semi-care services within the province. If a community care facility is either owned or operated by a non-profit organization, it is unlikely to be considered a residential premises as defined by the Residential Tenancy Act and therefore cannot be subject to a standards of maintenance bylaw.

In the case of all other community care facilities, there are many factors to consider in determining whether a standards of maintenance bylaw would apply. In some cases, the contractual agreement between the facility and the facility user may imply that a residential tenancy agreement exists and therefore the standards of maintenance bylaw may also apply.

For example, in circumstances where compensation is given for residency as part of the agreement for exclusive possession of the premises, a security deposit is given, or if one months notice is required to be given by the parties to vacate the premises, then the occupation may constitute a tenancy agreement. Where the relationship is unclear, an arbitrator may make an order whether the Residential Tenancy Act is applicable and the occupancy is a residential tenancy as defined in the Act.

Residential Property

The Residential Tenancy Act also includes a definition of residential property which assists in determining the scope of the definition of residential premises. A residential property is *a building in which, and includes land on which, residential premises are situated*. A standards of maintenance bylaw can clearly deal with all living areas, but in some cases may not extend to the yard and buildings and parts of the building external to the actual living areas such as elevators, lobbies and hallways.

Local government can use the *unsightly property* provisions of the Municipal Act and sections of the Fire Services Act to deal with maintenance and safety issues on the property and the Health Act to deal with a range of sanitary and health issues related to the upkeep of the property.

Allowable Standards

The legislation is clear that a standards of maintenance bylaw can not set standards that exceed those in the current British Columbia Building Code. Municipalities have the ability to exceed the British Columbia Building Code when they adopt building standards bylaws; however, in the case of a standards of maintenance bylaw, the provincial standards apply.

It is also important to note that the Building Code does not establish maintenance standards, it provides the minimum standard for new construction, or some alterations or renovation to existing structures. Therefore, while a complaint about a residential rental accommodation may result in improved living conditions, not every complaint will result in achieving the current Building Code standard.

Unauthorized Suites

It should be noted that compliance with the provisions of a standards of maintenance bylaw does not imply that the rental unit has satisfied the requirements of other bylaws. For example, it may be possible in some municipalities that a complaint by the tenant under the standards of maintenance bylaw will result in the owner of an unauthorized (or illegal) secondary suite being required to upgrade facilities or standards, without necessarily having the unit shut down.
At a later date, however, a complaint by a neighbour with respect to the zoning bylaw may result in the shutting down of the unit due to the fact that it is not a permitted use in that zone.

Maintaining Standards Using The Residential Tenancy Act

While a standards of maintenance bylaw will provide a useful tool to ensure safe and healthy rental accommodation, it is important to note that the Residential Tenancy Act does spell out both tenants and landlords responsibilities for dealing with regular and emergency repairs.

Regular Repairs

If tenants believe that a routine repair is required to their rental premises, they should first ask the landlord to make the repair. If the landlord does not make the repair, the tenant can apply for arbitration. If an arbitrator orders the landlord to make the repair and the landlord still does not do it within the time limit given by the arbitrator, the order may also permit the tenant to spend up to one month of rent to complete the necessary repairs. Or, the arbitrator may order that the tenant pay a lower rent to match the reduced value of the suite until the ordered repairs have been made by the

landlord. For example, if one of the two bedrooms in the suite can not be used because repairs have not been made, the arbitrator may reduce the rent to that of a one-bedroom suite.

Emergency Repairs

Under recent amendments to the Residential Tenancy Act, a tenant of a residential premises may be permitted to make emergency repairs to the residential property or premises. The new section 9.2 of the Residential Tenancy Act states the conditions and circumstances under which a tenant is entitled to make emergency repairs.

Situations requiring emergency repairs include blocked or major leaks to water pipes, sewer pipes or plumbing fixtures, a major leak in the roof, inoperable central or primary heating systems, and defective locks that would let anyone enter the premises without a key. In order to be considered emergency repairs, the need for repairs must be urgent and necessary for the health and safety of persons or the preservation and use of the residential property or residential premises.

Landlords must post an emergency contact name and telephone number in an easy-to-see place in the rental premises. If the tenant has made at least two reasonable efforts to reach the landlord or the landlords emergency contact person and no one has responded within a reasonable period of time, the tenant can have the emergency repairs done. The tenant must provide receipts and a written account of what happened, and the landlord must reimburse the tenant for reasonable repair costs. If the landlord does not reimburse the tenant for some or all of the repair costs, the tenant may deduct the remaining amount from subsequent rent payments. If the landlord disagrees with the repairs or the costs, the landlord may apply for arbitration to resolve the dispute.

Deliberate Damage

Should a tenant deliberately damage a rental property, the landlord can apply for assistance at the Residential Tenancy Branch. An Information Officer may, with the landlords permission, contact the tenants to let them know that an arbitrator may order the tenants to pay for any repair costs for damages to the suite. Tenants could also be subject to a $5,000 fine.

For more information on the use of the Residential Tenancy Act for repairs, contact:
The Residential Tenancy Branch
Telephone: 1-800-665-8779

A Model, Not a Prescription

The following model standards of maintenance bylaw provides an example which local governments can alter, modify or customize to suit their particular needs and community concerns. The resources available to the community for inspections and the capacity to enforce the bylaw must also be taken into account. Each community must carefully examine the model to ensure that it meets the needs and standards that are unique to that community.

It is strongly recommended that local governments obtain legal advice from their solicitors when modifying or adopting the model bylaw.

The model standards of maintenance bylaw is designed to serve as a starting point for those communities where tenants have expressed concern about their ability to ensure safe and healthy rental accommodation. Any questions can be directed to:

Housing Policy Branch
PO Box 9844 Stn Prov Govt
Victoria BC V8W 9T2
Telephone: (250) 387-6467
Email: Housing.Policy@gov.bc.ca

TENANT RESOURCE & ADVISORY CENTRE

Direct Advocacy Program
Andrew Sakamoto

TENANT RESOURCE & ADVISORY CENTRE

TRAC's Direct Advocacy Program

- Launched mid-May
- Eligibility criteria a little different than other advocacy programs
- We need your help with referrals!

TRAC
TENANT RESOURCE & ADVISORY CENTRE

Eligibility

1. Cases where a landlord is acting egregiously towards a large segment of a rental building

TRAC
TENANT RESOURCE & ADVISORY CENTRE

Eligibility

2. Cases where a tenant is experiencing an issue that TRAC considers serious, common and systemic

TRAC
TENANT RESOURCE & ADVISORY CENTRE

Eligibility

3. Cases dealing with a residential tenancy concept that TRAC believes lacks clarity or reasonableness, and taking on the case will help TRAC gain insight into the matter and more effectively argue for legislative, policy or procedural changes

TRAC
TENANT RESOURCE & ADVISORY CENTRE

Eligibility

4. Cases dealing with a residential tenancy concept that TRAC believes lacks clarity or reasonableness, and taking on the case could ultimately lead to a Judicial Review that would help establish a positive legal precedent for tenants

TRAC
TENANT RESOURCE & ADVISORY CENTRE

Eligibility

5. Cases that have a reasonable chance of resulting in Administrative Penalties against landlords

TRAC
TENANT RESOURCE & ADVISORY CENTRE

Questions?

TRAC
TENANT RESOURCE & ADVISORY CENTRE

Residential Tenancy Branch

2015 Update

Janet Donald

Director of Policy

Nithya Mascarenhas

Information Officer

AGENDA

- RTB Overview
- Policy & Public Education
- Service Delivery

BRITISH COLUMBIA

Overview

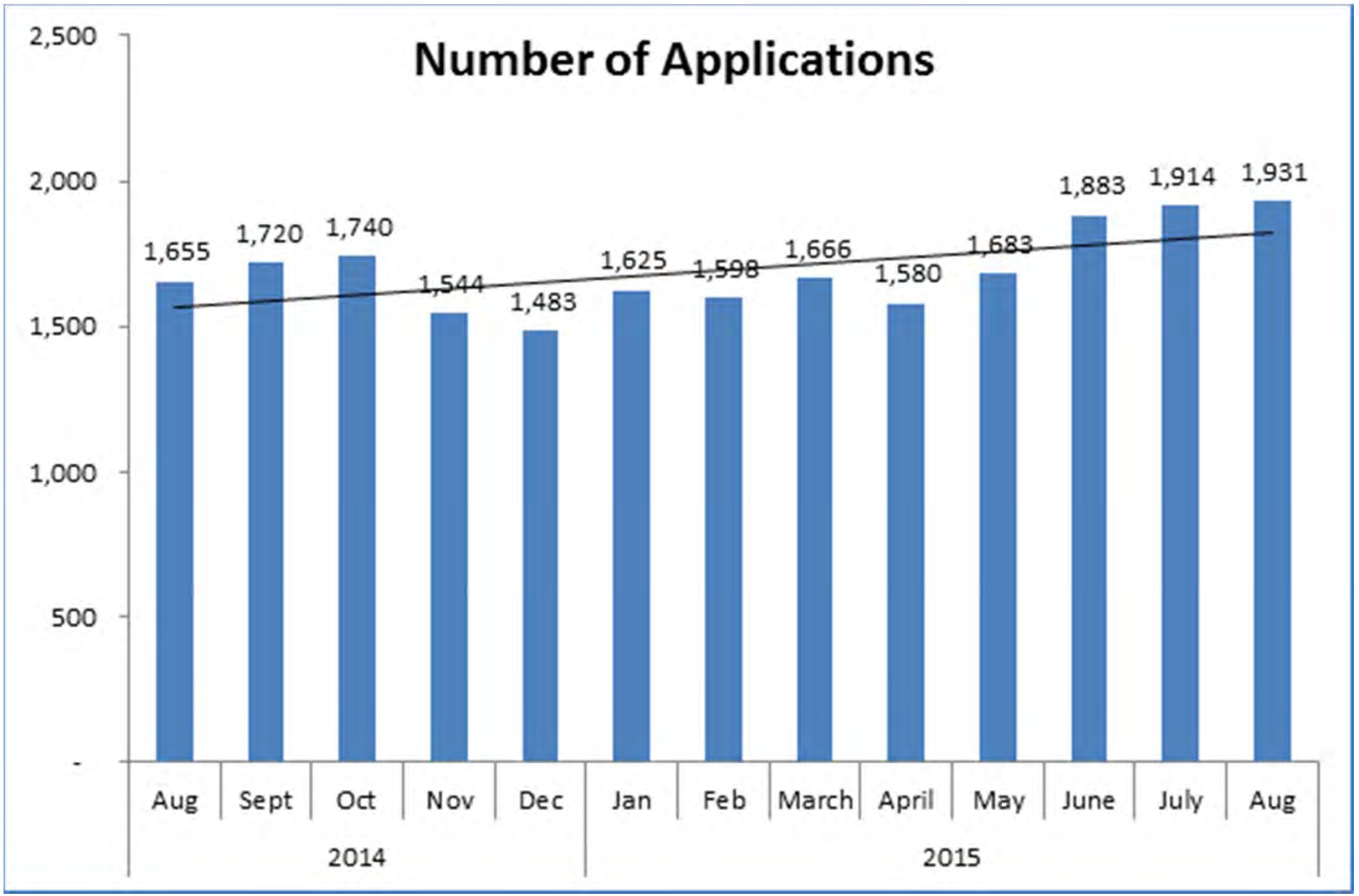
RTB Personnel

- 29 Arbitrators
- 7 Contract Arbitrators
- 2 Adjudicators
- 46 Information Officers

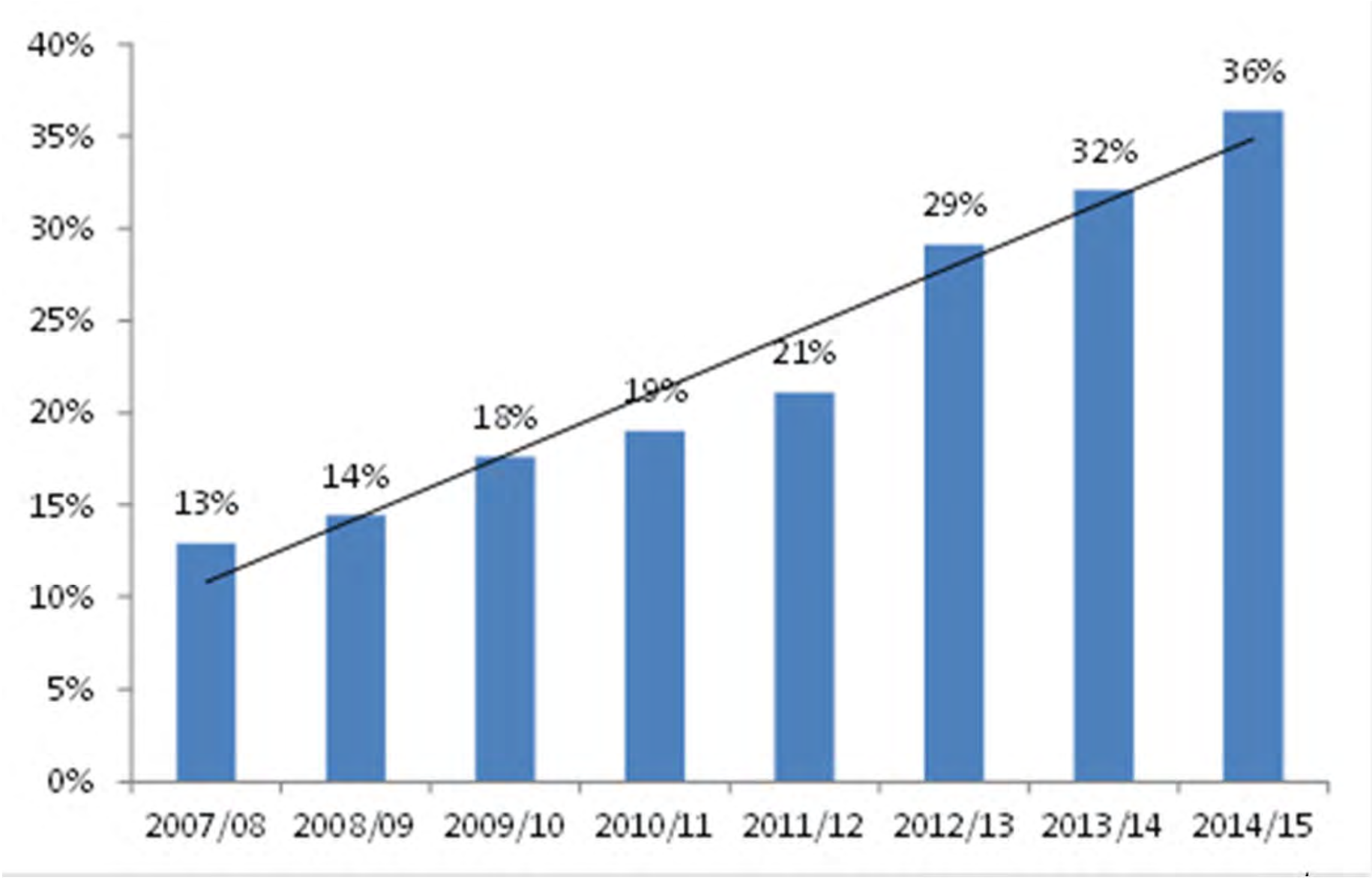
Dispute Applications

- 20,000 per year
- 20% filed online
- 80% filed in-person
- 60% landlords and 40% tenants

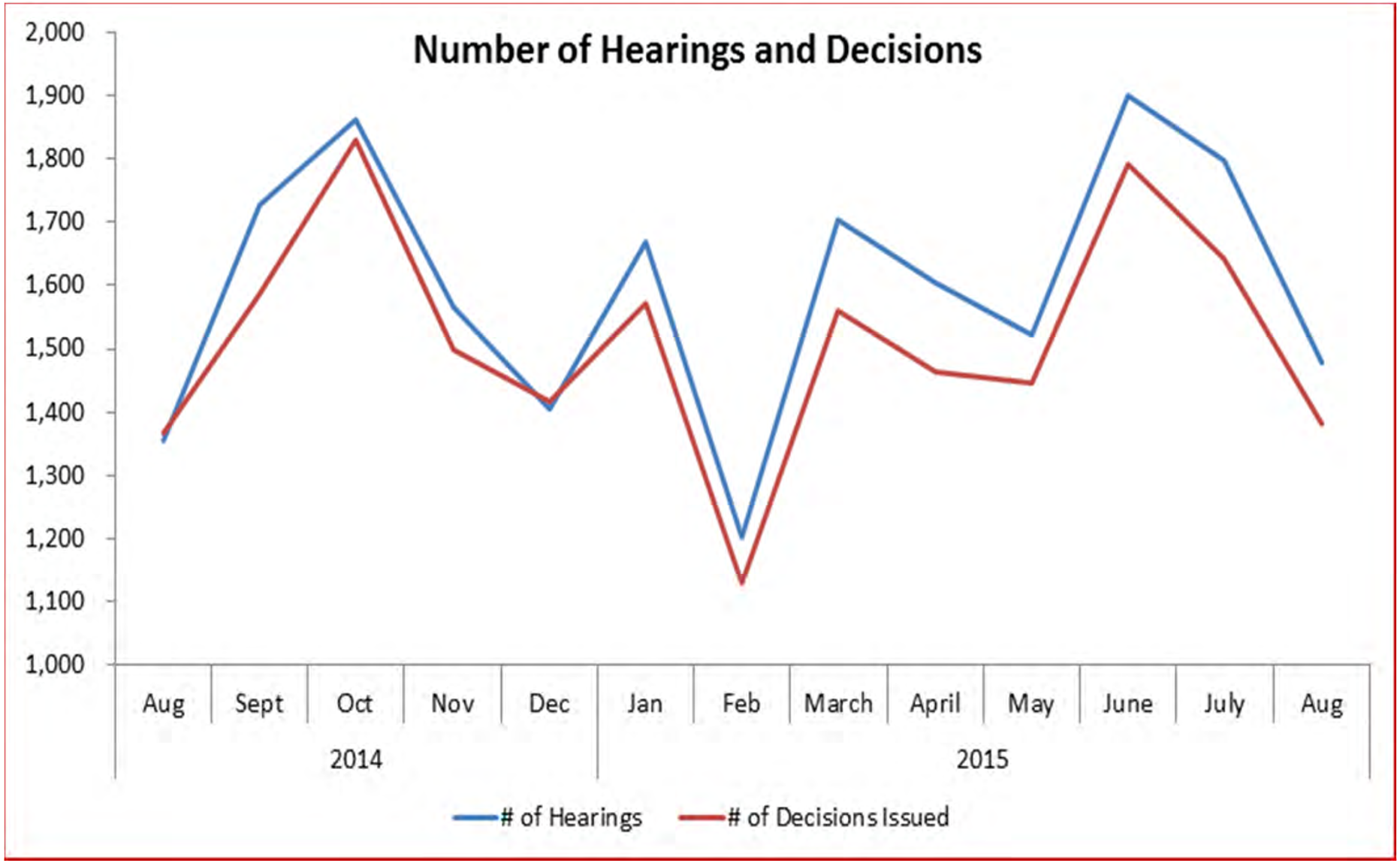
Number of Applications



Cross Applications



Number of Hearings & Decisions



Most Common Reasons Citizens Apply

Top reasons for tenants

- Monetary Order for return of security or pet damage deposit
- Cancel a Notice to End Tenancy

Top reasons for landlords

- Monetary Order for unpaid rent or utilities
- Order of Possession to End Tenancy

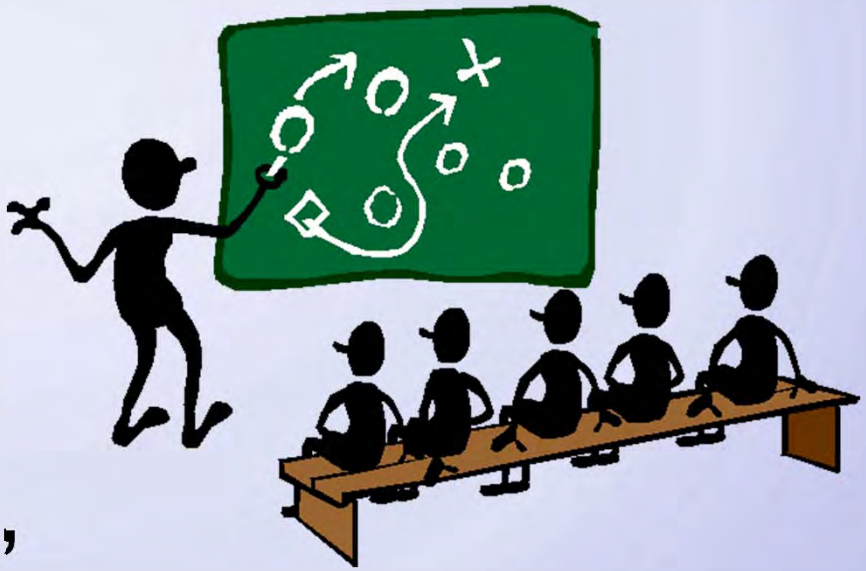
Policy

Amendments to the Legislation

- Streamline and modernize RTB services
- Improve tools to resolve disputes
- Increased options for citizens

Rules of Procedure *New*

- **Amendment to an application**
- **Reorganization by the phase of the process**
- **Take effect October 19th, 2015**



New

Supportive Housing Project

- Supporting the success of supportive housing tenancies
- How does supportive housing fit with the RTA?

Ending Fixed Term Agreements Under Special Circumstances

- Acceptance into Residential Care
- Fleeing Domestic Violence

Administrative Penalties Review

New

- Clarify intent and efficacy of administrative penalties
- Examine review process
- Identify alternative approaches

Public Education Team

Northern Education Project

- ✓ Visited **12** communities
- ✓ Presented **1** webinar
- ✓ Delivered a total of **23** information sessions
- ✓ Spoke to **471** attendees

Service Delivery

Online Tools

NEW

Application for Dispute Resolution

- ✓ New, easy-to-use question/answer format
- ✓ Option to pay online or in-person
- ✓ Now accepts Direct Request Applications

Application to Waive Filing Fee

#RTB – 17

Your personal information is collected under section 26 (a) and (c) of the *Freedom of Information and Protection of Privacy Act* for the purpose of administering the *Residential Tenancy Act* and *Manufactured Home Park Tenancy Act*. If you have any questions regarding the collection of your personal information, please contact an information officer by calling 604-660-1020 in Greater Vancouver; 250-387-1602 in Victoria; or 1-800-665-8779 elsewhere in B.C.

File No.

APPLICANT:

last name | first and middle name(s)

CURRENT ADDRESS:

box number or MHP site number | street number | street name | city

province | postal code | phone

HOUSEHOLD SIZE:

State the total number of people living at your address. The total must include all people who are related, as well as people who are not related (see page 2).

HOUSEHOLD INCOME:

State the total income, before deductions, from all sources for everyone living at your address: $

PROOF OF INCOME:

Please tick the box(es) and attach copies of the documents that you are providing with this application form:

- ☐ Income Assistance statement
- ☐ Employment Insurance Benefits statement
- ☐ Pension statement(s)
- ☐ Recent pay stub(s) from employer(s)
- ☐ Bank statement for 2 most recent months
- ☐ Scholarship statement(s)
- ☐ Other:

Note: the Residential Tenancy Branch may ask for additional information or material

OFFICE USE ONLY

Low-income cut-off $

☐ Approved ☐ Not approved

Notes:

Information officer

Cashier transaction No.

Cashier's initials

DECLARATION:

I understand that if I do not attend the hearing for any valid legal reason, and have not cancelled my application(s) at least three full business days before the hearing, I may be required to pay the waived filing fee.

I declare that the information I have provided above is true. I am aware that it is against the law to make a false declaration.

Applicant's Signature: _____ **Date:** day month year

FOR MORE INFORMATION

RTB website: www.gov.bc.ca/landlordtenant

Public Information Lines 1-800-665-8779 (toll-free) Greater Vancouver 604-660-1020 Victoria 250-387-1602

Thank you

2015 Update on Court Cases About Residential Tenancies

Community Legal Assistance Society

providing specialized legal assistance to promote social justice since 1971

About 20 Decisions Involving Res Ten and Manufactured Home Park Issues

Jurisdiction

October 2014:
Supreme Court of Canada Declines Leave to *Farmer and George v. Sechelt Indian Band*

Does Court Consider Original, Review Decision, or Both?

June 2014:

***Sereda v. Ni*, BCCA**

March 2015:

***Martin v. Barnett*, BCSC**

Guest ID Policy

Atira Property Management v. Richardson

Relief From Forfeiture and Effective Date of Orders of Possession

2014: SCC Declines Leave to *Ganitano v. Metro Vancouver Housing Corporation*

Example of Roommate Disputes in Small Claims Court

Bloomberg v. Barr

What is Required in Reasons?

Laverdure v. First United Church Social Housing Society

Good Faith in Contract Law

***Bhasin v. Hrynew*, 2014 SCC 71**
(parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract)

Conclusion

INTRODUCTION TO MANUFACTURED HOME PARK TENANCY LAW IN B.C.

October 2015

Presented by Joshua Prowse and Amita Vulimiri
Community Legal Assistance Society

Materials Developed by Jess Hadley and Kendra Milne

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INTRODUCTION TO MANUFACTURED HOME PARKS: SOME POLICY CONTEXT

In a manufactured home park, the tenants own their manufactured homes, but rent the land on which the home is sited (sometimes also called the manufactured home "pads"). The landlord is responsible for maintaining the sites and providing the basic services necessary for tenants to live in their manufactured homes (e.g. water and electricity hook-ups). Meanwhile, the tenants own the manufactured homes, and remain responsible for maintaining the homes.

When a manufactured home is sold it often does not get moved; rather, it stays put on the same manufactured home site. The person purchasing the home must either take over the previous tenancy agreement, or else start a totally new tenancy agreement with the landlord.

Benefits from a tenant perspective: manufactured home parks are a major source of low-cost housing for those living in rural or semi-urban areas of BC that do not have large rental developments. The month-to-month cost of living in a manufactured home on a rented site is usually quite low when compared to the cost of buying a similar home along with the land it sits on, or renting a full house, which may not be available

Benefits from a landlord perspective: for a landlord, manufactured home parks are typically viewed as investment properties. Landlords buy the undeveloped land and, while waiting for the land to increase in value, they use pad rent as a source of income. Although it may take many years for the land to increase in value, at that point the land owner usually has plans to sell or develop the land, converting it to another use. To a manufactured home park landlord, it is often important to be able to easily change the use of land from a manufactured home park to something more profitable whenever the landlord chooses to do that.

The difference between these two perspectives creates a built-in tension between the interests of landlords and tenants in manufactured home parks.

Manufactured home park legislation in BC *attempts* to strike a balance between:

(1) The desire for relatively stable, low cost housing in more rural areas that do not have much rental housing; and

(2) the acknowledgement that landlords often create manufactured home parks with the primary intent to eventually develop or sell the land for a profit, and as a result, want to be able to change the use of the land.

Unfortunately, the *Manufactured Home Park Tenancy Act* ("*MHPTA*") and associated regulation do a fairly poor job of balancing these conflicting interests of landlords and tenants. Tenants often only have one asset – their manufactured home – and the legislation's focus on allowing landlords to remove a manufactured home park relatively easily leaves park tenants disproportionally vulnerable.

This is because **the whole structure of the *MHPTA* is premised on the notion that manufactured homes can be moved with relative ease and minimal cost.**[1] The legislation does not provide much more security of tenure to manufactured park tenants renting a site than it does for tenants renting a house or apartment despite the increased risk the tenants take: their primary asset may be at stake. The reality is that once a manufactured home is placed in a manufactured home park, it is often impracticable, extremely expensive, or even impossible to move. In addition, it is often difficult to find a place to move the home to. This creates a lot of risk for tenants: they've put a primary asset on a piece of land, their rights to keep it there are tenuous, and the legislation does not provide adequate compensation for having to move it.

[1] Section 1 of the *MHPTA* defines a "manufactured home" as a structure that is designed, constructed or manufactured to be moved from place to place, and is used or intended to be used as living accommodation.

FOCUS OF THIS PRESENTATION:
WORKING <u>WITHIN</u> THE LEGISLATION, NOT CHANGING THE LEGISLATION

While it is important to be aware of the problems with the manufactured home park legislation as described above, and tenants may often approach you with legitimate complaints about these problems, *this presentation will not focus on those problems*.

This is because when a client approaches you with a problem with their manufactured home tenancy, **you will need to help your client in the context of the current legislation**. Actually fixing the problems with the legislation is not within a legal advocate's mandate. If a client wishes to seek legislative change, we recommend referring them to their MLA or to the provincial minister responsible for housing.

In this presentation we will cover:

1. The scope of the *Manufactured Home Park Tenancy Act* (the "*MHPTA"*);
2. Key similarities and differences between the *MHPTA* and the *Residential Tenancy Act*;
3. Practical factors at play in manufactured home park tenancies, which will help you to respond to clients in an informed way;
4. Key steps that you can take to help manufactured home park tenants;
5. Seizure of personal property by court bailiffs and sales of the manufactured home; and
6. Resources.

1. SCOPE OF THE *MANUFACTURED HOME PARK TENANCY ACT* (THE "*MHPTA*")

The *MHPTA* applies to "tenancy agreements, manufactured home sites and manufactured home parks" (s. 2 of *MHPTA*). Carefully review the following definitions in s. 1:

- Manufactured home
- Manufactured home park
- Manufactured home site

In some situations it may seem unclear whether the *MHPTA* applies. Two common examples are campgrounds, and situations where a single manufactured home sits on a residential property.

Campgrounds

In many areas of BC that have limited rental housing available, campgrounds become a permanent residence for tenants. They may have a recreational vehicle like a truck and camper, or a more permanent manufactured home on the site.

Park owners often try to argue that these types of tenancies are not covered by the *MHPTA* and, as a result, tenants have no protection from evictions without cause or proper notice and significant rent increases during the summer camping season.

Although the Residential Tenancy Branch Policy Guideline #9 sets out factors that weigh for and against the application of the *MHPTA*, new cases have come out since it was published that indicate a much broader application of the *MHPTA*.

When trying to determining if a client's tenancy falls under the *MHPTA*, the key is to look not at the type of home, trailer or vehicle the tenant has on the site, but instead at whether the home, trailer or vehicle is used as a primary, permanent residence.[2] If this is the tenant's only place to reside and the parties intended some permanence, then it is very likely a tenancy that is covered by the *MHPTA*.

[2] To see the recent court cases that support this broad application of the *MHPTA*, see:

- *D. & A. Investments Inc. (c.o.b. Garnet Rock Trailer and RV Park) v. Hawley*, 2008 BCSC 937 at paragraphs 11 and 29 (the judge upholds a DRO's decision that focuses on the actual use of the vehicle in issue)
- *Steeves v. Oak Bay,* 2007 BCSC 1409 at paragraphs 107, 109 and 111 where the judge says, in part:

> *… it is my view that the MHPTA is intended to provide regulation to tenants who occupy the park with the intention of using the site as a place for a primary residence and not for short-term vacation or recreational use where the nature of the stay is transitory and has no feature of permanence.(¶111)*

A single manufactured home on a residential property

It is also quite common for a land owner to allow one trailer on a property for rent or other payment. As long as the tenant owns the trailer and pays rent or some other consideration for the use of the land the trailer is on, this situation probably falls under the MHPTA.

See the definition of "manufactured home park" in s. 1, which includes "one or more manufactured home sites". See also Residential Tenancy Policy Guideline #9 (Tenancy Agreements and Licenses to Occupy) which describe factors to consider in this situation, such as whether the landlord and tenant have a family or personal relationship and occupancy is given for personal and not businesses reasons, whether the occupier pays a fixed amount for rent, and whether the landlord and tenant have agreed that the tenant can vacate without notice.

Some notes on the scope of the *MHPTA*:

- *MHPTA* does not apply where the manufactured home site AND manufactured home are both rented to the same tenant (s. 3 of *MHPTA*). Instead, the RTA probably applies in such a situation.

- Where the *MHPTA* applies, the Residential Tenancy Act doesn't apply (s. 4(j) of *RTA*).

2. KEY SIMILARITIES AND DIFFERENCES BETWEEN THE *MHPTA* AND THE *RTA*

ISSUE	SIMILARITIES TO *RTA*	DIFFERENCES FROM *RTA*
Tenancy agreements	• Parties cannot contract out of the *MHPTA* (s. 5 of *MHPTA*). • There are standard terms that apply to every tenancy whether written or oral (s. 12 of *MHPTA*). • The landlord is required to prepare a written agreement that includes key information (s. 13 of *MHPTA*).	• Rules are a factor! Tenancy agreements must include any Rules of the MHP (s. 13(2)(g) of *MHPTA*). But note - landlord can unilaterally change the rules without tenant's agreement (s. 14(3)(c) of *MHPTA*). • Landlord may not include a term in the tenancy agreement that the tenant must use the landlord as the tenant's agent when selling the manufactured home (s. 19(2) of *MHPTA*).
Before a tenancy	• Rights and obligations start as soon as tenancy agreement takes effect, even if the tenant has not yet occupied the manufactured home site (s. 16 of *MHPTA*).	• No security deposit (s. 17 of *MHPTA*) - although landlord can charge a key deposit (s. 4 of Regulation). • No conditional inspection at the start of tenancy.
Termination of services or facilities	• Landlord can only terminate with 30 days' notice and only if rent is reduced accordingly; landlord cannot terminate a service/facility that is "essential for the tenant's use of the manufactured home site as a site for a manufactured home" (s. 21 of *MHPTA*).	• The definition of "service or facility" includes water, sewer, electricity, lighting, roadway and other facilities • It does not include many of the services listed in the definition in the RTA (see s. 1 of *MHPTA).*
Tenant's property	• Landlord cannot interfere with a tenant's access to the tenant's property, and cannot seize the tenant's property (including the manufactured home) unless the LL has a court order or the tenant has abandoned it (s. 20 of *MHPTA*).	• Although not set out in the *MHPTA*, a Writ of Possession issued by the BCSC can give a bailiff power to seize the manufactured home itself.
Landlord's access	• As under the *RTA*, there are specific purposes for which a landlord can access the manufactured home site, and rules on advance notice that must be given to the tenant.	• Under the *MHPTA*, the landlord only has a right to access the manufactured home park site, not the home.

ISSUE	SIMILARITIES TO *RTA*	DIFFERENCES FROM *RTA*
Duty to maintain/ repair	• A landlord must provide and maintain the park in a reasonable state of repair and comply with housing, health and safety standards. • The tenant must maintain reasonable standards of health, cleanliness and sanitation throughout the site (ss. 26 and 30 of *MHPTA*).	• Landlord is not responsible for maintenance of the home itself – just the site & park. • Landlord is not responsible for maintaining any improvements the tenant has put onto the site (s. 26 of *MHPTA*). • "Emergency repairs" has a different definition than in the *RTA* because the landlord only controls the *site*, and not the manufactured home.
Ending a tenancy	• Same justifications as under the *RTA* for landlord ending tenancy (s. 39-42). • *Note – the timelines are the same too, for NTEs for cause and non-payment!* • NTE for cause: tenancy end date = end of next tenancy month! • NTE for non-payment: tenancy end date = 10 days after notice!	• Landlord can end tenancy if it *"has all the 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 to a residential use other than a manufactured home park".* • Landlord must give 12 months notice in the proper NTE form (*MHPTA* s. 42). • Tenants must dispute the NTE **within 15 days** (*MHPTA* s. 42(4)). • If NTE stands, tenants can leave early if they wish (*MHPTA* s. 43). • Landlord must pay tenants 12 months rent as compensation (*MHPTA* s. 44).
Assignment/ sublet	• Like the *RTA*, there is a general policy that a landlord cannot unreasonably refuse a request to assign or sublet. HOWEVER, the requirements for a tenant's request and the reasons a landlord can refuse are different. See the differences column.	• A tenancy agreement can prohibit subletting (s. 48(c) of *MHPT* Regulation). • There are very specific requirements for a tenant's request to assign or sublet (ss. 43-44 of the *MHPT* Regulation) • A landlord can only refuse a request for the reasons set out in the legislation. NOTE: these can be interpreted quite broadly (s. 48 of *MHPT* Regulation).

ISSUE	SIMILARITIES TO *RTA*	DIFFERENCES FROM *RTA*
Rent increases	• Increases are allowed once every 12 months. • As under the *RTA*, the landlord has to give tenants 3 months notice, in the proper form, of any rent increase. • As under the *RTA*, the landlord is entitled to an annual rent increase provision tied to inflation, plus an additional amount. However, see differences column for how this is calculated. • The landlord can also get a bigger increase by getting tenants to agree to the additional increase. • Or, the landlord can apply to the RTB for a bigger increase in certain circumstances (s. 34-36 of *MHPTA* and s. 33 of the *MHPT* Regulation).	• The annual allowable increase formula is different than under the *RTA* (s. 32(2) of the *MHPT* Regulation): ANNUAL INCREASE = INFLATION + 2% + A "PROPORTIONAL AMOUNT" THAT REFLECTS THE CHANGE IN LOCAL GOVERNMENT LEVIES AND UTILITY FEES • Note the special definition section in s. 32 of the Regulation, which defines "proportional amount". • There are differences in when a landlord can get an additional rent increase because of repairs or renovations (s. 33(1)(b) of *MHPT* Regulation). • There is particular evidence that a landlord is expected to provide if they want an exceptional rent increase for manufactured home units, as described in *Crest Group Holdings Ltd. v. British Columbia (Attorney General),* 2014 BCSC 1651 (CanLII)
Park Committee	N/A	• S. 31 of *MHPTA* provides for creation of a park committee (see also Part 3 of *MHPT* Regulation). Tenants can call a meeting to vote on whether to create a park committee composed of the landlord, plus a group of elected representative tenants. • S. 32 of *MHPTA* provides that the park committee may create and modify the park rules (see also part 3 of *MHPT* Regulation) by majority vote; the landlord has one vote and one tenant from each site has one vote.
Dispute resolution	• Dispute resolution process applies the same way as under *RTA* – Part 6. • Direct request process applies the same way.	None.

3. PRACTICAL FACTORS TO BE AWARE OF

a. Manufactured homes are hard to move or sell!

- It can be hard to find a place to move a home, especially an older home. Many manufactured home parks will not take older homes.

- The cost of physically moving the home to a new location is usually several thousand dollars.

- Fixtures, gardens, building additions, etc. that homeowners often establish make it even more physically difficult to move the home, and can even make it impossible to move the home without damaging it or reducing its value.

- If a manufactured home is going to be sold, it is always a condition of sale that the purchasers can arrange a tenancy agreement with the landlord. Landlords can therefore thwart sales by refusing to enter into a new agreement with the purchaser ***and*** refusing to assign the tenancy. A landlord can refuse to assign a tenancy for any of the reasons in s. 48 of the *MHPT* Regulation. For example, a landlord may claim the home does not comply with housing, health and safety standards required by law (s. 48(a)(i) of *MHPT* Regulation).

- The *Manufactured Home Act* provides rules for selling and moving a manufactured home. One must have a permit to move a manufactured home. They need to complete the Application to Transport a Manufactured Home and provide a Tax Certificate, from their local taxing authority to a Service BC Centre or through a qualified supplier. A Transport Permit will then be issued. Transport Permits expire 30 days after the date they are issued.

- BC Registry Services maintains a Manufactured Home Registry. Since April 1, 1978, under the Manufactured Home Act, no sale, transfer or purchase of a manufactured home in British Columbia is effective to transfer property in the manufactured home unless the transaction is registered in the Manufactured Home Registry.

b. Tenants' expectations of permanency are not a guarantee of permanency

As discussed above, manufactured homeowners typically have an illusion of permanency about their manufactured home park tenancy. With this in mind:

- They often place their primary assets, their home, on a site where it typically remains in one place for many years, making it difficult and costly (if not impossible) to move.
- They often invest a great deal of time, effort and money to create gardens and additional fixtures around their home, which can make it even more difficult to move.

- Many older adults on fixed incomes live in manufactured homes, and count on them as places to retire and grow old.

Despite all of this, they are relatively unprotected from having to move.

In the *Steeves v. Oak Bay* case (2007 BCSC 1409) a group of manufactured home park tenants were facing eviction with 12 months' notice under the *MHPTA* because the landlord wanted to change the park from a permanent manufactured home park to a temporary camp site. The tenants asked the BC Supreme Court to recognize a longer-term right of tenure in their manufactured home park on the basis that the park manager had allowed and encouraged them to make improvements to the sites, and had told them over time that the nature of the park would not change. The tenants said that, based on the park manager's actions, they reasonably believed they had a permanent right of occupancy in the park and had made improvements to their homes in reliance on that belief. (Legally, the tenants relied on the concept of "proprietary estoppel.")

The court in *Steeves* refused to recognize a longer-term right of tenure for the tenants. This was because the tenants failed to prove 2 things:

- They failed to prove that the landlord knew they believed they had a right of permanent occupancy.
- They failed to show that the landlord encouraged them in their belief that they had a right of permanent occupancy. Even though the park manager made casual comments that the park would remain as-is for many years, the court placed much greater weight on the written tenancy agreements, which clearly stated that the tenancies were month-to-month. The court found that the belief of a permanent right to occupy was largely perpetuated by the park residents, not by the landlord.

c. Municipal laws may play a role

Municipal bylaws and policies may affect manufactured home parks in various ways:

- There may be municipal bylaws or policies affecting re-zoning and development of a manufactured home park. These are relevant to NTEs for landlord use. It's important to look and see if there are any rules requiring MHP landlords to consult, warn, compensate, or to put timelines on the LL's redevelopment.
- There may be standards of maintenance bylaws that landlords must comply with (e.g. snow removal).

4. KEY STEPS FOR ADVOCATES TO TAKE

For manufactured home park tenants who approach you as clients:

- Get a copy of the specific tenant's tenancy agreement, <u>and rules if they exist.</u>
- If the landlord has issued a notice of any kind, get a copy of it as well as any documents the parties have exchanged.

- If there are multiple tenants wanting help with a common issue, get documents for each client, since their situations may vary widely.
- Review the detailed provisions of the *MHPTA* and do not assume they match the *RTA.*
- For systemic problems within a park, suggest that tenants take advantage of the park committee process.
- Speak to a lawyer (e.g. your supervising lawyer, or a lawyer at CLAS).

For people who approach you with questions about entering a MHP tenancy:

- Warn them about the risks: lack of security of tenure, lack of control over rental/ assignment, rent increases.

5. RESOURCES

Residential Tenancy Branch – http://www.housing.gov.bc.ca/rtb/
- Link to the *Manufactured Home Park Tenancy Act* and Regulations
- Forms
- Guidelines, Factsheets
- Dispute resolution Rules of Practice and Procedure
- Contact information for RTB offices

Active Manufactured Home Owners Association (AMHOA) - www.amhoa.ca/
- Grass-roots website with a variety of excellent reports and resources
- Advocates can call AMHOA with questions of a practical or logistical nature (no legal advice given).
- AMHOA asks that before calling, advocates check to make sure the situation really falls under the *MHPTA.*

CASL line - 1 888 781 CASL (2275)
- If you are helping your clients with manufactured home park issues at the RTB level, CASL lawyer Alison Ward can supervise you.

Community Legal Assistance Society - www.clasbc.net / 1 888 685-6222
- If your client already has a RTB decision, CLAS lawyers can give an opinion on a possible judicial review.

PLEI: PUBLIC LEGAL EDUCATION AND INFORMATION

Patricia Lim, 604-601-6007
Publications Development Coordinator
patricia.lim@lss.bc.ca

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

Legal Services Society
aboriginal.legalaid.bc.ca

LSS PUBLICATIONS

Audience & accessibility

LSS Publication Readability

How much legal understanding is needed?

Level 1 — None needed.
No legal understanding required. Outline or "first step" information, written in clear language for those with no previous knowledge or experience with the law.

Level 2 — Some helpful.
Some understanding helpful but not essential. Offers all basic information on a topic, meant for those who are reasonably comfortable reading and who may have a general sense of some legal concepts.

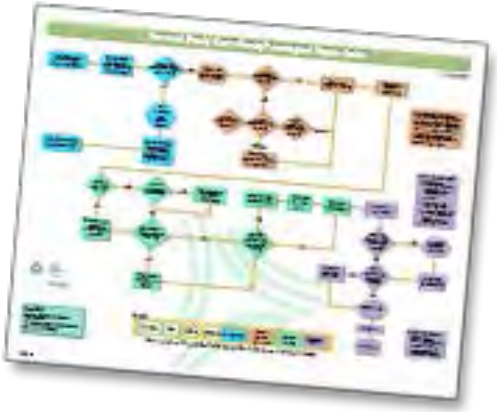
Level 3 — Some needed.
Basic familiarity assumed. Detailed material, written primarily as a reference for the advocate/intermediary audience, although accessible to members of the public with adequate literacy skills.

Family law publications

Level 2

Level 1

Level 3



Family violence

Level 1

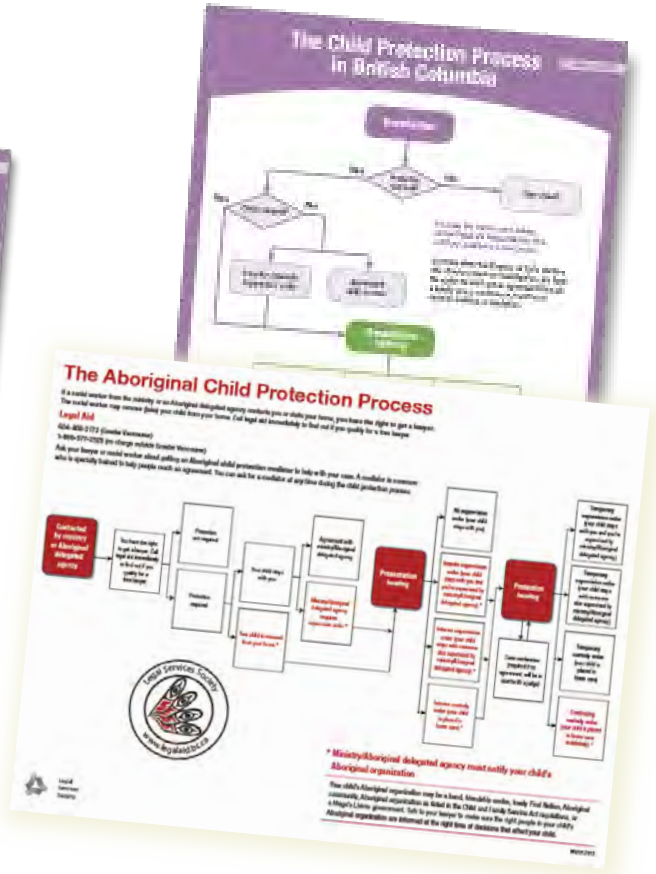
Level 2

Child protection

Level 1

Level 2

Level 3



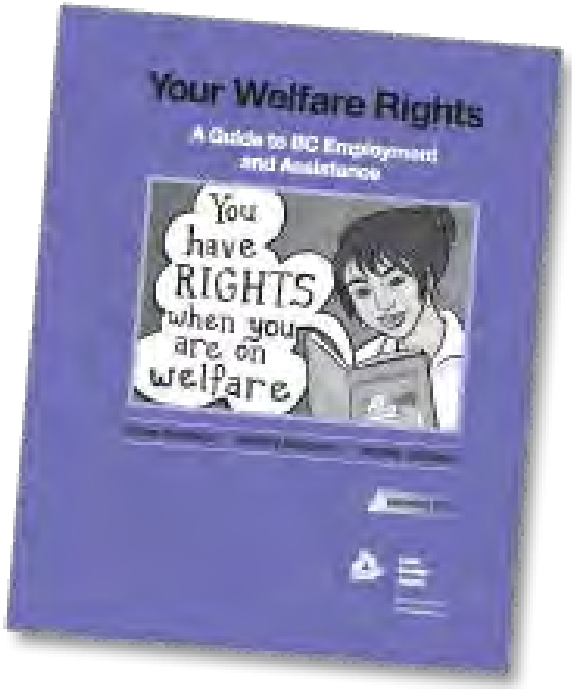
Criminal

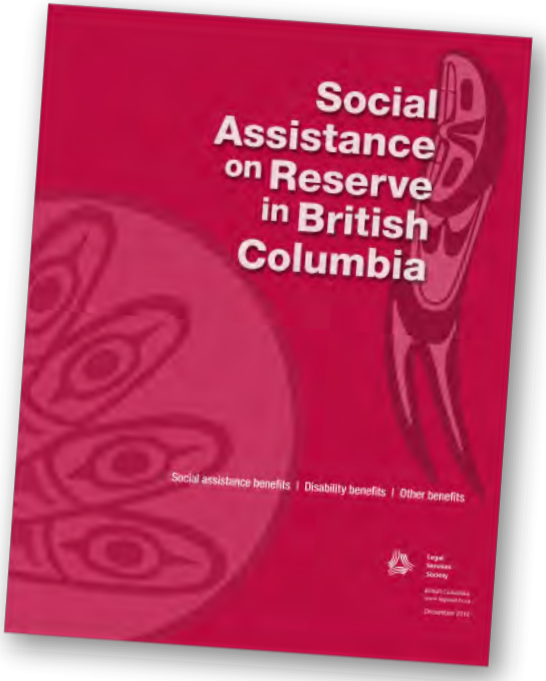
Level 1

Level 2

Civil publications

Level 2





Immigration & refugees

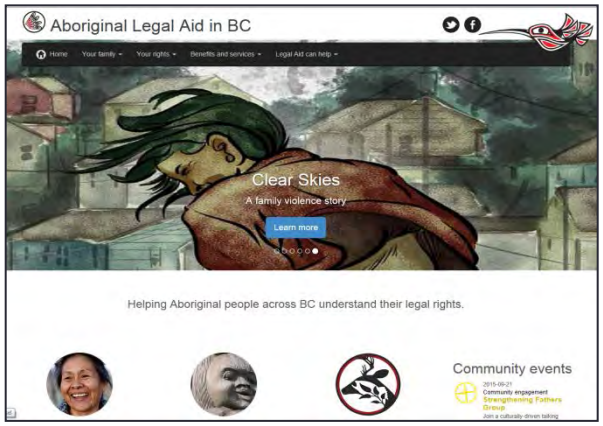
Level 1

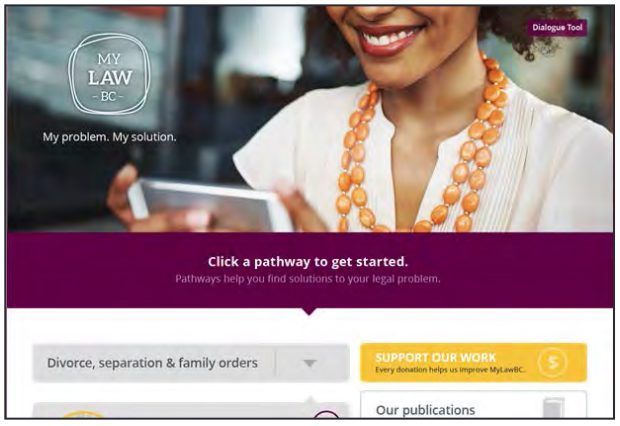
Level 2

LSS WEBSITES

PLEI websites from LSS

1. Aboriginal Legal Aid in BC
2. Family Law Website
3. MyLawBC (launching early 2016)





Aboriginal Legal Aid in BC

Home | Your family | Your rights | Benefits and services | Legal Aid can help

- Your family and the law
- Abuse and family violence
- Your home on reserve

The ministry and your kids

- Your family's rights
- Aboriginal delegated agencies
- Mediation
- Understanding court orders and hearings
- The Extended Family Program

Your home on reserve

The laws have changed. If you break up with your partner or your partner dies, you may be able to stay in your home.

Learn more

Helping Aboriginal people across BC understand their legal rights.

Is this site for you?

This website is for anyone who identifies themselves as **Aboriginal**.

Learn more »

Do you know about First Nations Court?

There are now four First Nations Courts in BC. You may be able to have your

Find out more in a publication

We have free publications. See if we have one that's right for you

Community events

2015-10-15
Conference
Accommodating FASD: Strategies, Skills & Support 2015 Conference
For front-line and primary care professionals working in Vancouver's Downtown Eastside
Read more »
Vancouver Aboriginal Friendship Centre, 1607 East Hastings Street Vancouver, BC

Aboriginal Legal Aid in BC

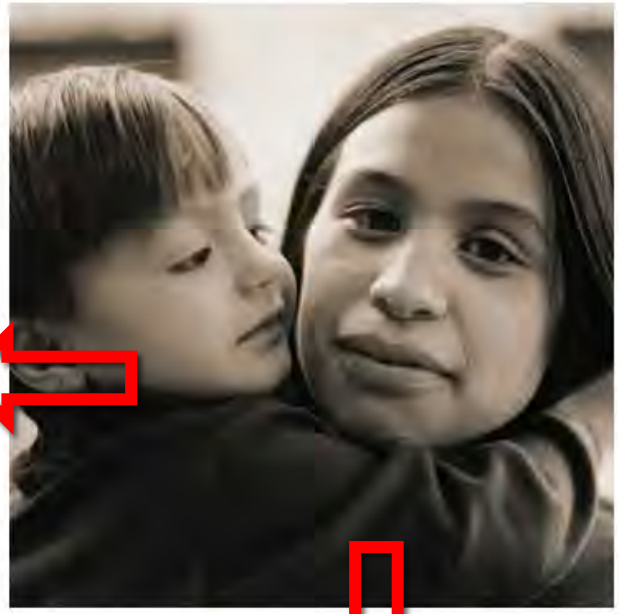
Home | Your family | Your rights | Benefits and services | Legal Aid can help

Your family's rights
The ministry and your kids

If a social worker from the Ministry of Children and Family Development or an Aboriginal delegated agency contacts you or visits your home, this means that they think your child might be at risk and are looking into it. This is part of the **child protection** process. (This is also called an **investigation**.) An i…us. It may result in the social worker **taking your child from your home**.

Your child is placed in foster care.

You, your family, and your community have rights. The law says ministry should respect your child's family ties and **Aboriginal** identity.



What is child protection?

BC law says that if the ministry gets a report about your child, the ministry (or an Aboriginal delegated agency) must look into it. If the ministry believes your child is at risk, they must:

- go to court to get an order that supervises your child's care, or
- if necessary, take your child from your home.

This process is called **child protection**.

Child protection and Aboriginal families

BC law also says that:

- Aboriginal cultural ties are very important to the well-being of Aboriginal children.

Find out more

Understanding Aboriginal Child Protection/Removal Matters

Explains what Aboriginal parents can do during a child protection investigation

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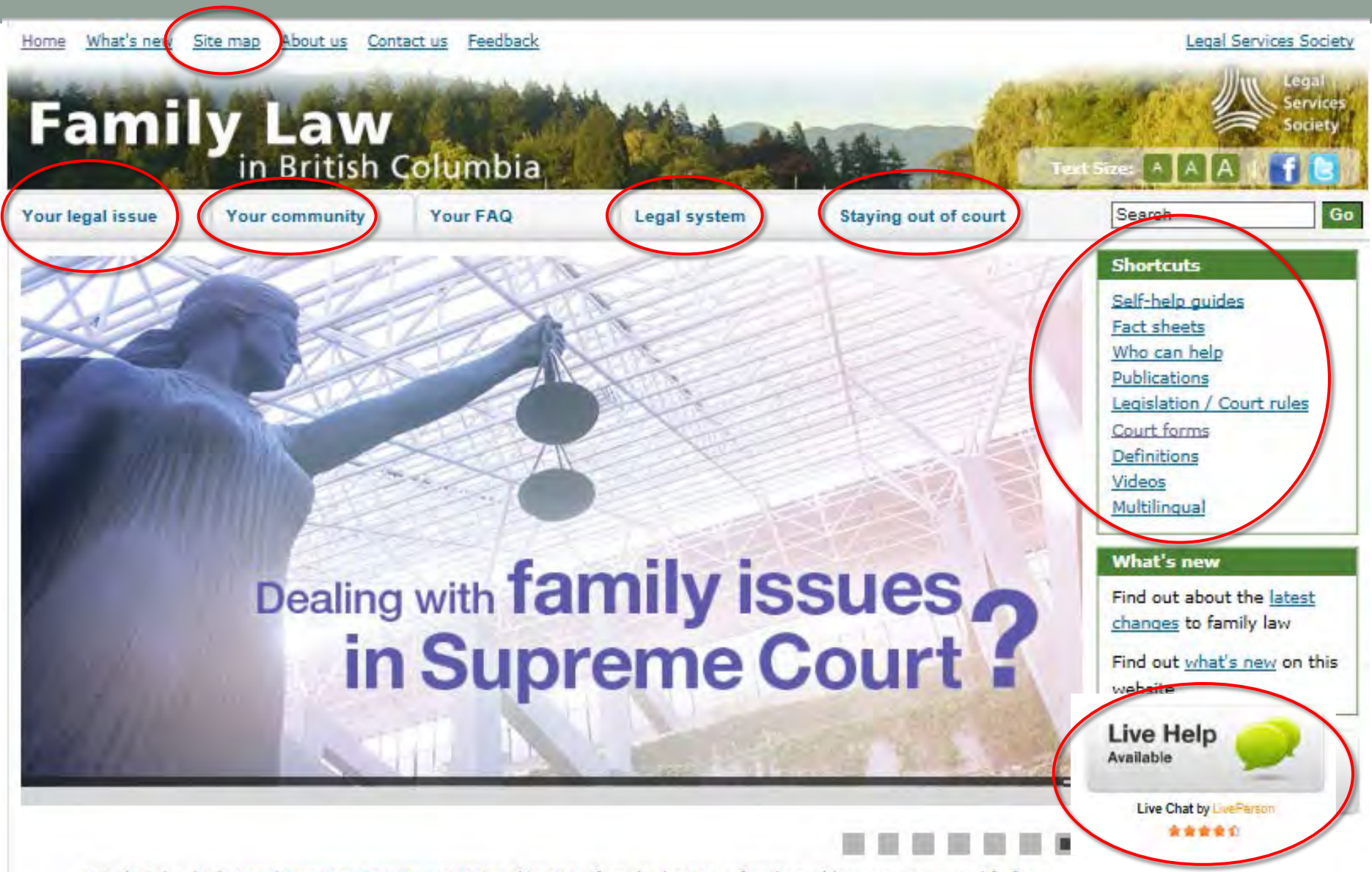
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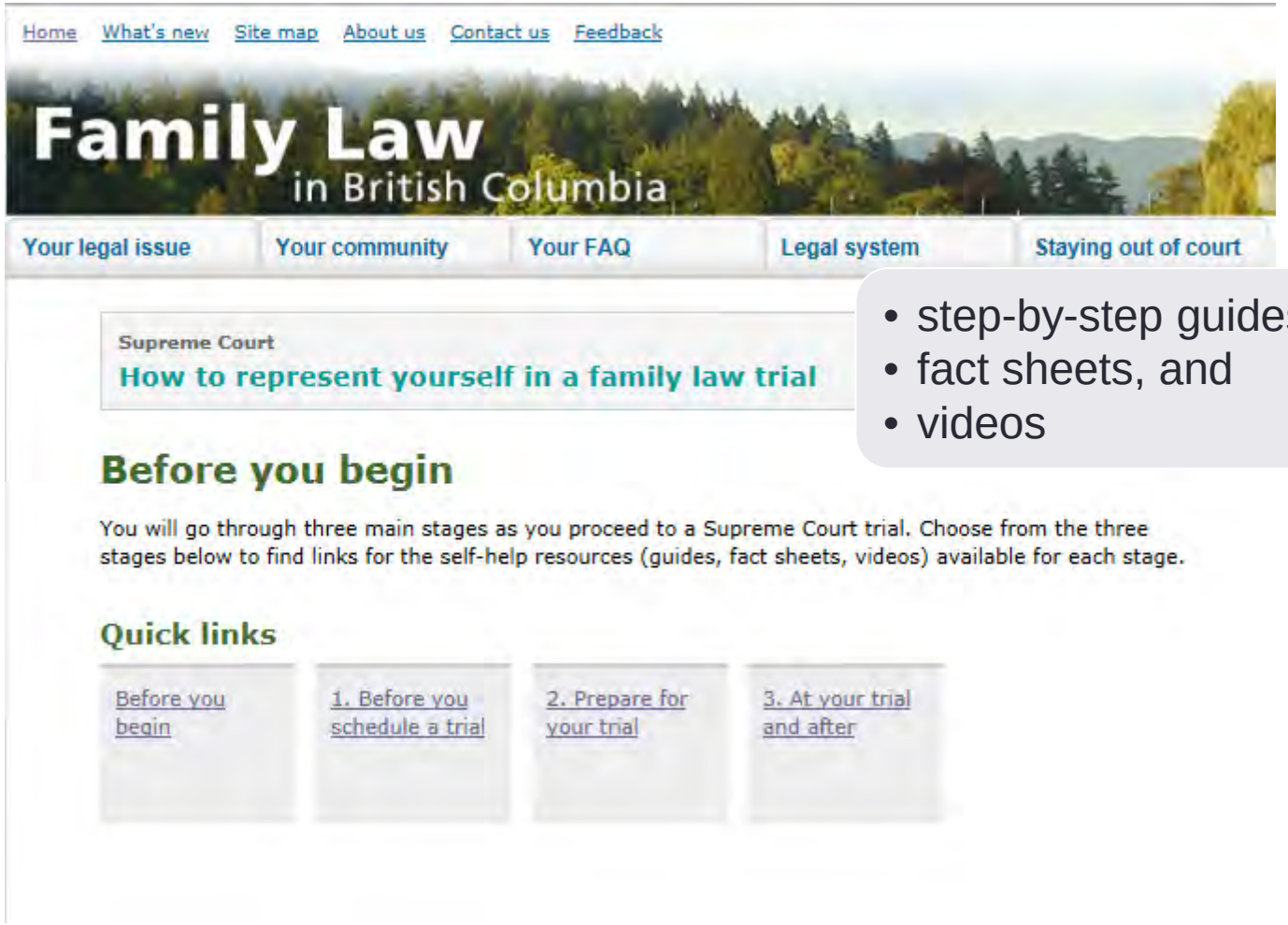
Multilingual
What's new
Find out about the latest changes to family law
Find out what's new on this website
Dealing with family issues in Supreme Court?
Live Help
Available
Live Chat by LivePerson
British Columbia's Legal Services Society maintains this site. If you're having a family problem, you may qualify for a lawyer to advise you or take your case. Contact Legal Aid to find out.

Family Law Website: Supreme Court self-help resources



- step-by-step guides,
- fact sheets, and
- videos

Stage 1: Before you schedule a trial

Supreme Court

How to represent yourself in a family law trial

Stage 1

Before you schedule a trial

Fact sheet

Discovery — Sharing information with the other party

Court forms

Notice of Family Claim PDF | Word | Sample (PDF)

Response PDF | Word | Sample (PDF)

Quick links

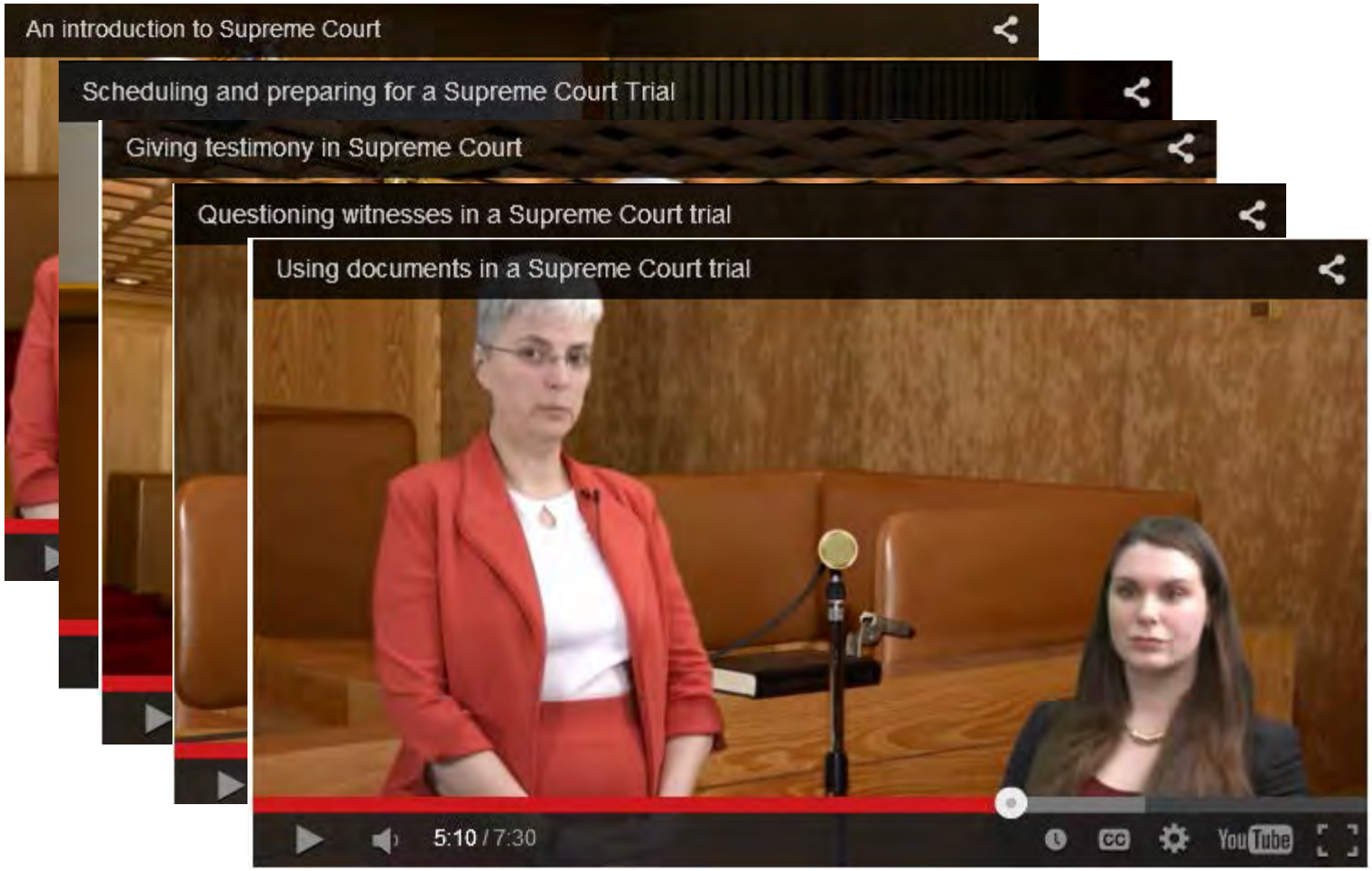
Before you begin

1. Before you schedule a trial

2. Prepare for your trial

3. At your trial and after

Step-by-step help for people with family law issues representing themselves in Supreme Court



- Guided pathways
- Action plan to solve legal problems
- Family negotiation platform

MY LAWBC Make a separation plan

Read information. Answer questions.

Click previous question to go back.

About this pathway

This guided pathway will help you make a plan for resolving the family law matters involved in your separation or divorce. It will give you tools and information to help you figure out if you and your spouse can work together to resolve your matters without going to court.

This pathway will give you the best available resources for your situation. It gives you a toolkit to help you understand and work on your family matters. And it gives you information on who can help you, such as professionals to help you and your spouse to work together, or where you can get legal advice.

Note: This pathway deals with what the law says about the children of your relationship. It doesn't deal with children from previous relationships.

This pathway will take you approximately 20 – 25 minutes to complete. All of your answers are confidential. They will be deleted when you leave the pathway

‹ Previous question Continue ›

Call for free legal help

Legal advice from a family lawyer

Guided Pathway start page: Sets out purpose, expectations, time duration. Includes sidebar if people need help right away.

MYLAWBC Make a separation plan

Summary › | Read first › | Do now › | Do next › | Get more help ›

Your first steps

WHAT TO DO NOW

Download your plan (PDF)

Your first steps towards addressing your family law matters are to:

1. Figure out if you can work together
2. Use the Dialogue Tool to make an agreement for the issues you agree on
3. Get support when you need it

1. Figure out if you can work together

Use your Negotiation Toolkit to find common ground

Your Negotiation Toolkit helps you figure out where you and your spouse agree and don't agree. Save or print this PDF, so you can refer to it later.

a. Make sure you understand your rights and responsibilities

It's important to understand your rights and responsibilities bef
says about your family matters.

b. See where you agree and disagree

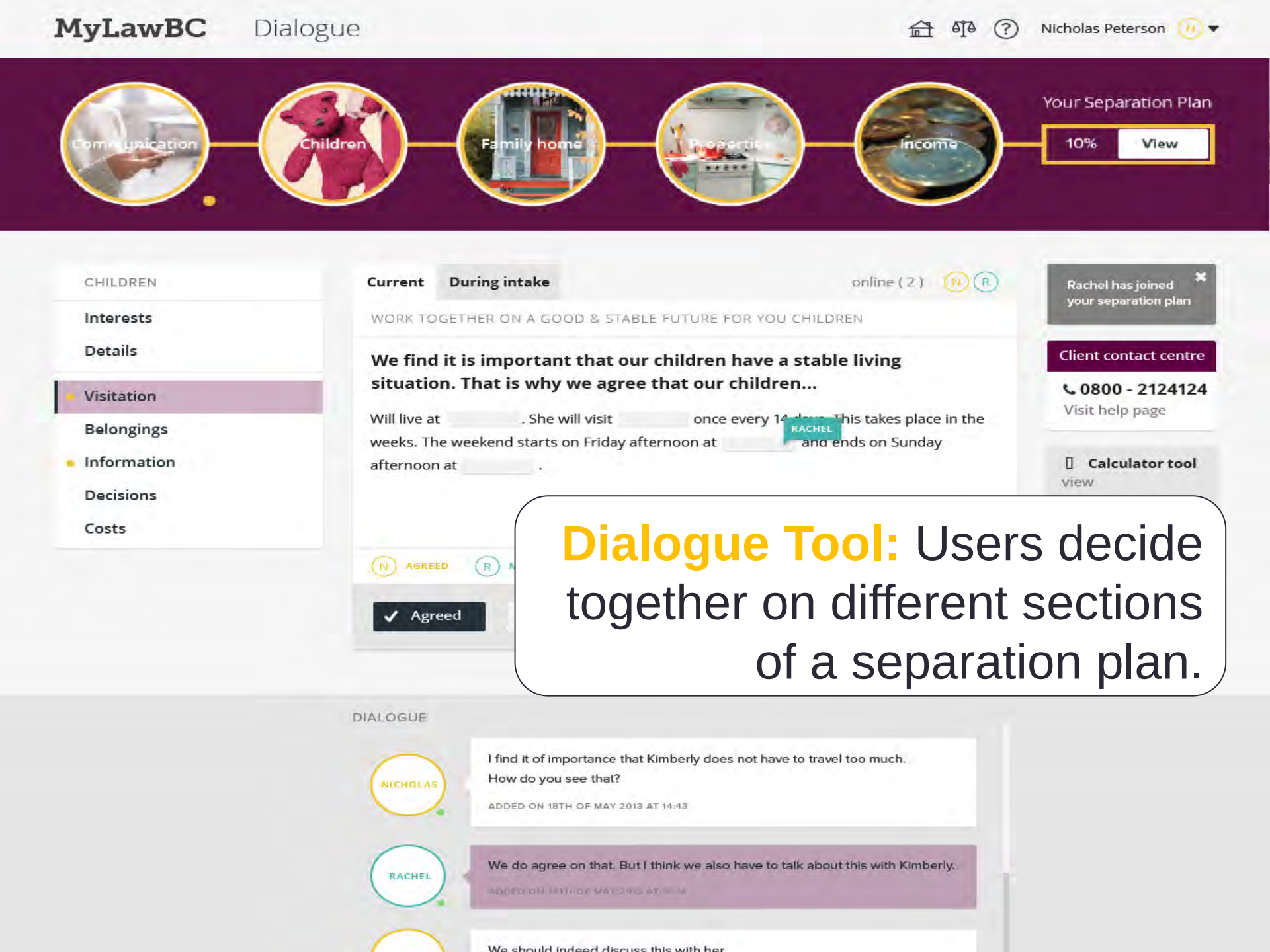
Your toolkit has tools you and your spouse can use to see wha
you agree and don't agree.

2. Use the Dialogue Tool t

MyLawBC's Dialogue Tool helps you and your spouse work together to make an agreement:

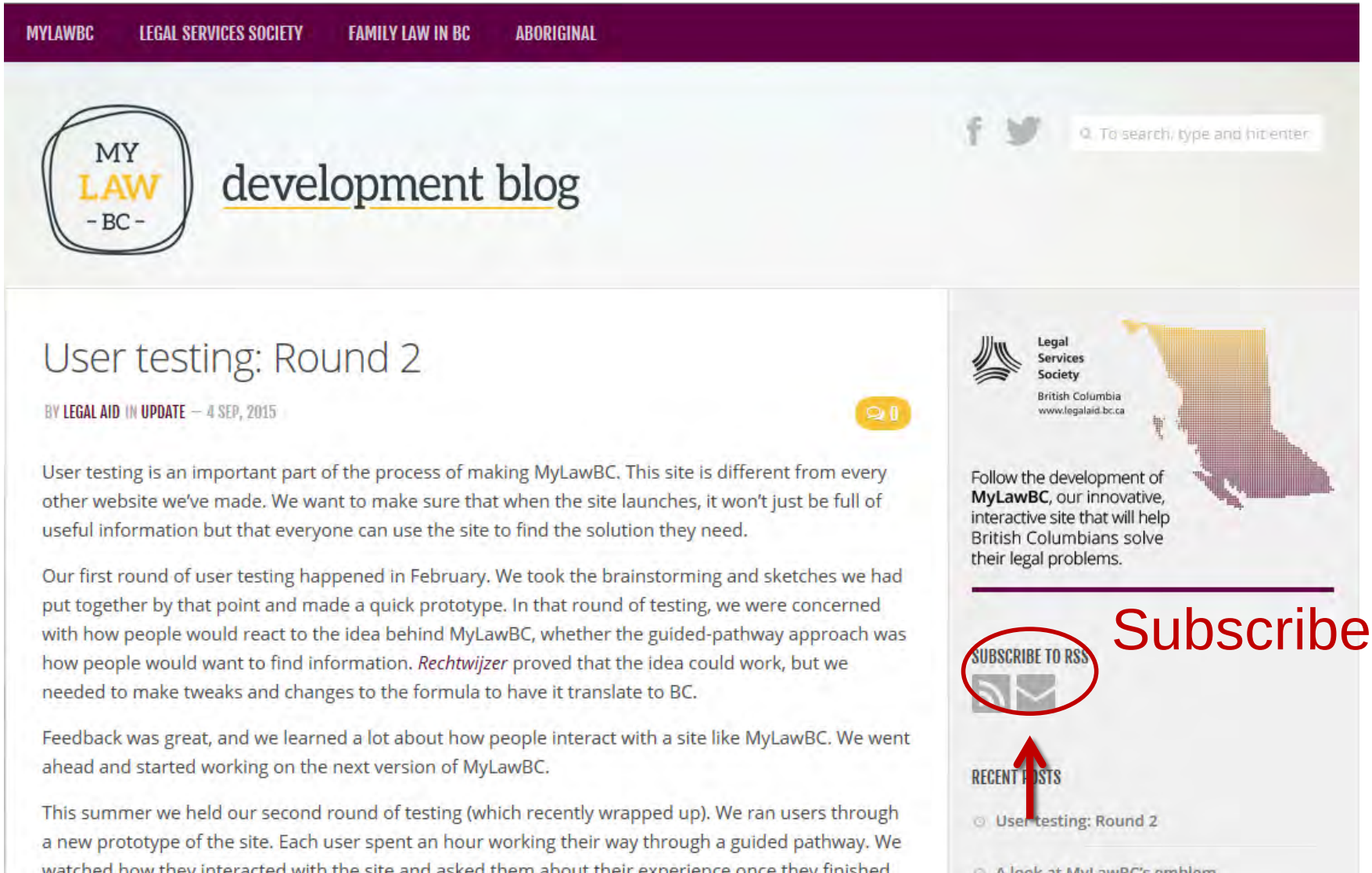
- You and your spouse can communicate and negotiate with each other online.
- The Dialogue Tool helps you to find your common goals and interests.

End point: Gives tools, information, resources who can help, and next steps.


MyLawBC
Dialogue
Nicholas Peterson
Communication
Children
Family home
Properties
Income
Your Separation Plan
10%
View
CHILDREN
Interests
Details
Visitation
Belongings
Information
Decisions
Costs
Current
During intake
online (2)
WORK TOGETHER ON A GOOD & STABLE FUTURE FOR YOU CHILDREN
We find it is important that our children have a stable living situation. That is why we agree that our children...
Will live at . She will visit once every 14 . This takes place in the weeks. The weekend starts on Friday afternoon at and ends on Sunday afternoon at .
RACHEL
AGREED
Agreed
Rachel has joined your separation plan
Client contact centre
0800 - 2124124
Visit help page
Calculator tool
view
Dialogue Tool: Users decide together on different sections of a separation plan.
DIALOGUE
NICHOLAS
I find it of importance that Kimberly does not have to travel too much. How do you see that?
ADDED ON 18TH OF MAY 2013 AT 14:43
RACHEL
We do agree on that. But I think we also have to talk about this with Kimberly.

MyLawBC Blog

devblog.mylawbc.com



Thank You

Patricia Lim
Publications Development Coordinator
Patricia.lim@lss.bc.ca | 604.601.6007

Legal
Services
Society

British Columbia
www.legalaid.bc.ca

October 2015

Community Advocate Support Line at CLAS

The Community Advocate Support Line (CASL) is a dedicated support service for BC advocates and community workers. CASL is staffed by lawyer Alison Ward, who can give advocates legal information and advice about specific client files they are working on in family and poverty law. CASL is funded by the Law Foundation of B.C.

Advocates and community workers in BC can reach CASL by phone at:

From the Lower Mainland:	(604) 681 CASL (2275)
Toll Free within BC:	1 888 781 CASL (2275)

These numbers are for the use of advocates and community workers only. **Please do not release them** to your clients or to the general public.

Community Advocate Support Line case priorities

CASL provides advice and assistance in relation to the following areas of law:

- income assistance;
- debt collection and bankruptcy;
- family law;
- residential tenancy and other housing issues
- judicial review
- consumer contracts;
- employment insurance;
- Canada Pension Plan benefits;
- foreclosures;

If you have a legal question about a client whose problem falls outside our case priorities, please contact CASL and we will review the situation with you.

Information you must give to the Community Advocate Support Line

To access legal advice through CASL, you must provide Alison with the full legal name, address and phone number (if any) of your client. You will also need to provide Alison with the full legal names of any opposing parties involved in your client's legal issue. Our professional responsibilities as lawyers require us to review and record this information; it will of course be kept confidential. This means that you should generally obtain your client's consent to release this information to CASL before calling.

We look forward to working with you through CASL, and to hearing your feedback about this service.

Rita Hatina
Assistant Executive Director, Community Legal Assistance Society
Suite 300 – 1140 West Pender Street, Vancouver, BC V6E 4G1
Tel (604) 685-3425; toll-free (1-888-685-6222)
rhatina@clasbc.net

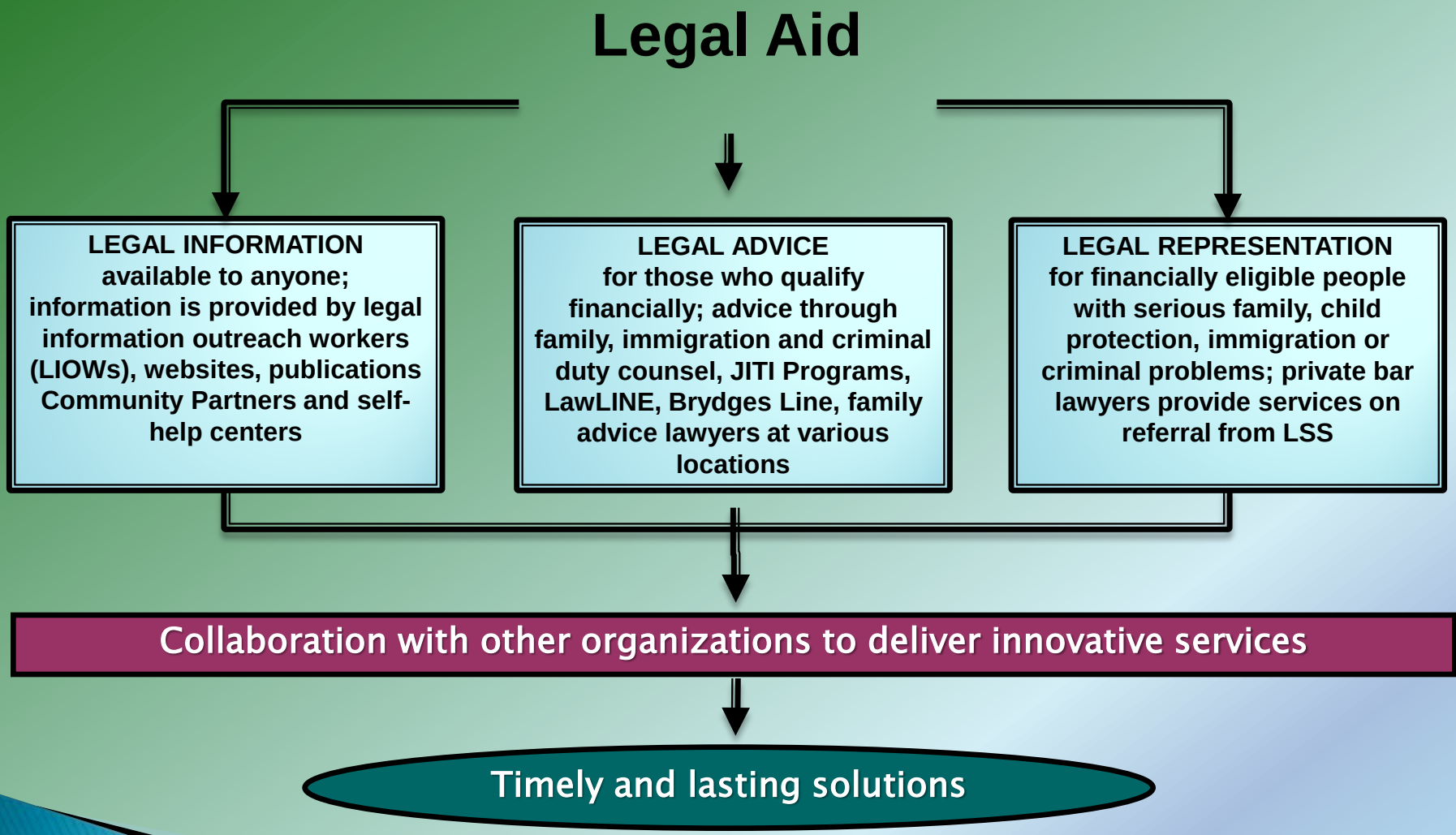
Working with LSS Intake

September 2015

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

Our Clients

Services Overview



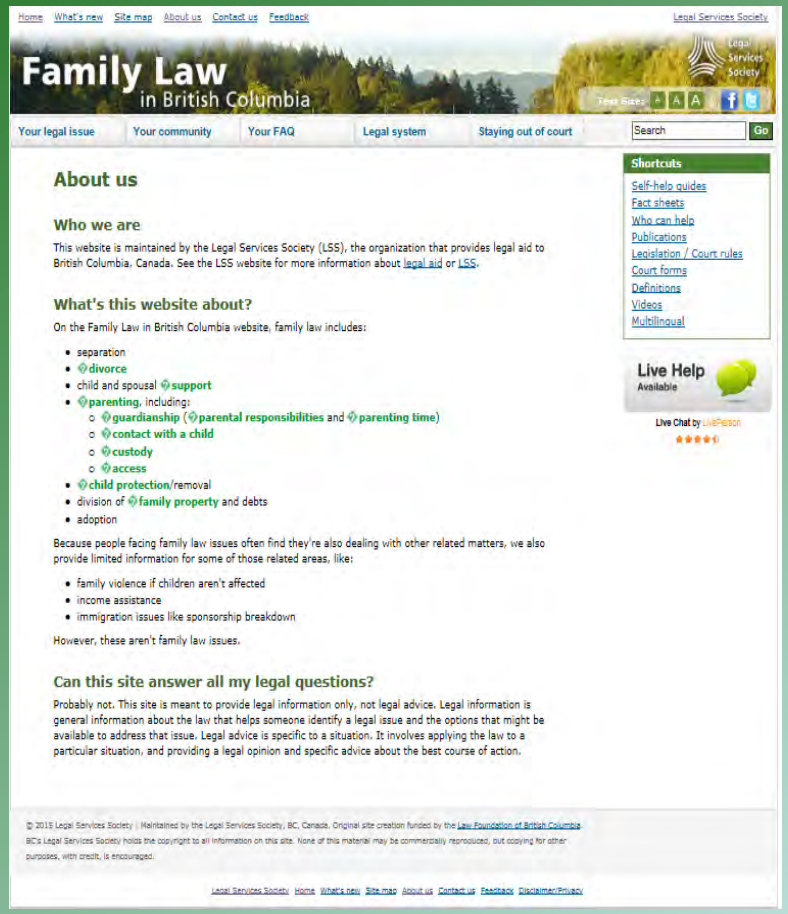
Legal Information

Legal Information Outreach Worker

Public Legal Education

- Information session for general public
- Legal information session for staff and volunteers
- Training for Advocates, Community and Settlement Workers
- The Factum

LSS Self-Help Websites



www.familylaw.lss.bc.ca

www.legalaid.bc.ca

LSS Self-Help Publications

Fact sheets

Brochures

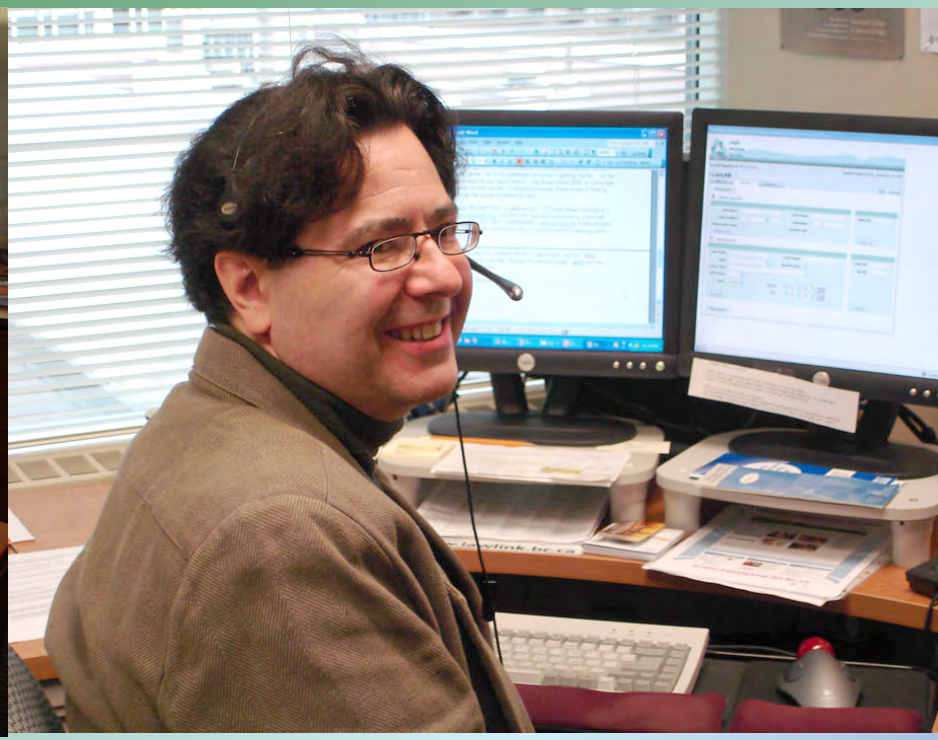
Self-help Guides

Community Partners

Community partners are available in 27 communities around the province. Clients can:

- get free legal information;
- call Legal Aid;
- find nearest Legal Aid office;
- get legal help online; and
- connect with people who can help.

Legal Advice



Duty Counsel

Family LawLINE

Duty Counsel

Duty Counsel provides legal advice in the following areas of law:

- Family law
- Criminal
- Immigration Law (if in detention)

Justice Innovation Projects

- Expanded Criminal Duty Counsel (Out Of Custody –Port Coquitlam)
- Expanded Family Duty Counsel (Victoria)
- Parent Legal Centre (Vancouver)
- Expanded Family Law Line
- Parent Legal Centre (Vancouver)
- Family Mediation

Expanded Criminal Duty Counsel (Out Of Custody – Port Coquitlam)

The Expanded Criminal Duty Counsel is a new pilot program offered by the Legal Services Society in Port Coquitlam. They hope to achieve early resolution of files and contribute to court efficiency. Under the pilot program, Criminal Duty Counsel will retain conduct of select uncomplicated files and provide services to a broader range of clients. The Expanded CDC program will deal with matters other than those that qualify for a Tariff Lawyer.

Expanded Family Duty Counsel (Victoria)

LSS is expanding this program to provide greater continuity of advice as well as new services such as legal coaching to support people who are representing themselves. It is located at the Justice Access Centre in Victoria. Clients will be able to set appointments so that they can work with the same lawyer throughout the service. The lawyers can also now provide up to 6 hours of service for each current legal matter.

Family LawLINE (Enhancement)

The Family LawLINE is a telephone advice service that provides brief next-step help for people representing themselves. We are expanding this service to include preparation and review of legal documents, and coaching of the client in self-representation. Clients will now be able to set up appointments so they can work with the same lawyer throughout. They can now provide up to 6 hours of service with the same lawyer for each current legal matter.

PARENTS LEGAL CENTRE (PLC)

This service is for eligible parents who will be appearing in Vancouver's Robson Street Court. They will assist eligible clients with early, collaborative resolution of child protection issues. They will focus on trying to resolve cases consensually out of court, and identify alternative methods before they escalate to court. A lawyer and an advocate will be assisting clients. The lawyer will provide advice and representation at an early stage, including at mediation and case conferences. The advocate will support parents in resolving underlying issues that led to the protection concern, and liaise with community supports and resources.

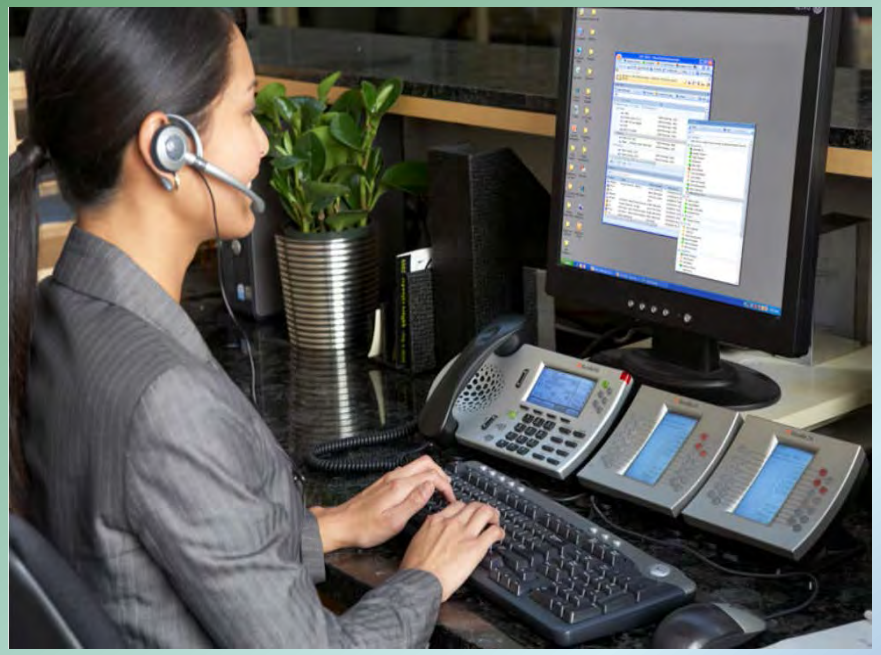
FAMILY MEDIATION PROGRAM

This is a program that is being offered by LSS and Mediate BC. The program is to assist eligible clients who would not qualify for a referral to a legal aid lawyer. The program is designed to assist clients achieve an early resolution of family disputes that include property division, debt and support issues when they are in conjunction with other family matters. LSS will issue a referral to Mediate BC for 6 hours of paid family mediation services.

APPLYING FOR LEGAL AID

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

Clients applying for immigration matters can call the LSS Immigration Line at 604-601-6076 or 1-888-601-6076 (no charge)



Come into one of our Legal Aid offices, their contact information is available on our website *www.legalaid.bc.ca*

Legal Aid Offices

There are 33 communities in BC where someone can apply for legal aid and get legal information.

Who Qualifies for Legal Aid?

A client qualifies for legal aid when:

- The legal problem is covered by LSS; and
- The client meets LSS financial guidelines

What Legal Problems Are Eligible For Coverage?

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

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

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

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

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

Financial Eligibility

Income chart (All case types)

Household Size	Monthly Net Income
1	$1,500
2	$2,100
3	$2,700
4	$3,290
5	$3,890
6	$4,490
7 or more	$5,090

Financial Eligibility
LEGAL ADVICE GUIDELINES

Household Size	Monthly Net Income
1 – 4	$3,300
5	$3,900
6	$4,520
7 or more	$5,110

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

Requesting A Review of A Denial

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

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

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

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

Working together

You can help your clients:

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

Presenter:
Sherilyn
Provincial Supervisor, Legal Aid Applications

Phone: 604-601-6093
Fax: 604-682-0787
Email: sherilyn.vancouver@lss.bc.ca

Family coverage

General policy

To qualify for legal aid representation, an applicant must:

- Be financially eligible, and
- have a family law problem covered by the family coverage guidelines:
  - need an initial, or a change to the current, guardianship or parenting arrangement order if there is a risk of harm or violence to the client or their child or children;
  - have guardianship of a child/children who have been unlawfully held by the access parent/party;
  - have been permanently or repeatedly denied contact or parenting time with a child;
  - need a family law protection order or other legal assistance to protect themselves or their children from harm or violence;
  - need an order to prevent the other parent from permanently relocating their children out of the province. The threat must be real and imminent, and involve a permanent change of residence;
  - be a respondent in a maintenance enforcement committal proceeding
- be eligible for coverage provided through the exception review process.

Who is covered?

When the legal issue involves children, an applicant must be a:

- parent (including a same-sex parent), or
- party to the proceeding who is a:
  - member of the children's immediate or extended family,
  - relative or individual who has lived with the children in a parental or custodial relationship, or
  - member of the community who has a cultural or traditional responsibility towards the children (this applies to emergency referrals only).

An applicant does not have to permanently reside in BC or hold Canadian citizenship to qualify for legal aid representation.

Exception

Youth under the age of 18 who are wards of the Ministry of Children and Family Development (MCFD) are not eligible for legal aid representation. In such cases, MCFD will arrange for counsel through the Ministry of Attorney General.

Also, applications where the client does not have a coverable issue but has property, asset, debt, spousal support or other issues likely to be resolved by mediation can be sent for an exception review for assessment for a family mediation referral to Mediate BC.

CFCSA

General policy

To qualify for legal representation, an applicant must:

- be financially eligible; and
- have a CFCSA problem covered by the CFCSA coverage guidelines.

An applicant must be:

- a parent (including parents in a same-sex relationships), or
- a party to the proceeding who is a:
  - member of the children's immediate family,
  - relative or individual who has lived with the children in a parent or custodial relationship, or
  - member of the community who has a cultural or traditional responsibility towards the children.

An applicant does not have to permanently reside in BC or hold Canadian citizenship to qualify for legal representation.

Where an applicant is financially eligible and his or her children have been removed or are at risk of being removed, coverage is provided.

An applicant is not eligible for legal aid if he or she is in the care of the Ministry of Children and Family Development (MCFD). In such cases, MCFD will arrange for counsel through the Ministry of Attorney General.

Couples who are living together

If a case involves a couple who are living together we can issue a single referral for one lawyer. We will only issue a separate referral if there is a conflict between the two people that prevents one of the lawyers from representing both parties.

Immigration Coverage Guidelines

General policy

To qualify for legal aid representation, an applicant must:

- be financially eligible, and
- have an immigration law problem covered by the LSS immigration coverage guidelines.

An applicant is covered if he or she:

- is making a refugee claim in Canada, or
- faces an immigration proceeding that could result in deportation from Canada to a country where his or her life is in danger or if he or she has other compelling reasons for not returning to his or her country.

LSS screens immigration cases for merit to determine whether the applicant has a reasonable chance of being successful in his or her case.

Refugee claims

Referrals for refugee and protected persons claims made in Canada are issued for (in two stages):

- Personal Information Form (PIF) preparation, and
- representation at refugee hearings.

Other immigration cases

The following types of cases will be referred to the LSS Judicial Appeals Section at the Vancouver Regional Centre. The Judicial Appeals Section screens these cases for merit and issues referrals if they determine that the applicant has a reasonable chance of being successful in his or her case.

- an appeal of a refugee claim refusal to the Refugee Appeal Division
- admissibility hearings before the Immigration and Refugee Board Adjudication Division
- judicial Review applications to the Federal Court of Canada, and appeals to the Federal Court of Appeal or the Supreme Court of Canada to review an order of the Immigration and Refugee Board or an immigration officer
- applications to stay a removal from Canada made to the Federal Court of Canada
- applications to reopen or reinstate proceedings before the Immigration and Refugee Board
- permanent resident (landed immigrant) deportation appeals to the Immigration Appeal Division (IAD) of the Immigration and Refugee Board
- Pre-Removal Risk Assessment (PPRA) submissions to Citizenship and Immigration Canada
- Humanitarian and Compassionate (H&C) submissions to Citizenship and Immigration Canada
- applications by people detained by immigration who cannot access duty counsel

Criminal Coverage Guidelines

General policy

To qualify for legal representation, an applicant must:

- be financially eligible, except for specified exceptions, and
- have a criminal law problem covered by the criminal coverage guidelines.

An applicant is covered if he or she:

- faces a criminal proceeding,
- is charged with a criminal offence, and
- if convicted, faces a risk of jail (includes house arrest).

An applicant does not have to permanently reside in BC or hold Canadian citizenship to qualify for legal representation.

Additional grounds for coverage

Less serious summary offences may be covered for adult applicants in very limited circumstances.

An applicant who does not necessarily face a risk of jail may be covered if he or she:

- faces a loss of livelihood upon conviction,
- has a mental or physical disability, or
- faces immigration complications that may result in deportation.

Aboriginal hunting and fishing rights

An applicant is covered if:

- they are Aboriginal, and
- the alleged offence:
  - occurred in a geographic area the applicant claims is his or her traditional territory, or
  - involves a traditional right;

  OR
  - occurred outside the applicant's traditional territory, but involves the exercise of an existing Aboriginal right extended to the individual by:
    - a traditional Aboriginal law or custom,
    - a band bylaw, or
    - Aboriginal government legislation.
- The applicant does not have to face a risk of jail if convicted.

Youths

Anyone under the age of 18 who is not a ward of the Ministry of Children and Family Development is covered for all Criminal Code and other charges under federal legislation (such as drug charges). They do not have to be financially eligible or meet LSS criminal coverage guidelines.

Youths under age 18 charged with provincial offences, such as motor vehicle offences, must be financially eligible and the case must meet criminal coverage guidelines.

Over age 18, facing Youth Criminal Justice Act charges

Applicants over the age of 18 who face Youth Criminal Justice Act charges are covered until the end of the case.

Exception

Youth under the age of 18 who are wards of the Ministry of Children and Family Development (MCFD) are not eligible for legal aid representation. In such cases, MCFD will arrange for counsel through the Ministry of Attorney General.

Justice Innovation and Transformation Initiatives (JITI) Pilots

Family Mediation Referral

A client that may qualify for mediation if they are financially eligible for representation and have a property, debt, asset, spousal support or other non-coverable issue likely to be resolved by mediation.

On a mediation referral, clients receive up to 6 hours of mediation through Mediate BC. This includes pre-mediation meetings and screening.

Services may include drafting of a mediation agreement if a lawyer conducts the mediation. If not, the mediator may draft a Memorandum of Understanding (MOU).

Clients can also receive summary legal advice from family duty counsel/advice lawyers or Family LawLINE prior to mediation as well as after mediation on the agreement reached.

Expanded Family LawLINE

The expanded Family LawLINE is piloting the following service enhancements:

- Up to six hours of service per legal matter (increased from three hours of service)
- Appointments so that one lawyer and client can work together throughout
- Help with preparing documents for court or other legal processes
- Legal coaching to help clients represent themselves in court

These services are in addition to the regular Family LawLINE services (brief next-step advice on court processes and options for resolving legal issues outside of court, and referrals to online resources and other agencies).

Expanded Family Duty Counsel (Victoria)

Expanded family duty counsel at the Victoria Justice Access Centre (JAC) is modelled on the expanded family duty counsel program in Vancouver.

Expanded family duty counsel will provide up to six hours of service per legal matter (increased from three); set appointments so that clients can work with the same lawyer throughout their legal matter, and introduce legal coaching to help clients represent themselves in court.

These services are in addition to regular family duty counsel services (information and advice on family law issues, court processes, and options for resolving legal issues outside of court; help with document preparation and preparation for court appearances; representation in court on brief uncontested issues; and referrals to online resources and other agencies).

Parents Legal Centre (Vancouver)

The Parents Legal Centre (PLC), located at the Provincial Court in Vancouver (Robson Square), will provide advice and limited representation services to parents facing child protection issues that would be heard in the Vancouver Provincial Court (Robson Square), to support early, collaborative resolutions outside of contested hearings.

The applicant must be:

- a parent (including parents in a same-sex relationship), or
- a party to the proceeding with whom the child resides and who stands in place of the child's parent or guardian

The PLC will provide:

- information and advice on options for resolving child protection issues out-of-court
- legal advice and representation, where appropriate, at collaborative processes such as mediation and family case planning conferences
- information and advice on court processes
- legal advice and representation at uncontested hearings
- referrals to other services, including online resources and other public agencies

All eligible applicants will be referred to the PLC instead of receiving a CFCSA representation referral under the *CFCSA Tariff*. If the issues cannot be resolved collaboratively and the applicant meets coverage and financial eligibility guidelines for a CFCSA representation referral, LSS may appoint a lawyer to complete the case.

Expanded Criminal Duty Counsel (Port Coquitlam)

Expanded criminal duty counsel (CDC) is located at the Provincial Court in Port Coquitlam. Expanded CDC will provide out-of-custody duty counsel services, including summary advice and assistance, to accused people making initial appearances. The pilot lawyer will retain conduct of select non-complex cases up to the trial fix date where the applicant meets the pilot's coverage and financial eligibility guidelines. The pilot lawyer will provide continuing services to try to achieve early resolution of cases, such as:

- reviewing disclosure
- having discussions with Crown Counsel
- attending court if a guilty plea is required to resolve the case
- expanded criminal duty counsel will not conduct bail hearings

All eligible applicants will be referred to expanded CDC instead of receiving a criminal representation referral under the *Criminal Tariff.* If the case cannot be resolved before the trial fix date and the applicant meets coverage and financial eligibility guidelines for a criminal representation referral, LSS may appoint a lawyer to represent him or her at trial.

The expanded CDC in Port Coquitlam will replace regular out-of-custody duty counsel at the pilot location. In-custody duty counsel will continue to be done by lawyers on the criminal duty counsel roster.

Discretionary coverage

JITI Pilots - Expanded Criminal Duty Counsel and Parents Legal Centre

If an applicant is over the financial eligibility guidelines, by approximately $1000 on monthly income or $1000 on assets, the file can be sent to the pilot lawyer. The pilot lawyer considers the nature of the charges or issues, the complexity, seriousness, and duration of the case, and the applicant's ability and financial capacity (e.g., ability to access disposable assets) to retain a lawyer privately or otherwise represent him or herself.

Criminal cases

If an applicant is only marginally over the financial eligibility guidelines, by approximately $100 – $200 on income or $500 on assets, and the matter is a serious and complex case that would likely result in a successful Rowbotham order, the intake worker can send it for a discretionary coverage assessment.

Family, CFCSA, immigration, and appeal cases

If an applicant is only marginally over the financial eligibility guidelines, by approximately $100 – $200 on income or $500 on assets, and the matter is serious, the intake worker can send it for a discretionary coverage assessment.

Exception review guidelines

Exception review merit considerations

The decision to approve a case on exception review is a discretionary decision made by the Provincial Supervisor, Legal Aid Applications, and is based on established guidelines, a merit test, and available budget.

Family cases

An application dealing with a matter under the Family Law Act can be sent for an exception review if:

- the applicant has recently been denied extended family services (within the past year);
- the applicant has received prior contracts in relation to the same children or parties;
- the emergency services referral policy is unduly harsh in the particular circumstances of an applicant's case or the circumstances are unusual and complex;
- the applicant has a mental or physical disability and is unable to represent him or herself (there must be a significant barrier that will create an injustice if the applicant is not represented);
- a significant injustice can only be avoided by appointing counsel; or
- the applicant is so traumatized by past abuse that he/she is unable to represent him/herself.

Criminal cases

If a policy is unduly harsh in the particular circumstances of an applicant's case or the circumstances are unusual and complex.

If an applicant has been charged with spousal assault (summary or indictable offence) where:

- there is no risk of jail if convicted,

AND

- he or she has a referral for a family or CFCSA issue that might be negatively affected by the spousal assault charge,

Denial of Legal Aid

If a client is denied legal aid they can request a review of the decision. They must submit a written request within 30 days of the date of the decision. They should state why they disagree with the refusal and explain why they believe they should get legal aid. They also need to include any supporting documents that support their request.

The request for review can be sent to:

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

"an interactive Legal Wiki
for poverty law advocates"

PovNet is a non-profit organization that helps social justice and anti-poverty advocacy groups connect online. PovNet hosts a public website (povnet.org), and email lists and free online training courses (povnetu.org) for advocates.

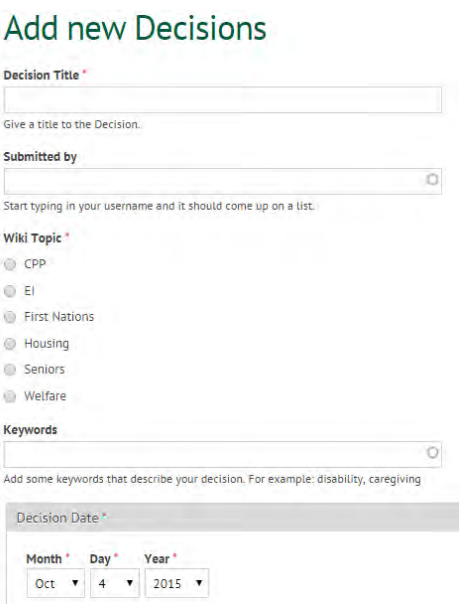
Now, PovNet is gearing up to launch a new initiative, that has the potential to be a game changer for anti-poverty advocacy in BC. It's called advocapedia. This new tool is a private, password protected, community driven wiki site for anti-poverty advocates to share resources and access authoritative information about a wide range of topics in poverty law.

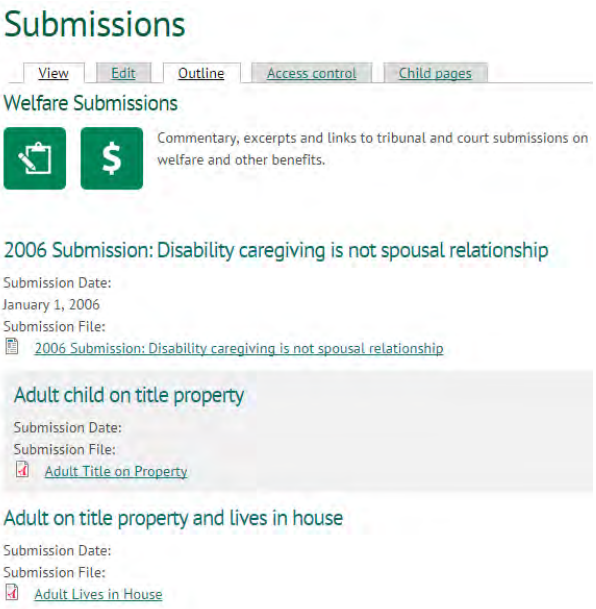
Wikis come in all shapes and sizes. Some, like wikipedia, are immense in size and global in scope, while others focus on narrower and more specific topics. advocapedia, will have a specific focus on issues relevant to anti-poverty advocates, such as residential tenancy and welfare law within BC. Like Wikipedia, it will be monitored and maintained predominantly by its user community.

Why is the development of a wiki for anti-poverty advocates significant? For several reasons, not least of which is the potential to change the way anti-poverty advocates in BC collaborate and share information. There is little question that this community is already relatively tight-knit and collaborative. Hundreds of advocates in BC and Canada already use PovNet's email lists to ask questions, share information, and provide support to one another. However, the email list format is conversational in tone, making it difficult to structure and keep track of discussions on the lists.

advocapedia will provide a more structured space for advocates to share information with one another while still providing the flexibility to modify and edit that information as the policies and laws pertaining to anti-poverty advocacy change. In addition to providing legal content and analysis, advocates will be able to share authoritative legal decisions, document templates, public legal education and information in the form of presentations or fact sheets, important reading materials, and more.

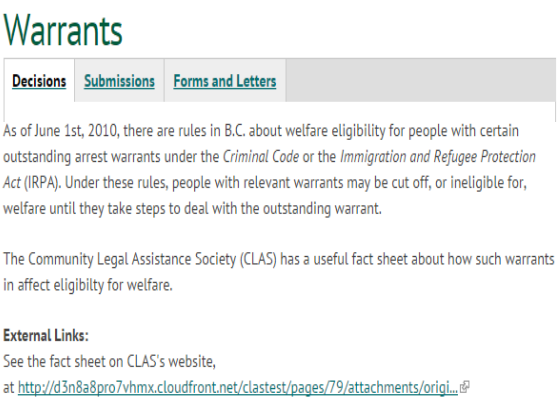
To further enhance its value, advocates will be able to annotate whatever they share. For example, an advocate could attach notes to a submission to let other advocates know what part of an argument worked well, or what in hindsight could be strengthened.





Part of the purpose of advocapedia is to create a closed space where advocates can discuss their work with relatively more candor than they would be able to in a more public space. For this reason, all advocapedia members will be screened and once approved will be required to log-in to the site with a username and password. While all advocapedia members will have the opportunity to make contributions, only authorized lawyers and senior advocates will have the level of permission required to contribute, edit and update content, which will help ensure that the information is legally accurate and clearly written.

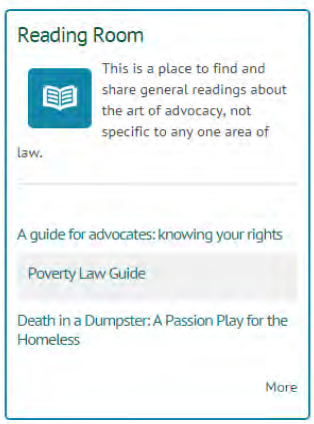
At this point, we have built a framework around welfare and housing law and have been adding content.

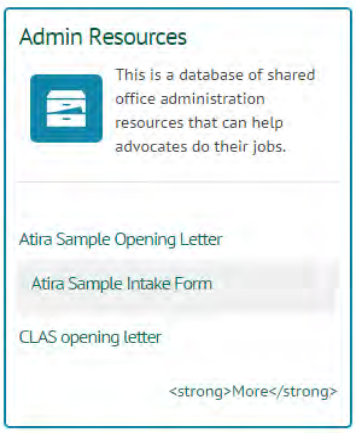


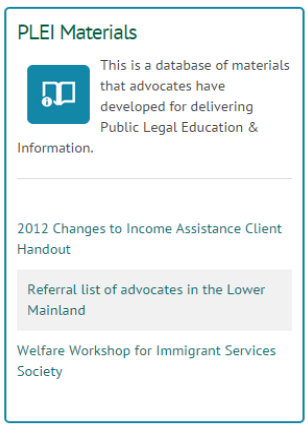
Our goal is to have the wiki cover the same areas of law that our email lists do, and more. We currently host lists on:

- CPP
- WCB
- Welfare
- Issues
- EI
- Housing / Tenancy
- First Nations
- Debt
- Employment
- Mental Health
- Intercultural
- Older Adults

We are now ready to adopt the "if you build it they will come" philosophy. Once launched, we need people to use advocapedia. Even though most users will not be legal content writers, almost everyone will have valuable resources to share, whether those are submissions and decisions or a letter or tool that they have developed that has made their job more efficient and improved their ability to help their clients.







So what's next….?

The potential of this tool really has no limits as far as the amount of content and resources that could be added. We do have to ensure that advocapedia grows in a direction that meets our users' needs and at a pace that is manageable with regards to monitoring and updating content. advocapedia users will be the driving force behind its growth and direction.

What do we need the advocacy and legal community to do?

- ✓ Do you have resources and tools that you can contribute and share?
- ✓ Do you feel that your legal expertise on a particular area is such that you could contribute content on an ongoing basis?
- ✓ Do you know of a funding source or collaborative opportunity that would provide PovNet with the resources required to grow this tool to its full potential?

Want to learn more about advocapedia or share your ideas?

Contact Nicky Dunlop, Executive Co-ordinator at nicky@povnet.org

advocapedia *is supported by funding from the Society of Notaries Publics of British Columbia*

advocapedia *is a project of PovNet.*
advocapedians working on the project are:
Kara Sievewright (designer and web manager)
Alison Ward (CLAS) – Welfare Content Expert
Andrew Sakamoto (TRAC) - Housing content expert
Jane Mayfield (TRAC) - Housing content expert
Nicky Dunlop (PovNet co-ordinator)

"A network for advocates, front-line workers & marginalized communities in British Columbia"

www.povnet.org; www.povnetu.org
http://facebook.com/povnet
http://twitter.com/povnet

Contact us:
604-876-8638 (phone)
email: co-ordinator@povnet.org

The Website

The PovNet website provides up-to-date information about welfare, housing and homelessness, unemployment, disability and human right issues.

PovNet links to resources for immigrants and refugees, seniors, women, youth, workers, people with disabilities, First Nations, Inuit and Aboriginal people.

We host a "Find an Advocate" map to assist people in finding help wherever they are in BC or across the country.

The site offers links to up-to-date anti-poverty news, a job board and a calendar of events.

Email Lists

PovNet hosts confidential email lists for front line workers, advocates, community, and settlement workers.

These lists provide a forum for discussing cases, sharing strategies and identifying & working on systemic issues that arise in the pursuit of access to justice.

BC lists:
Welfare, Housing, Mental health, Workers' rights, First Nations & Aboriginal and Debt

National lists:
Canadian Pension, Employment Insurance, Older adults, Issues, Intercultural

advocapedia

A password protected-site for advocates to share resources and authoritative information on different poverty law topics. PovNetters will be able to upload, annotate and share legal arguments, submissions and decisions, PLEI materials and administrative resources.

PovNetU

PovNetU offers online courses for front line workers & community advocates.

Current PovNetU courses include: Introduction to Advocacy; Welfare; Residential Tenancy; Employment Insurance; Seniors' Residential Care Advocacy; Persons with Disabilities Appeals; Dealing with Debt; CPP Disability and Elder Law.

To sign up for the PovNetU email list which will let you know when courses are being offered, go to: www.povnetu.org

"Building an online anti-poverty community" 2015

PovNet is funded by the Law Foundation of BC and the City of Vancouver Community Services with additional support from the Society of Notaries Public of BC. Support for PovNetU is provided by BC Government and Service Employees' Union, BC Centre for Elder Advocacy & Support, BC Coalition of People with Disabilities, BC Teachers Federation, Community Legal Assistance Society, CUPE BC, Community Unemployed Help Centre (Winnipeg), First United Church Mission, Hospital Employees Union, Ministry of Justice – Province of British Columbia, TRAC Tenants Resource and Advisory Centre and UNIFOR 464

Skills for Dealing with High Conflict Personalities

October 6, 2016 (10:00 – 12:15)

Presented by:

Michael Lomax
Lawyer/Mediator
mjlomax@mediator.bc.ca

PLAN FOR THIS SESSION

1. How all our brains respond to conflict
2. Understanding high conflict people
3. Strategies and practical tips
4. Exercise – Setting Limits
5. Exercise – Responding to Hostile Email

2 Hemispheres of Brain (approx.)

- Left Hemisphere
- "Logical Brain"
- Generally Conscious
- Language
- Thinks in words
- Planning
- Examines Details
- Rational analysis
- Systematic Solutions

- Positive Emotions
  Calm, contentment, etc.

- Right Hemisphere
- "Relationship Brain"
- Generally Unconscious
- Observes relationships
- Thinks in pictures
- Creativity, Art, Intuition
- Non-verbal Skills
- Facial recognition & cues
- Gut feelings

- Negative Emotions
  Hurt, anger, fear, etc.

Corpus Callosum

- The main wiring between the hemispheres of the brain, that aid in the flow of information back and forth. More flow is better.
- It's damaged or smaller in children repeatedly exposed to abuse, as well as in some adults with personality disorders.
- Some people get stuck in the upset emotions of the right hemisphere and can't access their left hemisphere to help resolve negative emotions.

Amygdala in Non-Verbal Communication

Amygdala of the brain:

- "Smoke Detector" of the brain
- "Hijacks" brain for fast, unconscious defensive responses
- Shuts down logical, analytical thought

-- Daniel Goleman
Emotional Intelligence (1995)

- Most of the time the Left Hemisphere is dominant, but in a crisis or totally new situation, the Right Brain is dominant.
- Right Amygdala is especially attentive to facial expressions of fear and anger; can respond in as little as 6 milliseconds

-- Allan Schore
Affect Regulation and the Repair of the Self (2003)

Why We Get Hooked into High Conflict

- Our brains are "wired" for group survival.
- All human beings, including professionals, are wired to respond instantly and unconsciously to high intensity emotions.
- Amygdala in the brain is wired to identify facial expressions of fear and anger, and to respond instantly in protective action.
- HCP's chronically, publicly and intensely have facial expressions of fear and anger.

THE BRAIN IN CONFLICT

PROBLEM-SOLVING LEFT BRAIN THINKING

- Slower
  - Analyzes Problems
- Flexible Thinking
  - Sees choices
- Managed Emotions
- Moderate Behaviours
  - To maintain relationships

DEFENSIVE RIGHT BRAIN THINKING

- Focus on Quick Action:
  - Higher Thinking & Problem Solving is Shut Down
- All or Nothing Thinking
  - Eliminate or Escape from the Enemy
- Intense Emotions
  - Driving Fight or Flight Behaviour
- Extreme Behaviours
  - In a fight for survival or perceived life or death dangers

"The Issue's Not the Issue"

- In high-conflict situations, the issue is not the issue. The high-conflict thinking is the issue, with distorted perceptions and expectations.
- For many people with high-conflict personalities, they are stuck in their negative emotions (R.B.) and can't easily access their problem-solving skills (L.B.)
- To handle them, you need to learn to communicate with the Right Brain

Talking to the Right Brain (the Elephant)

- Tone of voice and body language is amazingly important: Calm, Confident, Firm
- Avoid logical arguments in times of stress
- Avoid giving Negative Feedback (about the whole person, focusing on the past, negative tone of voice)
- Avoid threats: these escalate people who are stuck in their right brain
- Don't say they have a personality disorder or need therapy.

Common "High-Conflict" ISSUES

- Rigid and Uncompromising
- Difficulty Accepting and Healing Loss
- Emotions Dominate Thinking
- Inability to Reflect on Own Behavior
- Difficulty Empathizing With Others
- Preoccupied with Blaming Others
- Avoids Responsibility (For Problem or Solution)
- They MAY have personality disorders

Summary of Key HCP Skills

1. **CONNECTING:** Listen closely (briefly), then respond with Empathy, Attention and/or Respect (E.A.R.)
2. **ANALYZING:** Get client to make a list of problems/options and choose a task
3. **RESPONDING:** Be Brief, Informative, Friendly and Firm (B.I.F.F.)
4. **SETTING LIMITS:** Don't make it personal. Use "Indirect Confrontations" by helping client deal with policies and procedures.

Lower YOUR Expectations For Change

- Your not going to change your client. Forgetaboudit!
- Life-long personality patterns don't change with a statement, no matter how angry or sensitive you are.
- Change takes a *Program of Behavior Change* (therapy, batterers' groups, drug treatment, etc.)
- HCPs may not change attitudes, BUT may change behavior to avoid consequences.
- Many HCP clients can reach reasonable settlements, but it may take 3 times as long. Be patient.
- You're not responsible for their outcome – just your standard of care.

Connect with Empathy, Attention & Respect

You will be frustrated by the HCP's emotional reactivity and thinking distortions. It's easy to get "emotionally hooked," and to withhold any positive responses. It's easy to feel a powerful urge to attack or criticize.

Instead, consciously use your E.A.R.:

- EMPATHY
- ATTENTION
- RESPECT

E.A.R. Statement

- Example: "I can ***understand*** your frustration – this is a very important decision in your life. Don't worry, I will pay full ***attention*** to your concerns about this issue and any proposals you want to make. I have a lot of ***respect*** for your commitment to solving this problem, and I look forward to solving it too.

Cautions about E.A.R.

- Avoid believing or agreeing with content.
- Avoid volunteering to "fix it" for them (in an effort to calm down their emotions).
- Be honest about empathy and respect (find something you truly believe)
- Keep an arms-length relationship.
- You don't have to listen forever.
- You don't have to use words or these words.

1. Connect by Understanding their Fear-Based Logic

- Be watchful for signs that clients are feeling abandoned or insulted, by you or others. Have empathy for their pain.
- Some are preoccupied with fears of ABANDONMENT: Almost anything you do can "feel" abandoning.
- Others are preoccupied with fears of being SEEN AS INFERIOR. Almost anything can "feel" insulting or demeaning to them.

Logic (Cont'd)

- Put more energy into clarifications, to make sure you understand how they are thinking, and what they heard you say.
- **Don't argue with their logic** – try to understand it. You won't talk them out of their fears, but you can empathize with their fears.
- Find ways to reduce their fears in the process of dispute resolution. Reassure that you are not going to make assumptions or quick decisions.

4. Focus Them on Tasks

- STRUCTURE is needed. Don't expect to resolve their emotional issues. Emotional distresses dominate these clients, making it hard to think clearly, but they can switch out of these feelings with help.
- ACKNOWLEDGE intense feelings, then focus on tasks:
  - Making lists
  - Gathering information (records, etc.)
  - Writing down proposals.

Analyzing Options (Make a Proposal)

- Teach clients to Make Proposals
- Whenever clients are complaining, ask them to turn the problem into a proposal. Ask "So, what's your proposal?"
- Any concern about the past can be turned into proposal about the future.
- Proposals usually contain:
  - WHO does
  - WHAT,
  - WHEN and
  - WHERE.

3-Steps for Making Proposals

1. Propose: WHO will do WHAT, WHEN and WHERE.

2. **Ask questions:** The other person then asks questions about the proposal, such as:
"What's would this look like, if I agreed to do it?"
"What do you see me doing in more detail?"
"When would we start doing that, in your proposal?"

3. **Respond:** Other person then responds with:
"Yes." "No." Or: "I'll think about it."

And if you say "No," then you make a new proposal.

Avoid "Why" Questions

Why questions easily turn into a criticism of the other person's proposal.

Why questions start up defensiveness. If someone's defensiveness is triggered, then it makes it hard for them to think of solutions to problems.

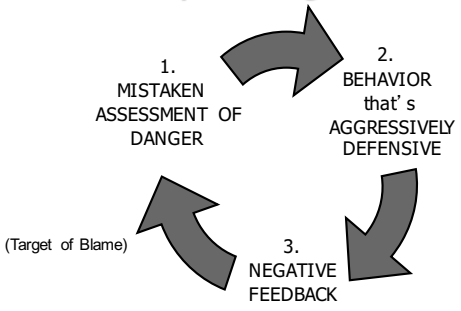
"*Why* did you say that?" usually really means "I think that's a stupid idea and I want to force you to admit it." Instead, if you think the other person's proposal is a bad idea, then the best thing to do is to just make another proposal – until you can both agree on something.

SETTING LIMITS EXERCISE

Closing Points about HCPs

- HCPs behavior is mostly unconscious
- HCPs want relief from their constant distress
- HCPs push professional boundaries out of desperation, not out of intent to be difficult
- Direct confrontation brings resistance and escalation of blame, not insight for HCPs
- Most HCPs have problem-solving skills, which you can access if you calm their emotions
- Many HCPs can be helped

The Cycle of High Conflict Thinking



The 3-Step Cycle

1.Mistaken Assessment of Danger
High Conflict Person feels internal distress, but it *feels* like external danger
(Being Abandoned, Treated Inferior, Ignored, Dominated, etc.)

2.Behavior that's *Aggressively* Defensive
HCP verbally, physically, legally, financially, etc., attacks the *perceived* source of danger

3.Negative Feedback
HCP gets negative feedback (most feedback *feels* negative to HCPs), which escalates HCP and feeds the cycle

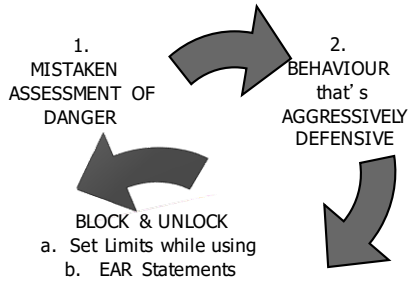
What is Negative Feedback?

•It's Personal: It's about personal qualities, like how you think (sanity, intelligence), personal values (being corrupt or immoral), yourself as a whole person (be ashamed of yourself)

•It has an negative tone: Nonverbal communication is 90% of communication. Your tone of voice can trigger intense and instant resistance to whatever you say next.

•It's focused on the past: Avoid emphasizing past behavior (but acknowledge it to extent required). Better to put emphasis on desired future behavior.

BLOCK & UNLOCK
The Cycle of High Conflict Thinking



Focus the Person on CHOICES or OPTIONS

- **In high-conflict situations, don't focus on feelings.** You won't resolve their emotional issues. Just acknowledge their frustrations. Talk to the right brain.

Instead, focus upset person on a choice:

- The goal is to get the upset person focused on problem-solving, away from his or her emotions.
- This puts responsibility on the person to help solve the problem; puts responsibility on the person for making the choice.
- It gives them some power, when they feel powerless.

7. SET LIMITS Use Indirect Confrontations

Set Personal Limits on Inappropriate Behaviour, whenever possible, because HCPs can't stop themselves, BUT,

- Avoid challenging the person or your relationship.
- Avoid attacking their defenses (resist saying how self-defeating their behavior is, how contradictory their thinking is, how inappropriate their emotions are, etc.).
- Avoid attacking your relationship with them (like telling them they are a difficult client, that you feel insulted by them, or threatening to end it if they proceed this way).

Indirect Confrontations (Cont'd)

- Focus on rules and the perceptions of those external to them and external to your relationship with them, as reasons to act differently.
- "The law requires…"
- "A judge would likely see this as violating…"
- "It might appear better if you…"
- "I understand, but someone else might misunderstand that action…"
- "The Court prefers that…"

8. SET LIMITS
Predict Consequences

- HCPs do not connect realistic CONSEQUENCES to their own ACTIONS, especially fear-based actions.
- They feel like they are in a fight for survival, which blinds them to realities.
- Their life experiences may have taught them different consequences than most.
- They can be educated by a caring person.

Setting Limits Problem

In Groups of 3-4

- Review the Setting Limits Exercise.
- Add any detail to the scenario so that it makes sense to you, or create your own.
- Discuss how you might approach the situation.
- Be prepared to demonstrate your approach to the other participants.

USING B.I.F.F. RESPONSES TO HOSTILE EMAIL

Use B.I.F.F Responses to Emails

Brief: Keep it brief. Long explanations and arguments trigger upsets for HCPs.

Informative: Focus on straight information, not arguments, opinions, emotions or defending yourself (you don't need to)

Friendly: Say you have empathy for their concerns; you will pay attention to their concerns; you will respect their efforts (E.A.R.)

Firm: Gently repeat information and close the door to further argument

Coaching for BIFF Responses: 10 Questions

- Is it Brief?
- Is it Informative?
- Is it Friendly?
- Is it Firm?
- Does it contain any Advice?
- Does it contain any Admonishments?
- Does it contain any Apologies?
- How do you think the other person will respond?
- Is there anything you would take out, add or change?
- Would you like to hear my thoughts about it? **(Don't give your thoughts *until* they have answered all the questions.)**

POSITIVE & NEGATIVE ADVOCATES

They Often Seek Advocates

- Because of weak problem-solving skills:
- They seek Family, Friends, Professionals, who often become "Negative Advocates":
  For HCP's extreme thinking
  For HCP's extreme emotions
  For HCP's extreme behaviors

NEGATIVE ADVOCATES

- Wanting to help is often driving force
- Believe cognitive distortions of upset HCP
- Misled by HCP's charm, hurt, fear, anger
- Advocate against perceived enemies
- Protect HCP from natural consequences
- Escalate conflicts inadvertently
- May also have high conflict personality
- Most are emotionally hooked and uninformed
- Treat same as HCPs: E.A.R. and education

POSITIVE ADVOCATES

- Avoid assumptions
- Investigate problems
- Provide support and information
- Avoid taking too much responsibility for others' behavior problems or solutions
- Avoid doing more work than the client
- Avoid getting in the way of others' feedback and natural consequences

YES, NO, or I'LL THINK ABOUT IT

(Two Tips for Resolving Any Conflict)

By: Bill Eddy, LCSW, ESQ.

Whether in a divorce, a workplace dispute, or a conflict with a neighbor, it's easy to get caught up in defending our own behavior and point of view. In a conflict, people can "push our buttons," and it's easy to react before we know it. The focus can quickly become personal and about the past.

To avoid this problem, there's a simple, two-step method that seems to help, no matter what type of conflict you are in. If you think you are going to be in a difficult situation, remind yourself of these two steps before you start talking. And if you are in the middle of an argument, you can always shift to this approach.

1) First Person: MAKE A PROPOSAL

Whatever has happened before is less important than what to do now. Avoid trying to emphasize how bad the problem is or criticizing the other person's past actions. There's nothing he or she can do about the past now. This just triggers defensiveness. Plus, people never agree on what happened in the past anyway. Instead, picture a solution and propose it.

For example, in a divorce dispute: "If you're going to be late to pick up the kids on Fridays, then I propose we just change the pickup time to a more realistic time. Instead of 5pm, let's make it 6:30pm."

Or in a workplace dispute: "I propose that we talk to our manager about finding a better cubicle for you, since you have so many phone calls that need to be made and I often hear them."

2) Second Person: YES, NO, or I'LL THINK ABOUT IT

All you have to do to respond to such a proposal is say: "Yes." "No." or "I'll think about it." You always have the right to say: "Yes." "No." or "I'll think about it." Of course, there are consequences to each choice, but you always have these three choices at least. Here's some examples of each:

YES: "Yes, I agree. Let's do that." And then stop! No need to save face, evaluate the other person's proposal, or give the other person some negative feedback. Just let it go. After all, if you have been personally criticized or attacked, it's not about you. Personal attacks are not problem-solving. They are about the person making the hostile attack. You are better off to ignore everything else.

NO: "No, I don't want to change the pickup time. I'll try to make other arrangements to get there on time. Let's keep it as is." Just keep it simple. Avoid the urge to defend your decision or criticize the other person's idea. You said no. You're done. Let it drop.

I'LL THINK ABOUT IT: "I don't know about your proposal, but I'll think about it. I'll get back to you tomorrow about your idea. Right now I have to get back to work. Thanks for making a proposal." Once again, just stop the discussion there. Avoid the temptation to discuss it at length, or question the validity of the other person's point of view. It is what it is.

When you say "I'll think about it," you are respecting the other person. It calms people down to know you are taking them seriously enough to think about what they said. This doesn't mean you will agree. It just means you'll think about it.

MAKE A NEW PROPOSAL: After you think about it, you can always make a new proposal. Perhaps you'll think of a new approach that neither of you thought of before. Try it out. You can always propose anything. (But remember there are consequences to each proposal.) And you can always respond: "Yes." "No." or "I'll think about it." (And there are consequences to each of those choices, too.)

AVOID MAKING IT PERSONAL

In the heat of the conflict, it's easy to react and criticize the other person's proposals—or even to criticize the other person personally, such as saying that he or she is arrogant, ignorant, stupid, crazy or evil. It's easy and natural to want to say: "You're so stupid it makes me sick." Or: "What are you, crazy?" "Your proposal is the worst idea I have ever heard." But if you want to end the dispute and move on, just ask for a proposal and respond "Yes" "No" or "I'll think about it."

Bill Eddy is an attorney and therapist, and the Senior Family Mediator at the National Conflict Resolution Center in San Diego, CA. For information about NCRC's mediation services, go to www.ncrconline.com or call 619-238-2400.

He is also the President of the High Conflict Institute and the author of *"It's All Your Fault!":12 Tips for Managing People Who Blame Others for Everything*. For information about his books or seminars, go to: www.highconflictinstitute.com.

Managing High Conflict People

by Michael Lomax, JD © 2015

High Conflict People (HCP) are not just difficult people, they are the most difficult people. Perhaps you have a co-worker, a relative or a client who is very challenging to deal with and always seems to get into conflict with other people. They get angry over small issues which they never think are their fault, and if someone tries to help, the High Conflict Person (also HCP) still doesn't seem to be able to stop, or gets angry at that person as well. They will very often complain about an issue or a person as being the cause of their problems, but the reality is that, for HCPs, it is their personality that is the issue. Despite how challenging HCPs can be, we can very often have effective working relationships with them, if we understand how their personality works and how best to manage them.

Four Characteristics of HCPs

1. All-or-Nothing Thinking

HCPs usually want a solution to their problem, but rather than take the time to analyze all of the information or options, they very often make a quick decision, and then will not compromise or be flexible. If you try to offer another opinion or argue with them, you could soon end up being seen as an enemy, because HCPs see people through a black-and-white lens: "you are my friend or you are my foe."

2. Unmanaged Emotions (Sometimes)

When HCPs get into conflict, they are often very emotional. They can have dramatic mood swings over small issues in a matter of seconds, or become very angry if they feel disrespected or if they think that someone is manipulating them. They will become very upset, yell, use personal attacks about someone's ethics or competence, or trash someone on social media (exaggerating or manufacturing events to make the story sound better). On the other hand, there are some HCPs who don't lose control of their emotions, and while they are being manipulative, can seem very calm and collected. Other people can be shocked or scared of this behaviour and become overwhelmed emotionally when trying to respond or simply get away from the HCP. For this reason, we need to be careful to not make a judgment too quickly about who we think might be the problem.

3. Extreme Behaviours

HCPs very often behave in extreme ways, because they lose control of their emotions or they have an intense drive to control or dominate those who are close to them. This behaviour can include spreading rumours, making hurtful comments, publicly accusing someone of lying, stalking someone or refusing to have any contact, or acting dangerously or self-destructively. HCPs can also respond out of proportion to what you and I might see as a small or even irrelevant event, such as someone not returning a phone call on time, being late for meeting, or disagreeing with the HCP.

4. Blaming Others

HCPs stand out because they focus on blaming others – especially those closest to them or in authority positions over them. This is because HCPs look outward when they are in distress and

think that they will feel better if they can remove the "target of blame." Also, they have a difficult time reflecting on their behaviour and how they might be contributing to the problem, so they see themselves as innocent victims.

Four Tips for Dealing with High Conflict People

The more that we understand the predictable behaviour patterns of HCPs, the more we can learn how to effectively respond to them. If you think that someone is an HCP, focus on ways you can change your behaviour versus changing theirs. The more you focus on maintaining a friendly, arms-length relationship with an HCP, the better your outcomes will be in dealing with them.

1. Lower Your Expectations

A key tip starts with our own reaction to the HCP. We need to lower our expectation that we can change an HCP by getting mad at them, by being very sensitive, or by trying to rescue them. HCPs are in conflict with people and organizations all the time; it is their personality that gets them into these situations, and life-long personality patterns do not change (except through a therapeutic program of behavioural change). We need to remind ourselves that we are responsible for our professional standard of care, but we are not responsible for what an HCP thinks and what choices they make.

2. Connect

Connect with the person using empathy, attention and/or respect (unless it is not safe, then you just need to stay away from the person). Say something friendly from time to time, even though you would prefer not to. Remember, HCPs put people into two categories: "friends" or "foes." Focus on maintaining a professional, arm's-length relationship in which you are as relaxed and respectful as possible.

3. Focus on the Future

HCPs react very strongly to negative feedback, which is about the person, about the past, and negative in tone. The "past is pain" for HCPs, so we want to stay focused on the future as much as possible when dealing with them. We can do this by providing information to help them make better decisions in the future. For example, if we have to talk to the HCP about inappropriate behaviour at work, focus on the behaviour you want from them going forward, rather than what they did wrong. If you are worried that they will repeat the inappropriate behaviour, predict consequences while demonstrating concern for their well-being.

4. Set Limits

How do we get HCPs to stop acting out in extreme ways, or simply get them to treat us with respect if we have a disagreement? The main thing to realize is that we cannot control what an HCP does; only they can. We need to focus on giving them information to assist them in making better choices, while maintaining our relationship. We should avoid direct personal confrontation, which will just turn into a power struggle. Instead, indirectly confront the person by referring to rules or policies that are external to your relationship with them, such as "I wish I could help you, we have a policy that says … "

Conclusion

When dealing with an HCP, focus on managing your relationship with them, primarily by managing your own expectations, anxiety and reactions, while at the same time recognizing that you cannot change an HCPs personality or make them do what you want. You can very often work effectively with an HCP if you try to connect with them, while providing information to help them make better choices.

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Coaching Clients to Make Proposals

Whether you are a lawyer, mediator, collaborative practitioner or other professional involved in dispute resolution, you know that making proposals or "settlement offers" is central to eventually reaching agreements for the benefit of your clients. Yet, traditionally, we have thought of making proposals as part of our professional job, rather than teaching our clients how to do this.

Two significant changes in recent years are causing this to change: Courts (and budget cuts) are driving more parties to use out-of-court decision-making (such as mediation and other negotiation methods); and Clients are demanding to play a greater role in their cases from start to finish. Furthermore, there are growing indications that parties are more likely to follow their own agreements than orders made by a court. This article explains a method of teaching clients how to make proposals, and why your clients will thank you for providing this skill.

Educating About Making Proposals

The most important aspect of making proposals is using flexible thinking. There are at least three fundamental concepts to teach clients about flexible thinking as soon as possible:

1. Make Two Proposals: Clients need to be prepared to make two or more proposals on each likely issue, from the start. This may take repeating, as they often have only one possible outcome in mind – 100% their way! Yet, agreements are rarely made after only one proposal (just watch politicians in the news for evidence of this). The person who has a second proposal ready may prevail, or at least gain the respect of the other side.

2. Ask Questions: Clients need to learn to ask questions – not just make demands – so they can revise their proposals during negotiations to more realistically lead to agreements. Many clients are so used to making demands and over-reacting to the proposals of others, that they miss opportunities to gather information by asking questions of the other party and making new, more refined proposals.

3. Preparation: Most lawyers know that good preparation is the key to successful negotiations. Therefore, lawyers can teach their clients to gather information, to think ahead about how the other party or parties will respond to proposals, to consider their own limits in the negotiating process (such as a "bottom line" or their own Best Alternative to a Negotiated Agreement (BATNA)), and to discuss in advance how to respond to various proposals the other party may make.

Gathering Information

One of the first steps of making proposals is to gather information about realistic outcomes of the conflict at hand. If it's a legal dispute, lawyers can share their expertise and knowledge about the solutions to prior similar cases. Letting clients know legal

standards – and how flexible these standards may be or not – will help them start thinking about what proposals they want to make.

Clients need to learn about various alternatives that others have used in similar circumstances, and any legal limitations that preclude some proposals. They need to learn why their case is different from others they have heard about – including from friends and family members with lots of opinions but little knowledge. They need to look at what's important to them and what's important to the other party to the dispute. Only then can they hope to make realistic and persuasive proposals.

Four Simple Steps for Making a Proposal
Teaching the following 4-step method is easy for clients to grasp and practice. (See article for clients titled "Making Proposals" under articles at www.HighConflictInstitute.com.) They can learn it in advance of a negotiation session, or even in the middle of negotiations, such as during a mediation session.

1. Making a proposal usually involves suggesting *Who does What, When and Where*.

2. Then, the other person asks questions about the proposal.

3. Then, the one making a proposal answers those questions and provides any further information.

4. Then, the other person responds by saying "Yes." "No." or "I'll think about it." If the respondent says "No," then it's up to the respondent to make a new a proposal.

It's important to point out that just reacting to a proposal is unhelpful, but very tempting. Difficult clients often criticize the proposal rather than asking questions about it. ("How could you even say such a thing?" "Why didn't you propose that a year ago!"?) Reminding them of these four steps makes it easier for them to respond productively. This also discourages them from simply taking a position and saying "No" to everything else – because they have to make a proposal after each "No" they give.

Practice Making and Responding to Proposals
Professionals can help their clients by encouraging them to write down a list of issues that need to be negotiated, followed by two proposals that the client is prepared to offer for each issue (usually saving the second one until they hear a response to their first). Then, the professional can discuss additional information that may be helpful, such as how similar proposals have worked out in other cases – or not.

Then, the client can discuss how they expect their proposal will be received. Perhaps even rate the likelihood of acceptance on a percentage scale. ("I think there's a 50% chance the other person will accept my proposal.") You can say what you think will happen. ("I think it has only a 10% chance, so let's work hard on your second proposal.") The benefit of helping the client think about this in advance is that he or she will be less surprised and more able to stay focused on problem-solving during

negotiations.

It may also be helpful to role-play making a proposal with the client - especially on a difficult topic. You can have the client start out playing the other party, and you can play the client. Then switch roles. This helps the client think about being in the other person's shoes and makes them more realistic about how their proposal will be received.

Conclusion

Lawyers and other professionals who teach their clients how to make proposals may fear that they will work themselves out of a job. But instead, they may impress their clients with how valuable they can be in the negotiation process. After all, clients who are well-informed about legal standards and realistic proposals may be much more willing to spend time with professionals than those who don't understand the value of these out-of-court skills. And clients appreciate learning these skills, because they can use them in every aspect of their lives, including at work, with neighbors, with family members and in future conflicts with the other party, such as in a divorce. So I propose that you give it a try!

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HIGH CONFLICT INSTITUTE
Changing the Culture of Conflict

Calming Upset People with E.A.R.

By Bill Eddy, LCSW, ESQ.

Everyone gets upset some of the time. High conflict people get upset a lot of the time. A simple technique called an "E.A.R. Statement" can help you calm others down. This is especially helpful if you are in a close relationship or a position of authority. High conflict people tend to emotionally attack those closest to them and those in authority, especially when they are frustrated and can't manage their own emotions. The intensity of their uncontrolled emotions can really catch you off-guard. But if you practice making E.A.R. statements you can connect with upset people and usually help them calm down.

E.A.R. Statements

E.A.R. stands for Empathy, Attention and Respect. It is the opposite of what you feel like giving someone when he or she is upset and verbally attacking YOU! Yet you will be amazed at how effective this is when you do it right.

An E.A.R. Statement connects with the person's experience, with their feelings. For example, let's say that someone verbally attacks you for not returning a phone call as quickly as he or she would have liked. "You don't respect me! You don't care how long I have to wait to deal with this problem! You're not doing your job!"

Rather than defending yourself, give the person an E.A.R. Statement such as: "Wow, I can hear how upset you are. Tell me what's going on. I share your concerns about this problem and respect your efforts to solve it." This statement included:

EMPATHY: "I can hear how upset you are."

ATTENTION: "Tell me what's going on."

RESPECT: "I respect your efforts."

The Importance of Empathy

Empathy is different from sympathy. Having empathy for someone means that you can feel the pain and frustration that they are feeling, and probably have felt similar feelings in your own life. These are normal human emotions and they are normally triggered in people close by because emotions are contagious. When you show empathy for another person, you are treating them as a peer who you are concerned about and can relate to as an equal in distress.

Sympathy is when you see someone else in a bad situation that you are not in. You may feel sorry for them and have sympathy or pity for them, but it is often a one-up and one-down situation. There is more of a separation between those who give sympathy and those who receive it.

But you don't even have to use the word "empathy" to make a statement that shows empathy. Here are some examples:

"I can see how important this is to you."

"I understand this can be frustrating."

"I know this process can be confusing."

"I'm sorry to see that you're in this situation."

"I'd like to help you if I can."

"Let's see if we can solve this together."

The Importance of Attention

Getting attention is one of the most important concerns of high conflict people. They often feel ignored or disrespected and get into conflicts as a way of getting attention from those around them. Many have a lifetime history of alienating the people around them, so they look to others – professionals, friends and new acquaintances – to give them attention. Yet they rarely feel satisfied and keep trying to get more attention. If you show that you are willing to pay full attention for a little while, they often calm down.

There are many ways to let a person know that you will pay attention. For example, you can say:

"I will listen as carefully as I can."

"I will pay attention to your concerns."

"Tell me what's going on."

"Tell me more!"

You can also show attention non-verbally, such as:

Have good "eye contact" (keeping your eyes focused on the person)

Nod your head up and down to show that you are attentive to their concerns

Lean in to pay closer attention

Put your hand near them, such as on the table beside them
(Be careful about directly touching an upset HCP – it may be misinterpreted as a threat, a come-on, or a put-down)

The Importance of Respect

Anyone in distress, and especially HCPs, need respect from others. Even the most difficult and upset person usually has some quality that you can respect. By recognizing that quality, you can calm a person who is desperate to be respected.

Many high conflict people are used to being disrespected and being independent and "not needing others." This characteristic often leads them into conflict with those around them, who don't wish to see them as superior and are tempted to try to put them down. This just makes the HCP even more upset.

Here are several statements showing respect:

"I can see that you are a hard worker."

"I respect your commitment to solving this problem."

"I respect your efforts on this."

"I respect your success at accomplishing _____."

"You have important skills that we need here."

Why E.A.R. is so Important

Upset people, especially high conflict people, may not be getting empathy, attention and respect anywhere else. They have usually alienated most of the people around them. It is the last thing that anyone wants to give them. They are used to being rejected, abandoned, insulted, ignored, and disrespected by those around them. They are starving for empathy, attention and respect. They are looking for it anywhere they can get it. So just give it to them. It's free and you don't sacrifice anything. You can still set limits, give bad news, and keep a social or professional distance. It just means that you can connect with them around solving a particular problem and treat them like an equal human being, whether you agree or strongly disagree with their part in the problem.

Many HCPs also have a hard time managing their own emotions. Since brain researchers have learned that we "mirror" each other's emotional expressions, it makes sense to respond to upset people with a calm and matter of fact manner – so that they will mirror us, rather than us mirroring their upset mood (which is what most people do much of the time – and it just makes things worse).

Managing Your Amygdala

Of course, this is the opposite of what we feel like doing. You may think to yourself: "No way I'm going to listen to this after the way I've been verbally attacked!" But that's just your amygdala talking, in an effort to protect you from danger. Our brains are very sensitive to threats, especially our amygdalas (you have one in the middle of your right brain and one in the middle of your left). Most people, while growing up, learn to manage the impulsive, protective responses of their amygdalas and over-ride them with a rational analysis of the situation, using their prefrontal context behind the forehead.

In fact, that is a lot of what adolescence is about: learning what is a crisis needing an instant, protective response (amygdala) and learning what situations are not a crisis and instead need a calm and rational response (prefrontal cortext). High conflict people often were abused or entitled growing up, and didn't have the secure, balanced connection necessary to learn these skills of emotional self-management. Therefore, you can help them by helping yourself not over-react to them. Just use your own prefrontal cortext to manage your own amygdala – which will help the upset person manage theirs.

It's Not About You!

To help you stay calm in the face of the other person's upset, remind yourself "it's not about you!" Don't take it personally. It's about the person's own upset and lack of sufficient skills to manage his or her own emotions. Try making E.A.R. statements and you will find they often end the attack and calm the person down. This is especially true for high conflict people (HCPs) who regularly have a hard time calming themselves down. All of the E.A.R. statements above are calming statements. They let the other person know that you want to connect

with him or her, rather than threaten him or her. It's their issue and you don't have to defend or explain yourself. It's not about you!

What to Avoid About E.A.R.

Don't Lie:
Upset people are often hyper-sensitive to lying. If you really can't feel empathy for the person, find something that you can respect that he or she has done. If you really can't respect the person, then simply pay attention. You can always just say: "Tell me more." This calms the person, because it tells him or her that you will listen without needing to be persuaded to do so. If your body language shows you are open to listening, most upset people feel better and will calm down enough to tell you what's going on.

You don't have to listen forever:
E.A.R. doesn't mean just listening. It's a statement in response to the person's upset mood, which you can use at any time. It can help you wrap up a conversation, if you need to do something else. High conflict people are known for talking endlessly. Keep in mind that high conflict people often don't get a sense of relief from telling their story or talking about their pain – they have told it many times and it is stuck. Often, they are stuck trying to get others to give them empathy, attention and respect, so that if you just give them an E.A.R. statement, they may not feel the need to keep talking or talk so long. You can interrupt an upset person much of the time, by saying how you can empathize with and respect the person.

E.A.R. doesn't mean you agree or disagree:
Giving your empathy, attention and respect helps you connect with an upset person as a human being. It doesn't mean that you agree or disagree with their point of view. Too often, people get stuck on arguing about an "issue." But with high conflict people "the issue's not the issue" – it's their inability to manage their own emotions and, sometimes, their behavior. If you are challenged about whether you agree or not, simply explain that you care or want to be helpful.

Maintain an "arms-length" relationship:
Giving your empathy, attention and respect to an upset person doesn't mean that you have to have a close relationship. You can still maintain a professional relationship, co-worker relationship, neighbor relationship, etc. In fact, it is wise not to become too close to a high conflict person, so that you don't raise their expectations of you becoming responsible for their welfare or planning to spend more time together than you intend.

Conclusion

Everyone gets upset some of the time. You don't have to be a high conflict person to be upset. At moments of trauma, anger and sadness, we really need the human connection of knowing that someone has empathy for us, is paying attention and still has respect for us. You can give anyone an E.A.R. statement to help them calm down. Nothing in this article is intended to mean that only HCPs get upset.

Making E.A.R. statements – or non-verbally showing your Empathy, Attention and Respect – may help you calm or avoid many potentially high-conflict situations. It can save you time, money and emotional energy for years to come. But it takes lots of practice. You can start today!

Bill Eddy is a therapist, lawyer and mediator. He is the President of the High Conflict Institute and the author of ***It's All Your Fault! 12 Tips for Managing People Who Blame Others for Everything*** which explains the use of E.A.R. statements further. This book and several other books and articles about managing high conflict people and situations are available at www.highconflictinstitute.com.

BIFF RESPONSE(SM) at Work

Responding to Hostile Mail

Hostile mail – especially email, texts and other electronic communications – has become much more common over the past decade. Most of this mail is just "venting," and has little real significance. However, when people are involved in a formal conflict (a workplace grievance, a divorce, a homeowners' association complaint, etc.) there may be more frequent hostile mail. There may be more people involved and it may be shown to others or in court. Therefore, how you respond to hostile mail may impact your relationships or the outcome of a case.

Do you need to respond?

Much of hostile mail or email does not need a response. Email from irritating co-workers, (ex-) spouses, angry neighbors or even attorneys do not usually have legal significance. The email itself has no power, unless you give it power. Often, it is emotional venting aimed at relieving the writer's anxiety. If you respond with similar emotions and hostility, you will simply escalate things without satisfaction, and just get a new piece of hostile mail back. In most cases, you are better off not responding. However, some letters and emails develop power when copies are filed in a court or complaint process – or simply get sent to other people. In these cases, it may be important to respond to inaccurate statements with accurate statements of fact. If you need to respond, I recommend a BIFF Response(SM): Be Brief, Informative, Friendly and Firm.

BRIEF

Keep your response brief. This will reduce the chances of a prolonged and angry back and forth. The more you write, the more material the other person has to criticize. Keeping it brief signals that you don't wish to get into a dialogue. Just make your response and end your letter. Don't take their statements personally and don't respond with a personal attack. Avoid focusing on comments about the person's character, such as saying he or she is rude, insensitive or stupid. It just escalates the conflict and keeps it going. You don't have to defend yourself to someone you disagree with. If your friends still like you, you don't have to prove anything to those who don't.

INFORMATIVE

The main reason to respond to hostile mail is to correct inaccurate statements which might be seen by others. "Just the facts" is a good idea. Focus on the accurate statements you want to make, not on the inaccurate statements the other person made. For example: "Just to clear things up, I was out of town on February 12th, so I would not have been the person who was making loud noises that day."

Avoid negative comments. Avoid sarcasm. Avoid threats. Avoid personal remarks about the other's intelligence, ethics or moral behavior. If the other person has a "high conflict personality," you will have no success in reducing the conflict with personal attacks. While most people can ignore personal attacks or might think harder about what you are saying, high conflict people feel they have no choice but to respond in anger – and keep the conflict going. Personal attacks rarely lead to insight or positive change.

FRIENDLY

While you may be tempted to write in anger, you are more likely to achieve your goals by writing in a friendly manner. A friendly response will increase your chances of getting a friendly – or neutral – response in return. If your goal is to end the conflict, then add a friendly greeting and friendly closing. Don't give the other person a reason to get defensive and keep responding. Make it sound as relaxed and non-antagonistic as possible. Brief comments that show your empathy and respect will generally calm the other person down, even if only for a short time.

FIRM

In a non-threatening way, tell the other person your information or concerns about an issue. (For example: "That's all I'm going to say on this issue.") Be careful not to make comments that invite more discussion, such as: "I hope you will agree with me …". This invites the other person to tell you "I *don't agree*." Just give your friendly closing and then stop.

However, if you need a decision from the other person, then end with two choices, such as: "Please let me know by Friday at 5pm if I should pick up those documents or you will send them to me." By limiting it to two choices, you are less likely to trigger a new argument. By giving a response date and time, you avoid having to keep contacting the person. If he or she does not respond by then, you can choose whether to ask again or take other action.

Firm doesn't mean harsh. Just sound confident and end the back-and-forth nature of hostile communications. A confident-sounding person is less likely to be challenged with further emails. If you get further emails, you can ignore them, if you have already sufficiently addressed the inaccurate information. If you need to respond again, keep it even briefer and do not emotionally engage. In fact, it often helps to just repeat the key information using the same words.

Example:

Roberta was terminated after a long progressive discipline process, with repeated failure to comply with the company rules. There had been several incidents in which she was believed to have harassed other employees, although none of the incidents ever resulted in legal claims (fortunately). After being counseled by the Human Resources department several times without any change in her behavior, she was terminated. Since she was not a member of a union and there was no contract for her position, she was let go "at will" of the company, without justification necessary (although the company had plenty of it).
Jerry is the Human Resource manager who dealt with her in the termination process. Jerry has remained in contact with Roberta by email, in order to be helpful to her and to help keep her calm during this transition in her life. Here is an example of the emails he gets from her:

> Hi Jerry,
>
> I had another job interview this week. This is good, because my medical benefits are running out, thanks to you. You had no right to ruin my career and make it impossible for me to get a good letter of reference. Your corrupt company will be exposed sooner or later. By the way, I need a copy of that last list of job duties that I had. I've asked you three times for it, and you refuse to respond. Let me know if I need to drop by to pick it up.
>
> Your old friend,
> Roberta

Here's the email that Jerry is thinking of sending. What do you think? Is it a BIFF Response?

> Hi Roberta,
>
> First of all, it will not benefit you at all to make threats about "exposing" our company. We have done nothing wrong and are ready to refute any claims you may raise against us.
> I was not aware of you ever asking for a list of your job duties. Please see it attached. As a reminder, you are not allowed to return to our company, nor allowed to set foot on our grounds. We will have you arrested if you attempt to do so. I hope that this message is clear.
>
> Sincerely,
> Jerry Butler
> Human Resource Manager

Is it a BIFF?

- **Brief?** Yes, it's fairly brief.
- **Informative?** Yes and No. It goes beyond straight information and sounds defensive.
- **Friendly?** Not really. It focuses on her negativity, unnecessarily. Nowhere does he make an attempt to connect in a friendly way. You can tell that he's pretty angry with her, by emphasizing the negative and purely setting limits, rather than trying to have a calming influence on her. While his anger is understandable, it won't help him bring an end to having conversations with her.

- **Firm?** Yes, somewhat. It sounds very firm, in that he is telling her the consequences of various actions. However, it's not firm in terms of ending the conversation. It is defensive and will reinforce her defensiveness with him and trigger even more communication from her.

Would the following be a BIFF Response?

> Dear Roberta,
>
> I'm glad you're making progress and getting interviews. I really want you to find a company that's a good fit for you. I am attaching a copy of your job duties. I hope that helps!
>
> Best wishes!
> Jerry

Is it a BIFF?

- **Brief?** Yes, it's very brief.
- **Informative?** Yes, it explains how he wants her to find a good fit, and he attaches her job duties. There is nothing in this that sounds defensive or would trigger defensiveness for her.
- **Friendly?** Yes, he expresses his positive wishes and responds to her request with straight information.
- **Firm?** Yes, in that he does not invite a response to anything. He has put an end to that conversation, even though he knows there will probably be more. But his response took a minimum of time and effort – and calmed the conflict.

Conclusion

Whether you are at work, at home or elsewhere, a BIFF Response is an easy way to save yourself time and emotional anguish, while you look good to your co-workers and supervisors. The more people who handle hostile mail in such a manner, the less hostile mail there will be.

Bill Eddy is an attorney, mediator and therapist, and the author of several books including:

- *BIFF: Quick Responses to High Conflict People, Their Personal Attacks, Hostile Email and Social Media Meltdowns, 2nd Ed.* (Unhooked Books, 2011, 2014)**.**
- *So, What's Your Proposal? Shifting High-Conflict People from Blaming to Problem Solving in 30 Seconds* (Unhooked Books, 2014).
- *SPLITTING: Protecting Yourself While Divorcing Someone with Borderline or Narcissistic Personality Disorder* (New Harbinger, 2011)
- *It's All YOUR Fault! 12 Tips for Managing People Who Blame Others for Everything* (HCI Press, 2008)

Bill Eddy is also the President of the High Conflict Institute, which provides speakers, training, consultation and resources for professionals and anyone dealing with high conflict disputes at work or in their personal lives. High Conflict Institute has given trainings in over 25 states, several provinces in Canada, Australia, New Zealand, France and Sweden.

E.A.R. Statements – Skills Sheet

An E.A.R. (Empathy, Attention, Respect) Statement is a short statement that acknowledges a person's emotions, attempts to connect with them and helps calm them down, keeping them focused on problem-solving.

E.A.R. Statement (Examples):

- *I can **understand** your frustration – this is a very important decision in your life. Don't worry, I will pay full **attention** to your concerns about this issue and any proposals you want to make. I have a lot of **respect** for your commitment to solving this problem, and I look forward to solving it too.*
- *I **appreciate** this complaint process is very stressful and upsetting. You need a mediator who is paying close **attention** to your concerns and really **understands** how difficult this has been. I **will listen** to your concerns today and I will **do my best** to assist you.*
- *I respect your efforts on this.* [Respect]
- *You have put a lot of work into this.* [Respect]
- *I can see how important this is to you.* [Empathy]
- *I can understand how frustrating this is.* [Empathy]
- *I will listen as carefully as I can.* [Attention]
- *I will pay attention to your concerns.* [Attention]

GENERAL TIPS:

1. It may be counter-intuitive so it will take lots of practice to honestly show **E**mpathy, **A**ttention and **R**espect when someone is raging or **B**ehaving in other **A**ggressively **D**efensive ways.
2. An E.A.R. statement will sometimes take only a minute. It does not have to take much time to unlock The Cycle of High Conflict Thinking. You don' t have to listen forever.
3. Your statement of **E**mpathy, **A**ttention and **R**espect must be honestly felt or the HCP's Cycle of High Conflict Thinking will continue.
4. Avoid volunteering to "fix it" for the person (in an effort to calm them down).
5. Keep an arms-length relationship.
6. Avoid believing or agreeing with the content.
7. Avoid apologizing as this only confirms to the HCP you are to blame. A "social sorry" is fine – "I am sorry this is so difficult."
8. To help you stay calm in the face of the other person's upset, remind yourself "it's not about me!" Don't take it personally. It's about the person's own upset and lack of sufficient skills to manage his or her own emotions.

Working With High Conflict Clients

October 6, 2015 (1:45 – 3:15)

Presented by:

Michael Lomax
Lawyer/Mediator
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PLAN FOR THIS SESSION

1. How all our brains respond to conflict
2. Understanding high conflict people
3. Strategies and practical tips
4. Practice Exercise

2 Hemispheres of Brain (approx.)

- Left Hemisphere
- "Logical Brain"
- Generally Conscious
- Language
- Thinks in words
- Planning
- Examines Details
- Rational analysis
- Systematic Solutions

- Positive Emotions
  Calm, contentment, etc.

- Right Hemisphere
- "Relationship Brain"
- Generally Unconscious
- Observes relationships
- Thinks in pictures
- Creativity, Art, Intuition
- Non-verbal Skills
- Facial recognition & cues
- Gut feelings

- Negative Emotions
  Hurt, anger, fear, etc.

Corpus Callosum

- The main wiring between the hemispheres of the brain, that aid in the flow of information back and forth. More flow is better.
- It's damaged or smaller in children repeatedly exposed to abuse, as well as in some adults with personality disorders.
- Some people get stuck in the upset emotions of the right hemisphere and can't access their left hemisphere to help resolve negative emotions.

Amygdala in Non-Verbal Communication

Amygdala of the brain:

- "Smoke Detector" of the brain
- "Hijacks" brain for fast, unconscious defensive responses
- Shuts down logical, analytical thought

-- Daniel Goleman
Emotional Intelligence (1995)

- Most of the time the Left Hemisphere is dominant, but in a crisis or totally new situation, the Right Brain is dominant.
- Right Amygdala is especially attentive to facial expressions of fear and anger; can respond in as little as 6 milliseconds

-- Allan Schore
Affect Regulation and the Repair of the Self (2003)

Why We Get Hooked into High Conflict

- Our brains are "wired" for group survival.
- All human beings, including professionals, are wired to respond instantly and unconsciously to high intensity emotions.
- Amygdala in the brain is wired to identify facial expressions of fear and anger, and to respond instantly in protective action.
- HCP's chronically, publicly and intensely have facial expressions of fear and anger.

THE BRAIN IN CONFLICT

PROBLEM-SOLVING LEFT BRAIN THINKING

- Slower
  - Analyzes Problems
- Flexible Thinking
  - Sees choices
- Managed Emotions
- Moderate Behaviours
  - To maintain relationships

DEFENSIVE RIGHT BRAIN THINKING

- Focus on Quick Action:
  - Higher Thinking & Problem Solving is Shut Down
- All or Nothing Thinking
  - Eliminate or Escape from the Enemy
- Intense Emotions
  - Driving Fight or Flight Behaviour
- Extreme Behaviours
  - In a fight for survival or perceived life or death dangers

"The Issue's Not the Issue"

- In high-conflict situations, the issue is not the issue. The high-conflict thinking is the issue, with distorted perceptions and expectations.
- For many people with high-conflict personalities, they are stuck in their negative emotions (R.B.) and can't easily access their problem-solving skills (L.B.)
- To handle them, you need to learn to communicate with the Right Brain

Talking to the Right Brain (the Elephant)

- Tone of voice and body language is amazingly important: Calm, Confident, Firm
- Avoid logical arguments in times of stress
- Avoid giving Negative Feedback (about the whole person, focusing on the past, negative tone of voice)
- Avoid threats: these escalate people who are stuck in their right brain
- Don't say they have a personality disorder or need therapy.

Common "High-Conflict" ISSUES

- Rigid and Uncompromising
- Difficulty Accepting and Healing Loss
- Emotions Dominate Thinking
- Inability to Reflect on Own Behavior
- Difficulty Empathizing With Others
- Preoccupied with Blaming Others
- Avoids Responsibility (For Problem or Solution)
- They MAY have personality disorders

1. Lower YOUR Expectations For Change

- Your not going to change your client. Forgetaboudit!
- Life-long personality patterns don't change with a statement, no matter how angry or sensitive you are.
- Change takes a *Program of Behavior Change* (therapy, batterers' groups, drug treatment, etc.)
- HCPs may not change attitudes, BUT may change behavior to avoid consequences.
- Many HCP clients can reach reasonable settlements, but it may take 3 times as long. Be patient.
- You're not responsible for their outcome – just your standard of care.

2. Connect with Empathy, Attention & Respect

You will be frustrated by the HCP's emotional reactivity and thinking distortions. It's easy to get "emotionally hooked," and to withhold any positive responses. It's easy to feel a powerful urge to attack or criticize.

Instead, consciously use your E.A.R.:

- EMPATHY
- ATTENTION
- RESPECT

E.A.R. Statement

- Example: "I can ***understand*** your frustration – this is a very important decision in your life. Don't worry, I will pay full ***attention*** to your concerns about this issue and any proposals you want to make. I have a lot of ***respect*** for your commitment to solving this problem, and I look forward to solving it too.

Cautions about E.A.R.

- Avoid believing or agreeing with content.
- Avoid volunteering to "fix it" for them (in an effort to calm down their emotions).
- Be honest about empathy and respect (find something you truly believe)
- Keep an arms-length relationship.
- You don't have to listen forever.
- You don't have to use words or these words.

3. Connect by Understanding their Fear-Based Logic

- Be watchful for signs that clients are feeling abandoned or insulted, by you or others. Have empathy for their pain.
- Some are preoccupied with fears of ABANDONMENT: Almost anything you do can "feel" abandoning.
- Others are preoccupied with fears of being SEEN AS INFERIOR. Almost anything can "feel" insulting or demeaning to them.

Logic (Cont'd)

- Put more energy into clarifications, to make sure you understand how they are thinking, and what they heard you say.
- **Don't argue with their logic** – try to understand it. You won't talk them out of their fears, but you can empathize with their fears.
- Find ways to reduce their fears in the process of dispute resolution. Reassure that you are not going to make assumptions or quick decisions.

4. Focus Them on Tasks

- STRUCTURE is needed. Don't expect to resolve their emotional issues. Emotional distresses dominate these clients, making it hard to think clearly, but they can switch out of these feelings with help.
- ACKNOWLEDGE intense feelings, then focus on tasks:
  - Making lists
  - Gathering information (records, etc.)
  - Writing down proposals.

5. Ask for or Make a PROPOSAL

- You can turn any complaint into a proposal.
- Focus on the future.
- When they are blaming or complaining, just ask you: "**So then, what do you propose?**"

6. Focus the Person on CHOICES or OPTIONS

- Keep the burden of resolving the issues on the client, no matter how badly they want you to resolve it for them.
- Tell them "**You have a dilemma. How do YOU want to resolve it?**"
- Then, if they can't think of options, suggest several:

"You could do discovery"

"You could informally ask to see more info"

"You could proceed with what info you have now"

7. SET LIMITS Use Indirect Confrontations

Set Personal Limits on Inappropriate Behaviour, whenever possible, because HCPs can't stop themselves, BUT,

- Avoid challenging the person or your relationship.
- Avoid attacking their defenses (resist saying how self-defeating their behavior is, how contradictory their thinking is, how inappropriate their emotions are, etc.).
- Avoid attacking your relationship with them (like telling them they are a difficult client, that you feel insulted by them, or threatening to end it if they proceed this way).

Indirect Confrontations (Cont'd)

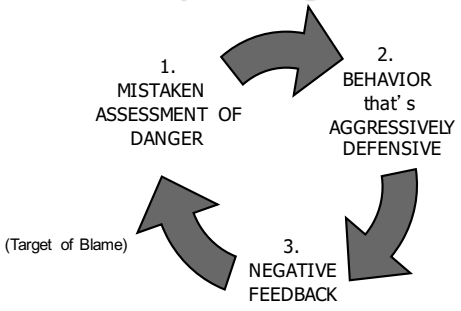
- Focus on rules and the perceptions of those external to them and external to your relationship with them, as reasons to act differently.
- "The law requires…"
- "A judge would likely see this as violating…"
- "It might appear better if you…"
- "I understand, but someone else might misunderstand that action…"
- "The Court prefers that…"

8. SET LIMITS
Predict Consequences

- HCPs do not connect realistic CONSEQUENCES to their own ACTIONS, especially fear-based actions.
- They feel like they are in a fight for survival, which blinds them to realities.
- Their life experiences may have taught them different consequences than most.
- They can be educated by a caring person.

SETTING LIMITS EXERCISE

The Cycle of High Conflict Thinking



The 3-Step Cycle

1.Mistaken Assessment of Danger
High Conflict Person feels internal distress, but it *feels* like external danger
(Being Abandoned, Treated Inferior, Ignored, Dominated, etc.)

2.Behavior that's *Aggressively* Defensive
HCP verbally, physically, legally, financially, etc., attacks the *perceived* source of danger

3.Negative Feedback
HCP gets negative feedback (most feedback *feels* negative to HCPs), which escalates HCP and feeds the cycle

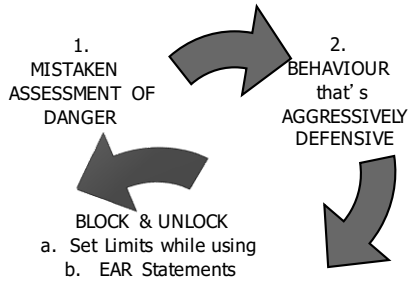
What is Negative Feedback?

•It's Personal: It's about personal qualities, like how you think (sanity, intelligence), personal values (being corrupt or immoral), yourself as a whole person (be ashamed of yourself)

•It has an negative tone: Nonverbal communication is 90% of communication. Your tone of voice can trigger intense and instant resistance to whatever you say next.

•It's focused on the past: Avoid emphasizing past behavior (but acknowledge it to extent required). Better to put emphasis on desired future behavior.

BLOCK & UNLOCK
The Cycle of High Conflict Thinking



Setting Limits Problem

In Groups of 3-4

- Review the Setting Limits Exercise.
- Add any detail to the scenario so that it makes sense to you, or create your own.
- Discuss how you might approach the situation.
- Be prepared to demonstrate your approach to the other participants.

Closing Points about HCPs

- HCPs behavior is mostly unconscious
- HCPs want relief from their constant distress
- HCPs push professional boundaries out of desperation, not out of intent to be difficult
- Direct confrontation brings resistance and escalation of blame, not insight for HCPs
- Most HCPs have problem-solving skills, which you can access if you calm their emotions
- Many HCPs can be helped

SETTING LIMITS – Skills Sheet

SETTING LIMITS:

1. Focus the person on **CHOICES** or **OPTIONS**
2. Refer to **EXTERNAL Rules** or **Limits**
3. **EDUCATE** about **CONSEQUENCES**

SETTING LIMITS with E.A.R. Statement (Examples):

Choices:	"I understand this is upsetting and I want to work with you on this. You have a dilemma – you could do A or you could do B. It is up to you."
External Limits:	"You may not realize it, but our policies do not allow us to do your request. I understand your frustration with that. We all have to follow this rule. I wish I could help you more. I have to go now."
Consequences:	"I know this is frustrating. I want to help you resolve this. You might not realize it; if you take that step the other person might misunderstand your intentions. It could escalate the situation further."

GENERAL TIPS:

1. **S**etting **L**imits is not aggressive. The goal is to redirect the HCP while calming them and remaining calm yourself.
2. **S**etting **L**imits is assertive. The goal is to calmly and clearly communicate to **block** the Behavior that's Aggressively Defensive, while avoiding giving Negative Feedback, retaliating or avoiding dealing with an HCP.
3. **S**etting **L**imits is not only about the words being said but also, acting *differently* – by staying calm, confident and firm.
4. **S**etting **L**imits is best done in a matter-of-fact manner, with Empathy, Attention and Respect (E.A.R.). With practice, using this method will help you respond productively under pressure.

High Conflict Exercises

By Michael Lomax, Lawyer/Mediator

Exercise: **Setting Limits with a High Conflict Client**

Format : Small Group Discussion

Purpose: Discuss and demonstrate the best approach for setting limits with a High Conflict Client.

Scenarios: (*Or create your own scenario***!**)

You work for an LSS community partner and you are outside of a meeting room waiting for your friend Joan/John works for your office as well. Joan/John is meeting with a client (Derek) who is requesting Legal Aid assistance on a WorkSafe BC case after having been refused representation at the Workers Advisers office. Joan/John has been trying to explain that Legal Aid cannot be provided for this situation. The client becomes very upset (yelling, swearing, personal insults). Joan/John becomes upset as well and is on the edge of tears.

Joan/John comes to you outside and asks you to help manage the meeting with the client.

How will you assist Joan/John in talking with the client:

1. Help Joan/John manage their own emotions and focus on managing the communication with the client.
2. Discuss the problem with the client by Setting Limits with E.A.R. (Empathy, Attention and Respect), including
    1. Indirectly confront the client using external policies and predicting consequences;
    2. Helping the client look at his choices
        1. Around his behaviour in the meeting
        2. With respect to his legal problem.
3. See if you can develop a plan of action with the client.

WORKING EFFECTIVELY WITH A LAWYER ON A JUDICIAL REVIEW

Presented By
Sarah Khan & Amita Vulimiri

Prepared for
Law Foundation / Legal Services Society Provincial Advocates Training Conference 2015

CLAS Community Legal Assistance Society
providing specialized legal assistance to promote social justice since 1971

BCPIAC Public Interest Advocacy Centre

SPECIAL THANKS

Big thanks to Kendra Milne & Jess Hadley for preparing the original materials for this presentation

CONTENTS

WHAT IS JUDICIAL REVIEW?

- When a judge of the court reviews the decision of a Tribunal for errors so serious that the Tribunal decision should be quashed and re-decided

- Judge can set aside the original decision and:

    a) send case back for re-hearing in front of Tribunal; or

    b) make a new decision replacing the Tribunal's original decision (less common)

A JUDICIAL REVIEW IS NOT

- An Appeal
- An opportunity to re-argue the case because you feel that the Tribunal was wrong
- An opportunity to submit new evidence

WHAT IS DEFERENCE?

- Legislature has given power to specialized Tribunals to make certain decisions

- Judges are hesitant to interfere with Tribunal decisions UNLESS the error is very serious

ERRORS:

A judge will show varying degrees of deference depending on what type of error is alleged.

FACTUAL: attracts more deference as judge wasn't there to assess credibility

LEGAL: attracts less deference – judge is as capable of interpreting the law as the Tribunal

SERIOUS UNFAIRNESS: no deference but judge will review decision & process to determine level of fairness required and whether that level was met by the Tribunal.

ERRORS NOT A BASIS FOR JUDICIAL REVIEW:

- Conflicting evidence – client believes that the Tribunal weighed the evidence incorrectly

- "He said, she said" – client believes the Tribunal believed the wrong person

- Appeal – client wants a chance to re-argue their case

- Failure to submit evidence – client failed to submit their evidence and wants the opportunity to get it in front of the decision maker.

WHAT MAKES A DECISION REVIEWABLE?

LOOK AT:

- Procedural Fairness
- Legal Findings
- Factual Findings

1. PROCEDURAL FAIRNESS

Refers to fairness in the procedure not the result

- Example: Tribunal proceeded with the hearing despite your client not having received copies of the evidence against him/her.

- Not an issue of procedural fairness: Tribunal made a decision that did not consider evidence your client failed to submit.

2. LEGAL FINDINGS

Problems with the way the law was applied or explained

Example: the Tribunal applied the wrong law or failed to apply or adequately explain a relevant legal principle.

3. FINDINGS OF FACT

Findings of fact that are *very* unreasonable and have no evidence to support them may justify a judicial review.

REMEMBER YOUR TIME LIMIT!

For most Tribunal decisions (including welfare and residential tenancy) there is a **60 day** time limit to file your judicial review **from the date of the original decision.**

For some Tribunals, **such as the Social Security Tribunal, the deadline for filing a judicial review may be 30 days.**

YOUR CLIENT'S BEST INTEREST...

- A successful judicial review generally only leads to a new hearing.

- It does not automatically "reverse" the original decision.

- If the new decision is likely to go against the client anyway, the only benefits of a JR are

a) to give your client "his/her day in court" and

b) to buy more time.

YOUR CLIENT'S BEST INTEREST...

- **Re-hearing:** Consider the likely outcome should the matter be re-heard. Will your client probably lose once the Tribunal's errors are corrected on re-hearing? Is it likely that the re-hearing could result in a more detrimental decision against your client?

- **Buying time** (if you determine that a re-hearing will not benefit your client): **REMEMBER** that filing a judicial review *doesn't automatically suspend the order(s) of the Tribunal*. This would require a separate application.

SOME THINGS TO CONSIDER...

Judicial review can be stressful & may be more trouble than it's worth

Judicial review can be empowering for the client.

However, balance this positive with the negative risk of COSTS

WORKING WITH A LAWYER ON A JUDICIAL REVIEW

It is very helpful if you can get the following:

- Clean copies: decision, orders issued by the Tribunal and all documents submitted at hearing

- Copies of documents required to waive court fees (indigent status) – income verification/ Ministry stubs, tabulation of monthly expenses, etc…

WORKING WITH A LAWYER ON A JUDICIAL REVIEW
(OUT-OF-TOWN CLIENTS)

You can help the lawyer assist the client remotely by:

- Have client attend you office to speak with the lawyer via phone
- Help prepare court documents – see CLAS website
- Arrange to have affidavits sworn by a lawyer or notary public
- Help client appear in court – "McKenzie Friend"
- Help client serve documents on parties – don't forget the Ministry of Attorney General
- Help client negotiate a settlement

COURT FORMS AND WRITTEN RESOURCES ON JUDICIAL REVIEW

CLAS WEBSITE:

http://www.clasbc.net/judicial_review_guide

WHO TO CALL?

CLAS
For assistance with RTB, EAAT, CPP, EI, Human Rights and judicial reviews
1-888-685-6222 or 604-685-3425

BC PIAC
For assistance with judicial reviews of EAAT decisions involving welfare service delivery issues or essential utilities. We also work on legal issues related to access to legal aid and systemic race discrimination.
604-687-3063

Alison Ward @ CLAS
Advice for advocates
1-888-781-2275 or 604-681-2275

Introduction to Statutory Interpretation

PRESENTED BY
Juliana Dalley, Erin Pritchard & Amita Vulimiri

CLAS & BCPIAC

Prepared for
Law Foundation / Legal Services Society Provincial Advocates
Training Conference 2015

THE GENERAL RULE

Ordinary Meaning + Context

=Driedger's Modern Rule

FINDING THE ORDINARY MEANING

Exercise 1:

Does Tanya meet the eligibility criteria for a "Person with Disabilities" under the *Employment and Assistance for Persons with Disabilities Act*?

FINDING THE ORDINARY MEANING

- Tanya was seriously injured in 2009. She has ongoing medical problems that impact her life on a daily basis, and her doctor recently told her that her condition isn't likely to improve.
- Tanya tells you that she has problems walking any distance and carrying heavy objects. Her wife has to do all the household chores and shopping because Tanya gets very tired very quickly.
- Tanya has come into your office to find out if she qualifies for PWD benefits.

FINDING THE ORDINARY MEANING

Persons with disabilities

2(1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"health professional" repealed

"prescribed professional" has the prescribed meaning;

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

CONTEXT

1. **Context specific to this provision:**
   - definitions in the legislation
   - Interpretation Act
   - other sources specific to the statute (e.g. Rules)
   - policy guides

2. **Interpretation by others**
   - court decisions
   - Secondary sources (e.g. textbooks)

MORE CONTEXT

3. **Purpose of the provision**
   - Hansard
   - public statements about meaning

4. **Wider context**
   - rest of the statute
   - related legislation (especially for regulations)
   - purpose of the statutory scheme

5. **Special methods of interpretation**
   - e.g. Benefit-conferring legislation

BREAK TIME!

GOING BEYOND THE ORDINARY MEANING: CONTEXT

- Jagdeep was living in a subsidised rental unit operated by the City Housing Foundation. The market value of his rental unit was $800, but he paid $200 after subsidy.
- In 2013, Jagdeep was late in submitting his application for subsidy. The City Housing Foundation informed him he no longer qualified for subsidy that year, and his rent would be increased to $800.
- Jagdeep challenged this as an illegal rent increase under the *Residential Tenancy Act*. The City Housing Foundation argued that it is exempt from rent increase provisions under s. 2 of the Regulations.
- The City Housing Foundation gets money from BC Housing for some of its buildings but not for Jagdeep's.

GOING BEYOND THE ORDINARY MEANING: CONTEXT

Exemptions from the Act

2 Rental units operated by the following are exempt from the requirements of sections 34 (2), 41, 42 and 43 of the Act [assignment and subletting, rent increases] if the rent of the units is related to the tenant's income:

(a) the British Columbia Housing Management Commission;

(b) the Canada Mortgage and Housing Corporation;

(c) the City of Vancouver;

(d) the City of Vancouver Public Housing Corporation;

(e) Metro Vancouver Housing Corporation;

(f) the Capital Region Housing Corporation;

(g) any housing society or non-profit municipal housing corporation that has an agreement regarding the operation of residential property with the following:

(i) the government of British Columbia;

(ii) the British Columbia Housing Management Commission;

(iii) the Canada Mortgage and Housing Corporation.

After examining the ordinary meaning, do you have questions about the meaning of this provision?

THINK ABOUT

1. **What do (a)-(h) have in common?**

   "Provisions tend to be grouped together when they deal with the same theme, share a single idea, contribute to a shared purpose, or perform the same or analogous functions"

2. **What is the purpose of the act?**
3. **Is the provision ambiguous?**
4. **What did the legislature say?**

WHAT THE COURT SAID

"… I do not find that the language can be said to be ambiguous … The rents for the petitioners' rental units were found to be related to the tenant's income, in other words subsidized. The requirement for exemption in s. 2(g) is that there be "an agreement regarding the operation of residential property". There are such agreements in place. There is no limiting specification that any such agreements relate to a specific building or rental unit. … I agree with the respondent's submission that if such a limitation had been intended the Legislature could have specified this. I recognize that the Act confers a benefit and protection to tenants and that authorities state that ambiguities in the interpretation of the Act should be resolved in favour of tenants. However, I also note that the Act is said to balance the rights of landlords and tenants, and that s. 2 of the Regulation provides to specified organizations, including the [Survivors' Housing Foundation], who provide subsidized housing, special status through an express exemption. Thus, in this specific context, I agree … [that] the DRO's interpretation of s. 2 furthers the purposes of the Act by benefitting vulnerable tenants."

HOW IMPORTANT IS CONTEXT?

Exercise 3: “Insurance benefits”

HOW IMPORTANT IS CONTEXT?

- Fran receives PWD benefits and was unfortunately injured in a car accident that wasn't her fault. She retained a personal injury lawyer who is helping her negotiate a settlement with ICBC, but they haven't yet agreed on a final amount for the settlement.
- In the meantime, Fran's doctor told ICBC that she needed physiotherapy, and ICBC gave her a series of small advance payments on her settlement to pay for the physiotherapy.
- Are these advance payments exempt income or will the Ministry claw them back from Fran's PWD cheque?

HOW IMPORTANT IS CONTEXT?

- **Employment and Assistance Regulation**
  - The definition of "unearned income" includes "insurance benefits" and "any other financial awards or compensation";
  - "a criminal injury compensation award or other award, except the amount that would cause the family unit's assets to exceed, at the time the award is received, the limit applicable under section 10 [asset limits] of this regulation" is listed as exempt unearned income under Schedule B, s. 7(1)(c).

HOW IMPORTANT IS CONTEXT?

Buried in the Online Resource section on income is this:

Financial and Other Awards:

One time awards that are not specifically defined in regulation as exempt can be considered "other awards" under Schedule B, Section 7 and exempt up to the family's asset level.

Some examples include land claim settlements, eviction compensation, criminal injury, insurance settlements and other lump sum payouts (see table below).

On going monthly financial awards are considered unearned income and must be considered when calculating eligibility for assistance.

If the payments are from a structured settlement, they are treated the same way as payments from a trust.

BREAK TIME!

THE GREAT DEBATE

Exercise 4:

Does Bill have an enforceable tenancy agreement?

THE GREAT DEBATE

- Bill arrived home after a vacation, only to find that his landlord had moved all his belongings out of his apartment and re-rented it.
- Bill tried to talk to his landlord about it, but the landlord told him that they did not have a written tenancy agreement, so there is nothing Bill can do about it.
- Bill is worried that he made a big mistake trusting the verbal agreement of his landlord. He wants to file a dispute against his landlord under the Residential Tenancy Act, but he doesn't know if he can.

THE GREAT DEBATE

Residential Tenancy Act

What this Act applies to

2 (1) Despite any other enactment but subject to section 4 [what this Act does not apply to], this Act applies to tenancy agreements, rental units and other residential property.

(2) Except as otherwise provided in this Act, this Act applies to a tenancy agreement entered into before or after the date this Act comes into force.

Hint: you may also want to looks at sections: 1, 4, 5, 6, 12, 13, and the schedule to the Residential Tenancy Regulation

THE GREAT DEBATE

DEBATE FORMAT

ROUND 1:

Opening comments from each side
(2 minutes each)

ROUND 2:

Debate
(2 minutes total)

ROUND 3:

Closing comments
(1 minute each)

NOTE: we encourage you to confer with your group between each round or to switch debaters.

THE GREAT DEBATE

Justice Funt in *Darbyshire v. Residential Tenancy Branch (Director), 2013 BCSC 1277* said this in a situation where the landlord and tenant had only an oral agreement:

> "A reading of the RTA shows that a written tenancy agreement is an essential statutory requirement. The DRO failed to find that there was not a written tenancy agreement. The DRO's underlying finding of law that there was an enforceable tenancy agreement, despite the RTA's unambiguous requirement for a written tenancy agreement was patently unreasonable. The DRO's decision is not "defensible".

THE GREAT DEBATE

On the other hand, **Justice Affleck**, in *Johnson v. Patry, 2014 BCSC 540*, distinguished Darbyshire as follows:

> "It is important to recognize three considerations in the reasons of Funt J. which are inconsistent with the conclusion that to be enforceable a tenancy agreement must be written. The first consideration which leads me to conclude that Darbyshire does not decide an agreement pursuant to the Residential Tenancy Act must be in writing to be enforceable is that Funt J. not only set aside the DRO's decision, he also ordered the Residential Tenancy Branch to conduct a new hearing "in order to reconsider and determine the matter". If Funt J. had determined there was no written agreement, thereby depriving the DRO of jurisdiction, it would have been futile to send the matter back for reconsideration. I do not accept Funt J. intended that futility. The second basis for concluding Funt J. could not have intended to decide a written agreement is mandatory to obtain an enforceable tenancy agreement is the definition of a "tenancy agreement" in the Residential Tenancy Act which reads:
>
> > "tenancy agreement" means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit".

QUESTIONS?

Introduction to Statutory Interpretation

Presented by
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Original materials by Kendra Milne and Devyn Cousineau

OVERVIEW

This session will go over the basics of interpreting legislation. Specifically, we will go over how to identify the possible meanings of statutory provisions; find materials to base your interpretation on; and persuasively argue that the decision-maker should adopt the one most favourable to your client. You should be able to use these methods regardless of the statute you are working with.

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THE BASICS OF LEGISLATION

What is legislation?

"Legislation" generally refers to laws (or "statutes") enacted by Parliament or the provincial Legislature. A statute will often set out the general framework of a legislative scheme and may allow for regulations to be passed that will set out the details of the scheme. Regulations are enacted by the executive branch of government (i.e. cabinet) and are subordinate to statutes. In other words, a regulation must comply with its enabling statute. Although they are not passed by Parliament or the Legislature, regulations still have the force of law and decision makers must apply them. On the other hand, policies and guidelines are not legislation and are generally not binding on decision makers.

How to find relevant legislation:

(1) Start with a secondary source, if available

In some areas of law, you may already know what legislation you need to look at. If you don't know, a good place to start is a secondary source, such as a text book, annotated statute, policy guide or other resource that compiles and summarizes information about the area of law you are dealing with. These resources often have a subject index that you can use to find the section in the resource that will tell you what legislation, and which sections of it, to look at. Examples include: the annotated *Residential Tenancy Act*, the Ministry of Social Development Online Resource, etc.

Some secondary sources, such as annotated statutes, will summarize information about the statutory provisions. This can be very helpful. However, you always need to go through the following steps and look at the actual wording of the legislation yourself.

(2) Look at the text of the statute or regulation

Once you know which statutory provisions might be relevant to your client's legal issue, find them. You can usually use one of the consolidated statute sites (CanLII, BC Laws, etc.) or the website of the government body or tribunal that administers the legislation (so the Residential Tenancy Branch site for tenancy legislation, or the Ministry of Social Development site for income assistance legislation, etc.). Once you find the text of the statute or regulation, make sure to check the following:

a. Is the provision the most up-to-date version?

Legislation changes on a regular basis. In particular, regulations can change very quickly and with no notice. Make sure to check that you are looking at an up-to-date version of the statute or regulation. If you are looking at an online version, there will generally be a note at

the top of the document setting out “regulation is current to…” or “includes amendments up to…”. Check that date, and if it’s not current, you may need to make sure there is not a more recent version of the legislation.

b. Is the provision in force?

Once you find the legislation, check to make sure it is in force. Sometimes statutes can be passed in the legislature, but not actually be in force, for years.

c. Is there any companion legislation?

If you are looking at a statute, are there any regulations? If you are looking at regulations, do you also have the statute it was enacted under? You need the whole picture to start interpreting. Don’t forget key pieces of the puzzle.

d. Do you have a version that is formatted correctly?

Finally, while it may seem obvious, make sure you have a version of the legislation that is properly formatted. Indenting and punctuation are very important when interpreting legislation and it is possible to make serious errors because of silly formatting issues.

HOW TO INTERPRET LEGISLATION

Once you have identified the relevant legislation, the next step is to interpret it.

Statutory provisions can be often interpreted in more than one way and you can usually argue that an interpretation that helps your client is the one that a decision maker should adopt. Unless a superior court has expressly determined that the provisions cannot be interpreted in a given way, your job will generally be to consider what the plain meaning of the language could be and what meaning the “context” of the provisions supports.

The General Rule

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.*

This general rule 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. When using this approach, you will look at the following general questions every time you are interpreting a statutory provision:

(1) What interpretations are supported by the actual text of the provision;
(2) What interpretations are supported by the context of the provision;

THE ORDINARY MEANING(S) OF THE TEXT

The first step is to find the "ordinary meaning" of the text of the provision. The ordinary meaning is the understanding that a reader would have on first impression when reading through the words in their immediate context.

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 will be hard to persuade a decision maker to adopt it).

At this point, you do not look at dictionary definitions or external sources. Instead, you are simply looking for the meaning(s) that a regular person with basic language comprehension would find when reading the provisions.

Because some language can be ambiguous, there may be more than one reasonable interpretation 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 provision fits into the larger picture. That is the next step.

THE CONTEXT OF THE PROVISION

Once you've determined what interpretation(s) the text of the provision can support, you need to think about the context of the provision.

The context is everything outside the ordinary language of the provision. In other words, it is external information that helps you determine what the language means. The context can include: other parts of the statute and/or regulation, decisions of superior courts or other administrative decision makers, policies and guidelines issued by the body that administers the legislative scheme, commentary from secondary sources, etc. Generally, these fall into the following categories:

1) Context specific to the provision
2) Interpretation by others
3) The purpose of the provision
4) The wider context
5) Special methods of interpretation

The context can help you understand the language of the provisions and/or argue for a specific interpretation that is helpful to your client. However, not all contextual factors will be equally persuasive. You need to evaluate the factors that you found and decide which should be given more weight.

(1) Context specific to the provision

You can use external aids to interpret the specific language of the provision you are interpreting. At this step, you are still focused on the text of the provision, but you are now looking outside the section of the statute to determine what it means. In other words, you are looking for external aids to help you understand what that specific text means. Here are some examples:

1) Definitions in legislation: the first place to look is the definition section of the statute. Many statutes have defined terms, either at the beginning of the statute or at the beginning of the section you are dealing with.

   Look at the statute you are dealing with to see if there is a defined terms section and, if so, if any of the terms in your provision are there. If you find them, those definitions will generally be binding and you will not be able to suggest that different meanings should be adopted.

2) *Interpretation Act*: the next place you can look for an explanation of the specific terms of your provision is the *Interpretation Act*. There are provincial and federal interpretation acts that set out some definitions for common terms and also some general rules about some statutory interpretation issues. Specifically, it may be helpful with the calculation of time, defining some generic terms, and determining which version of a statute applies to your client's case.

   For example, see s. 8 of the BC *Interpretation Act*, which reads "[e]very enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

   Also see s. 29, which provides definitions for a variety of terms used in provincial legislation.

   These sections are binding in the sense that they are valid law enacted by the legislature, although the provisions about how to interpret statutes will rarely be the one source of context that will win a case because they apply to every statute and every decision applying a statute.

3) Other sources specific to the statute: are there any rules of practice and procedure for the decision maker that offer insight into what the provision means? Some decision makers, like the Residential Tenancy Branch, offer definitions of a handful of procedural terms in its rules of practice and procedure. In most situations, the rules of procedure for a tribunal may not be binding, but they may be very, very persuasive.

4) Policy guides: many government branches provide policy guides designed to assist in understanding the statutes and regulations that the branch administers. These are generally non-binding (which means that the decision maker is not bound to follow

them), but often give an idea of what the legislature was aiming for. Be careful when using the guides – don't necessarily restrict yourself to what they say the provision means, and make sure they reflect the current version of the statute and case law.

Some relevant examples:

Residential Tenancy Branch Policy Guides, which can be found here:
http://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/tools-and-resources/policy-guidelines

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 Rehabilitation Services and Claims Manuals, are binding on WCB and WCAT decision makers)

5) Dictionary: if you cannot find a term in the definitions section 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.

(2) Interpretations by others

It is also important to know how others have interpreted the provision. Even more importantly, you want to know how important that other interpretation is – in 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, that will obviously 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 (BC Supreme Court for provincial decision makers) or an administrative decision maker that binds the decision maker you are dealing with. That being said, most tribunals' decisions are not binding on each other – each tribunal panel or decision maker gets to make its own decision in each specific case. To determine whether a former decision is binding, look at the statute governing the decision maker you are dealing with.

Even if a former tribunal decision is not binding on your current decision maker, if the decision supports your client's interpretation of the provision, it may help you to persuade your decision maker to adopt it as well.

Previous court decisions can be found on CanLII: http://www.canlii.org/. If you access the legislation through CanLII, you can often click on the blue section number and any court cases referencing that section will come up.

Previous tribunal decisions, if publicly available, can usually be found on the webpage of the tribunal you are dealing with.

2) Secondary sources: your statutory provision may also be addressed in a secondary source, like a textbook or annotated statute. Again, it is helpful to look through these to see if the materials support your interpretation because, if so, you can use them to persuade your decision maker to adopt your interpretation. Secondary sources are not binding, but if they are authored by a recognized expert in the area, they may be very persuasive.

   If you don't have secondary sources at your office, try looking at the BC Courthouse library website to see if the local branch has relevant textbooks or annotated statutes: http://www.courthouselibrary.ca/

The key to using others' interpretations is to decide how much weight, or importance, you can give the interpretation. Remember that, if a decision maker has made a binding decision interpreting the provision a certain way, it may carry the day.

(3) The intention or the purpose of the provision

When trying to determine what a statutory provision means, an obvious solution is to ask the person who wrote it what she actually meant. Although we cannot speak to the individual drafters of our legislation, we do have tools to look at what the legislature, or the body that enacted the provision, intended it to mean.

There are generally three places to look for evidence about what the legislative body intended the provision to mean:

1) Legislative debates (Hansard): when enacting a statute, the legislature often debates the content of the statute, and sometimes sends the statute to committee so that each provision can be separately debated and examined. You can read transcripts of these debates on Hansard. 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 be given a certain meaning?

   BC's legislative debates can be found at: http://www.leg.bc.ca/hansard/

Canada's parliamentary debates can be found at: http://www.parl.gc.ca/

2) Other public statements about the meaning or intent of the provision: there may be other evidence out there about the enactor's intent in enacting the provision you are interpretation. This might include press releases or consultation materials.

While not binding, these sources can provide evidence about what the body that enacted the provision intended for it to mean. Remember, though, that this evidence must be read with the ordinary meaning of the provisions as well as the rest of their context.

(4) The wider context: how does your provision fit in?

Finally, you can look at the wider context of the provision, or where and how it fits into the larger picture. At this stage, you are looking beyond the text of the provision. Understanding how the provision you are looking at fits into the wider picture can inform what the provision means.

1) The rest of the statute: make sure that you understand where your provision fits in the rest of the statutory regime. Look carefully at the index and headings of the legislation to see of any of the other sections might be helpful. Or, look to see if other sections can provide you with more information about what the provision was designed to do.

2) Related legislation: if your provision is part of a larger legislative scheme 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: another 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 that the regime is trying to achieve.

   To find the broader purpose of the regime, you can look at past decisions, the preamble of the statute (if there is one) or legislative debates on the regime more generally. (You may have come across more general information in your hunt for evidence of the intention or purpose of the specific provision you are interpreting.)

Again, these tools are not about the specific language of your provision. Instead, they 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.

(5) Specialized methods of interpretation:

Some specific types of statutes have specialized methods of interpretation that you can use.

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. The BC Supreme Court made note of this principle in *Hudson v. British Columbia*, 2009 BCSC 1461 (see para. 35 for a list of other cases confirming this principle).

A specialized method of interpretation usually will not carry the day – you still have to make sure the text of the provision supports the interpretation you are putting forward. But, it may help to persuade the decision maker to adopt an interpretation that is helpful for your client.

PUTTING IT ALL TOGETHER

In summary, your goals when interpreting a legislative provision are, first, to determine what interpretations the ordinary meaning of the text of the provision can support, and second, to find external evidence of the context of the provision that supports the interpretation you want to put forward.

When applying this method to a particular case, you can:

(1) Determine the plain language meaning of the provision and identify any aspects that are unclear or ambiguous.
(2) Find other tools or context to help resolve the ambiguity.
(3) Decide how much to rely on the contextual interpretation tools you found. (Are they binding? Are they only persuasive?)
(4) Determine whether any of the tools support an interpretation that will help your client's case.

PREPARING YOUR CASE

ESSENTIAL CHECKLIST FOR ADVOCATES

PTC 2015

Presented by Kendra Milne
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(based on materials created while at CLAS)

This checklist will take you through some key steps in handling a client file that is headed to a hearing. We hope it will give you some helpful ideas to handle these files with skill and confidence!

Contents

Original materials by Jess Hadley.

Initial assessment of your case

Always do this assessment before committing to represent a client

At some point after you have spoken with the client and developed an understanding of what she would like you to help with, it's very important to consider these points before you commit to take on her case.

Go over these questions <u>with the client</u>:

☐ What, exactly, does the client want to achieve? Why has she come to see you?

☐ Is the client's goal realistic? What specific results can realistically be expected?

☐ If your client has a specific plan in mind (e.g. take her landlord to the RTB, challenge a reconsideration decision at EAAT), is that specific plan likely to be helpful to the client? Is it possible that plan will put the client in a worse position?

☐ Are there other options that you and the client should explore as well or instead? (e.g. negotiation, doing nothing, a different legal option, re-applying, etc.)

And go over these questions <u>in your own mind</u>:

☐ Do you have the skills and experience necessary to do a proper job of this case? Should you get some support and mentorship from a supervising lawyer or senior advocate, and if so is that person available?

☐ How much time will it take to assist this client? Given your overall workload, do you have enough time to do the work necessary?

☐ If there is a hearing or a deadline coming up, can you get ready in time?

☐ If the client is set to go to hearing, does she have at least some chance of succeeding in the hearing?

☐ Have you gone over all the options with your client and has she given you clear instructions to proceed?

Only commit to doing a hearing when you're satisfied there is a good reason to do so.

File management

Steps to take as soon as you're ready to commit to the hearing

After you have gone over all the above steps and you're ready to commit to assisting the client, always make sure to ask yourself these file management questions.

- ☐ Does your office have a system for checking for conflicts of interest? If so, have you checked for conflicts?
- ☐ Have you clearly communicated to the client exactly what you can and cannot do for her? (e.g. Who will file the notice of appeal? When? Who will gather the evidence for the case?)
- ☐ Have you completed an opening letter for the client?
    - O Does it confirm exactly what assistance you can provide, and what assistance you cannot provide?
    - O Does it set out any ground rules for your or your program's continued assistance?
    - O Does it explain confidentiality, including any applicable exceptions?
- ☐ Do you need any consent forms signed by the client? (e.g. to act for the client at a tribunal, or to gather any evidence you might need for the case)
- ☐ Do you have reliable contact information for the client? If not, have you thought about how you will communicate?
- ☐ Do you need the client to provide any additional documents? When?
- ☐ Have you opened a file or do you have another means to organize the correspondence and documents for the file?
- ☐ Are there any deadlines you are aware of at this stage? Have you put them in a reliable calendar system?

The rest of this handout is geared toward cases that are going to hearing. But keep in mind, not all clients will benefit from going to hearing! It's your job as an advocate to help the client to make a good decision about what approach to take.

Getting started

Do this soon after you have taken on the case,
but before you do any other work on the file

☐ **Identify your objective and write it down.**

What, specifically, are you hoping to achieve for your client in this hearing?

☐ **Make sure you have all the relevant documents.**

Get your client to give you *all* the relevant documents. (Re-assess whether you need the client to sign any additional releases.)

If it's an appeal hearing of any kind, it's essential that you get a copy of the decision being appealed, as well as all the documents that were submitted to or relied on by the lower level decision-maker.

☐ **Think about the nature of the tribunal.**

How are hearings done at this tribunal? Formal or informal? In person, by phone, or in writing? What are the rules governing procedure at this tribunal? If the rules are published, review them. Pay particular attention to timelines.

You can usually get this information from the tribunal's website.

☐ **Take the time to identify any deadlines you will need to meet.** Carefully note these deadlines, as well as the time and date of the hearing, in a reliable calendar system.

☐ **Locate the law that applies.**

What statutes and regulations will you rely on? Is there any policy or case law relevant to your case? Read these materials carefully and find the specific parts you will rely on.

Think about the interpretation of the statutes and regulations. Are there any statutory interpretation issues you need to sort out?

If in doubt, ask your supervising lawyer or a senior advocate, to make sure you are finding everything and focusing on the right stuff.

Develop a case plan

We strongly suggest you put in the time at the outset to come up with a good case plan that identifies the following elements.

☐ **1: Key legal principles or legal arguments.**

- Think carefully about the legislation, policy and any case law that might apply.
- Take your time to figure out what the legal issues are and to break them down into their elements. It can take some effort.
- If in doubt, talk it over with a more senior advocate or supervising lawyer. It's very helpful to get this stuff straight as early as possible.

☐ **2: Key factual points that need to be proven.**

- Looking at each element of the legal test that applies in your case, what factual points need to be proven in order for your client to have a shot at winning?

☐ **3: What evidence you will rely on to prove each of these points.**

- Evidence can be contained in all kinds of documents (such as pictures, letters, emails, contracts, receipts, etc.)
- Evidence can be in the form of a witness' testimony. If a witness cannot attend the hearing, he/she can write a signed and dated statement, or swear an affidavit if it's a really key point.
- Consider: what would be the simplest and most convincing way to prove each point? It is usually best to keep it as simple as possible.

  ***NOTE**: It's very helpful if you can create a table lining up the factual points that need to be proven in one column, and the evidence to prove those points in the other column. (see next page)*

☐ **4: Theory of the case**

- Come up with a brief (1-3 bullet point) statement summarizing how you will argue the case. Every case can be boiled down into a simple "This case is about…" statement.

Note: the number of facts that you need to prove will vary with each legal issue

Legal Requirement #1	
Fact to Prove	**How you will prove it**
Legal Requirement #2	
Fact to Prove	**How you will prove it**
Legal Requirement #3	
Fact to Prove	**How you will prove it**

Evidence-gathering

☐ Decide what documents you need for evidence by looking at your "How will you prove it" column in your case plan. If you have them already, great. If not, get them!

You might be able to get some documents yourself. Others you may have to get from the client or a third party.

Keep these documents organized in a sensible way. We recommend an evidence folder *separate from the rest of the file.*

☐ Decide what witnesses you might need by looking at your "How will you prove it" column in your case plan. Talk to them right away.

Make sure each prospective witness' evidence is actually going to be helpful to your client. If so, make sure they can attend the hearing.

Keep a list of witness names and phone numbers in your evidence folder.

☐ Think about both sides of the case – what witnesses and documents do you think the other side will use? Does that change what evidence you might want to rely on?

Once you have gathered your evidence, it needs to be organized and sent in to the decision-maker (and to the other side if required at this specific tribunal) in advance of the hearing and within the tribunal's timelines.

It is okay to send in additional evidence later if you need to, but keep in mind if it's sent in after the deadline it might not be accepted.

Before sending the evidence, think about the following tips for submitting documentary evidence

Some tips about documentary evidence

Remember that everything you put before a decision-maker is an opportunity to advocate for your client and get the decision-maker on your side. Think about how to submit your documentary evidence in the most persuasive and helpful way possible.

- ☐ This might be obvious, but when you send in your documentary evidence, it makes a huge difference if you can **organize the documents in a helpful way** (chronologically, conceptually, or some combination of the two).

- ☐ It's also very helpful if you can **number the pages** so that everyone can refer to it easily.

- ☐ Ideally, try to create **a list of your documents,** like a table of contents, and include the list when you send your documents in to the tribunal. This is especially helpful if the case is complex. There is an example list of documents at the back of this checklist.

- ☐ If the evidence deadlines allow, you can send your **written submissions** to the decision-maker along with your documentary evidence, in a neat package. This makes life much easier for the decision-maker. (More on written submissions later.)

- ☐ Remember that your job is to **make it easy for the decision-maker to find in your client's favour**, so think about how you can accomplish that.

    - o Do you have time to put all the documentary evidence, the list of documents, and your submissions into a neat binder?

    - o If you are faxing in your evidence, can you make the cover page as clear, professional and helpful as possible?

    - o Is there anything else you can do to make the evidence easy to navigate?

Preparing to present your case

☐ **Prepare a list of direct examination questions for each of your witnesses.** If you don't have time to do a full list of questions, at least write out the key points you want to get across, in chronological order.

Some people prefer to write just a list of points to cover; others like to write out the whole question. Either way the questions you ask should be short and simple.

Start with 2 or 3 questions that guide the witness to introduce herself and explain her relationship to the case. *These can be <u>leading</u> questions as long as the subject-matter is not contentious in the case. (Leading questions suggest an answer, e.g. "Your tenancy started on September 1, 2010, right?")*

Then, move on to questions that lead the witness through her testimony in an orderly way. *These <u>cannot</u> be leading questions. The goal is to stay out of the witness' way as much as possible so that your witness is telling her story. Some tribunals won't even want you to ask questions and will just want to hear from the witness.*

In direct examination it can help to start with descriptive questions that "set the scene", and then move on to questions about sequences of events.

☐ **Make a plan for how you will draw the tribunal's attention to all the important documentary evidence.** Will the documents be discussed during the witnesses' testimony? If possible, it is a good idea to bring them in that way, rather than just referring to them in your argument. Have a plan for bringing each important document to the tribunal's attention.

☐ **Prepare each of your witnesses for direct examination.**

- Go over the time and place of the hearing, and how the witness will attend.
- Describe the tribunal and how it operates.
- Explain what exclusion of a witness is (some witnesses may have to stay out of the hearing until they have given their evidence so they don't hear other witnesses).
- Explain the duty to tell the truth, and how you will guide the witness to get her evidence out, but you will not be telling her what to say.
- Tell the witness how to address the decision-maker. It's usually appropriate to address him/her by surname (e.g. Mr. Wong or Ms. Smith).

- Go over the "4 S's" – 4 basic principles for direct examination:

    1) Simple questions; simple answers.
    2) Slow answers: allow time for the decision maker to absorb information.
    3) Specific answers: do not generalize.
    4) Systematic testimony: let the advocate guide the way.

- Go over the 3 or 4 key points you need the witness to get across.

☐ **If possible, practice the direct examination with your witness (especially if it's an important witness).**

☐ **Prepare your witnesses for cross-examination by the other side.**

Explain that the other side might ask questions to try and (A) get evidence that hurts your client's case; and/or (B) attack your witness' 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>

Brainstorm leading (narrow!) questions, such as:

- "You didn't ever respond to the tenant's request, did you?"
- "In a 3 year tenancy, this tenant has always paid his rent on time, right?"
- "There have been problems with bedbugs in several units in this building, haven't there?"

Preparing yourself for hearing

☐ Remind yourself of the rules and tone of this tribunal and make sure you have everything you might need during the hearing.

☐ Ask yourself whether there are any procedural requests you need to make prior to the hearing or at the hearing itself.

☐ We suggest you prepare a **hearing binder** containing your notes for the hearing. You can re-use the same binder for different hearings. Helpful things for the binder to contain:

(A) Your written argument if you have one;

(B) Your list of documents;

(C) Your plan for leading your witnesses through their evidence (direct examination);

(D) Your plan for cross-examining witnesses on the other side, if any; and

(E) Any other materials you may want to refer to.

☐ If you do not have a written argument, we suggest you prepare the following items to put in the hearing binder. This will really help with getting ready for the hearing.

(A) Your opening statement including your statement of what, exactly, you are asking the tribunal to do. (Remember your theory of the case and your "This case is about..." statement.)

(B) A summary of the key facts, organized chronologically. *Stick to the relevant facts and don't get bogged down in excessive detail.* Have a plan for referring to the documents as you go through the facts. Sometimes a table is helpful with the fact on one side and the relevant document on the other.

(C) A statement of the applicable law. Again, stick to the key points and don't get bogged down.

(D) A statement of your legal arguments about the case.

It is essential to spend some time, in each individual case, thinking about exactly how you will present your client's case. There is no "one size fits all" formula. The best way to get ready is to become completely familiar with the evidence, the law, your client's theory of the case, and exactly what you are asking for.

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ACCESS DENIED: SHUT OUT OF BC'S WELFARE SYSTEM

Complaint to the Ombudsperson of British Columbia regarding service delivery at the Ministry of Social Development and Social Innovation

Filed by the

B.C. Public Interest Advocacy Centre (BCPIAC)

to the Ombudsperson of British Columbia

on behalf of

Together Against Poverty Society (Victoria)

Atira Women's Resource Society (Vancouver)

First United Church (Vancouver)

The Kettle Society (Vancouver)

Disability Alliance BC

Abbotsford Community Services (Abbotsford)

The Advocacy Centre (Nelson)

Upper Skeena Counselling and Legal Assistance Society (Hazelton)

Dze L K'ant Friendship Centre (Smithers)

May 12, 2015

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ACCESS DENIED: SHUT OUT OF BC'S WELFARE SYSTEM

Complaint to the Ombudsperson of British Columbia regarding service delivery at the Ministry of Social Development and Social Innovation

OVERVIEW OF THE COMPLAINT

Individuals receiving income assistance have very little money. Many live in unstable housing and some are homeless. This means that many do not own a phone, and many that do own phones use "pay as you go" plans that run out quickly. Most income assistance recipients do not own a computer and many are not computer literate. For those that do have a computer, few can afford internet access.

Over the last five years, the Ministry of Social Development and Social Innovation ("Ministry" or "MSDSI") has made radical changes to the way it delivers its services. Income assistance services are now delivered primarily through a centralized phone line and over the internet. Wait times on the centralized phone line are long, and when callers finally get through, the Ministry places limits on the length of the call. The initial application for income assistance is confusing, lengthy and must be done online, with no dedicated Ministry services available to assist applicants with its completion. While local Ministry offices still exist, in-person, face to face services have been dramatically reduced. Fourteen Ministry offices have been closed completely since 2005, and in September 2014, 11 more offices across the province reduced their hours to only three hours per day, making it impossible for many in communities in the North and Interior regions to be able to speak to Ministry staff in person. Unsurprisingly, these offices often have long lineups.

At the heart of this complaint is the incongruence between the changes to the Ministry's service delivery and the lives of the people that the system is purportedly designed to serve. This complaint sets out how the current administrative design of income assistance services creates serious barriers for the most vulnerable people in the province to access essential funding for their basic needs.

BC Public Interest Advocacy Centre (BCPIAC), a public interest law office, is representing the following nine non-profit advocacy and social service agencies in this

systemic complaint to the BC Ombudsperson (the "Complainant Organizations" described at Appendix F):

- Together Against Poverty Society (Victoria)
- Atira Women's Resource Society (Vancouver)
- First United Church (Vancouver)
- The Kettle Society (Vancouver)
- Disability Alliance BC
- Abbotsford Community Services (Abbotsford)
- The Advocacy Centre (Nelson)
- Upper Skeena Counselling and Legal Assistance Society (Hazelton)
- Dze L K'ant Friendship Centre (Smithers)

Collectively the Complainant Organizations provide services each year to thousands of low-income people who rely on income assistance and disability benefits as an income source of last resort pursuant to the *Employment and Assistance Act,* [SBC 2002] c. 40, and the *Employment and Assistance for Persons with Disabilities Act*, [SBC 2002] c. 41, and the respective regulations. The Complainant Organizations serve some of the most vulnerable people in our communities. Many people who access services through these organizations have disabilities, mental illnesses, speak English as a secondary language, have limited education, have dependent children, and cannot afford computers and telephones.

The Complainant Organizations serve individuals in all five of the Ministry's service regions: Region 1 - Vancouver Island (Together Against Poverty Society), Region 2 - Vancouver Coastal (Atira Women's Resources Society, First United Church & The Kettle Society), Region 3 - Fraser (Abbotsford Community Services), Region 4 - Interior (The Advocacy Centre), and Region 5 - North (Upper Skeena Counselling and Legal Assistance Society & Dze L K'ant Friendship Centre). Members of the Complainant Organizations have repeatedly raised service delivery issues with Ministry representatives at the local, regional and provincial levels.

The nature of issues raised in the complaint requires systemic review. Individual remedies will not address the serious barriers to access that all Ministry clients currently face. An individual who has not been able to reach Ministry staff because of the wait times on the phone line may see the issue resolved if the Ombudsperson intervenes and has Ministry staff contact that person. Someone who has been turned away from a Ministry office and referred to the phone line, but feels uncomfortable discussing an issue on the phone, would likely be given an opportunity to speak to Ministry staff in person if the Ombudsperson intervened. A person who is unable to complete the online application and is told that the Ministry does not assist with it would likely get such assistance if the Ombudsperson intervened. Such resolutions may assist the particular

individual with respect to the particular interaction, albeit after some delay, but leave behind the many Ministry clients that never make a formal complaint but are still subject to the same service delivery model.

This complaint sets out how these examples of service delivery failures are not isolated outlier events, but rather are to be expected given the centralized technology on which the Ministry relies. The Ministry's changes in service delivery are fundamentally flawed in that they disregard the circumstances of the very people who are attempting to access Ministry services. The unfairness described in this complaint is the very type of unfairness that the Ombudsperson is required to report on following an investigation. The Complainant Organizations are asking the Ombudsperson to investigate and report on the barriers to accessing Ministry services set out in this complaint, and to provide recommendations to address the gap between service delivery design and the needs of the users of the income assistance system.

LINE UPS, WAITING ON HOLD, AND GIVING UP

Scott's Story – Complaint filed with the Ombudsperson Office on May 11, 2015

May 5, 2015

My name is Scott Simpson. I want to make a complaint to the Ombudsperson about my inability to access services at the Ministry of Social Development and Social Innovation. I live just outside of Nelson. I have been trying for approximately one year to get the answers to questions I have with my disability assistance. For example, I wanted to find out if my trailer pad rental was being included in my shelter costs and if there were any other supplements available through the Ministry to help me. I have not been able to speak face to face with a Ministry staff person to get the answers I need to these issues.

I am physically disabled and use a scooter. I am not able to sit, walk, or even stand for a long period of time. It is extremely uncomfortable for me to even sit for 10 minutes. I have to rest in a lying position when I am at home. When I have managed to get to the office to speak to someone in person about my questions, there has always been a line up. The local Nelson office is only open from 1PM to 4PM. As soon as I see the line up, I leave as I know that there is no way I will be able to wait.

Approximately three months ago, I did, as I routinely do, go to check the line up at the Nelson Ministry office. On this occasion there was only one person in front of me. I still had to wait approximately 10 minutes before I could speak to a staff person. I was not able to speak very long with the staff person as I had to get to another appointment. I did, however, explain to the staff person the difficulty I was having in accessing services at the Ministry and asked to file a complaint. The worker did feel bad for me, and also said how frustrated Ministry workers were with all the changes that have happened and how it's affected everyone (them included), and their resulting inability to help everyone anymore. The worker suggested that I contact the Advocacy Centre in Nelson for assistance. I had not heard of the Advocacy Centre before. After that conversation I did contact the Advocacy Centre and heard back from Amy Taylor. Amy has been assisting me in getting some of my questions answered.

The staff person assured me that a supervisor would be contacting me in the next few days in order to sort out my difficulties in accessing Ministry services. I never received this call

I mentioned the same problem a second time on April 9th when I went into the Nelson Ministry office to drop off some paperwork for reimbursement for medical travel. I chose that day, as I had continued to check in to the office to see if there was ever less of a line-up. On April 9, over 10 people were waiting, and as usual, there was only one staff member assisting the people in line. I couldn't wait, so I tried to get the attention of the other staff person in the back corner of the office. When she came over, I told her I was only dropping off paperwork for medical travel reimbursement. I also asked her to mention that I was still waiting for a phone call from a supervisor that I had been promised weeks earlier. The worker was reluctant to accept my paperwork, and told me that she would make a note, but unless I waited in line, she couldn't guarantee anything would get done.

I have in the past tried to use the Ministry's phone line. I found it very frustrating. I had to wait on hold for a long period of time and then the person on the line could not answer my question or would tell me to either go online to find my answers or go to my local ministry office (and we know how impossible that is now). I found the online system very difficult to understand. I have not been able to access services in that way. Going into a Ministry office in person is the only way I can access its services.

I still have not received a call from a Supervisor, nor have I received reimbursement for my Medical Travel, which used to happen within a week.

I am happy that I found the services of an advocate at the Advocacy Centre but do not think I should have to rely on her in order to get the answers to my basic questions answered.

Thank you for listening.

Scott Simpson

WAITING AND WAITING…AND TURNED AWAY ***Shiraz's Story****

April 30, 2015

My name is Shiraz. I am a woman who receives disability assistance. I live in the Downtown Eastside. I have mental health issues.I heard about the complaint being filed with the Ombudsperson about service delivery at the Ministry of Social Development and Social Innovation. I wanted to provide some of my experience for the complaint. I did not want my name identified as I know this will be a public complaint and do not want to suffer any personal consequences for making this statement.

The local Ministry offices that serve my area are the Kiwassa and Dockside offices. I often find it very difficult to get answers to my questions from the Ministry of Social Development and Social Innovation. It is really hard to get in to speak to someone face to face. The office is now only open from 9AM to 10AM and then 1PM to 2PM for drop-in appointments. There is usually a line up to speak to someone. Sometimes when I have managed to get to the front of the line and speak to someone, I have been told that I need to check online or that I should call the general call centre.

I don't call the call centre on my own anymore. I find it too frustrating. I have done it in the past and have had to wait a very long time and then don't feel like I can explain what I need or that the person on the other end has the information that I need. Now if I need something, I often wait to get an appointment with the advocate at Atira Women's Resource Society who then will call the Ministry with me. It can take some time to get an appointment with the advocate.

There are some things I don't even bother asking for even though I know that I should be given certain subsidies. For example, I know I could apply for the clothing allowance but the whole process is so burdensome and difficult, that I would rather not even try and go without instead.

*** The name of the complainant has been changed in order to keep their identity anonymous**

A. BACKGROUND TO THE COMPLAINT

1. Income Assistance Recipients

In thinking about the administration of income assistance services, it is critical to consider the circumstances of the users of those services. The Complainant Organizations, which collectively work with thousands of individuals on income assistance and disability assistance each year, describe their clients' circumstances in the following way:

- Many do not own a phone
- Many that do own a phone rely on "pay as you go" phone plans that frequently run out of minutes
- Most do not own a computer
- Those that do own a computer cannot afford internet service
- Many are not computer literate
- Most live in unstable housing
- Some are homeless
- Many do not have a high school education
- Many or most have physical and/or mental disabilities
- Many have suffered from abuse and/or trauma

The provincial government frames income assistance and disability assistance as "programs of last resort."[1] To be eligible for income assistance or disability assistance, one must have exhausted all other potential income sources and may only have very limited assets. A single person with no dependents who receives regular income assistance from the Ministry relies on a monthly income of $610, or $906 if that person receives disability benefits. The amount allocated for shelter costs (including utilities) for both is $375/month.[2]

2. System Design Changes at the Ministry

Over the last number of years there has been a shift in how the Ministry delivers services to people receiving income assistance and disability assistance. This shift has been variously referred to in Ministry publications and presentations as the "Ministry's channel strategy," "virtually delivered services," and "a standardized technologically-enabled approach."

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[1] http://www.newsroom.gov.bc.ca/ministries/social-development-and-social-innovation/factsheets/factsheet-bcs-family-maintenance-program-and-income-assistance.html

[2] http://www.gov.bc.ca/meia/online_resource/verification_and_eligibility/payassist/policy.html.

(a) Features of the New Service Delivery Strategy

We have identified several key features of the Ministry's new service delivery strategy: a centralized intake system through the online Self Serve Assessment and Application and an online portal for recipients (called "My Self Serve"), a centralized queue for telephone services, and a reduction in the availability of in-person services. These changes have been introduced alongside the implementation of the Ministry's new data system, the Integrated Case Management system ("ICM"). To provide some context for the complaint, we describe each of these features below, beginning with the ICM.

i. Integrated Case Management (ICM)

A significant part of the new service delivery strategy and "integrat[ion] with other ministries" has been through the implementation of the $182 million[3] ICM system. The ICM is a data system used in partnership by MSDSI, the Ministry of Children and Family Development ("MCFD"), and the Ministry of Technology, Innovation and Citizens' Services ("MTICS"). Implementation of the ICM began in November 2010, and involved four phases, the last of which was completed in November 2014.[4]

The new software has significantly altered how Ministry staff make eligibility decisions, and how they save and locate client documents. In 2014, the BC Government and Service Employees' Union ("BCGEU"), the union representing front-line workers at both MSDSI and MCFD, undertook a survey with its members about the conditions of their work, resulting in a report entitled *Choose Children: A Case for Reinvesting Child, Youth, and Family Services in British Columbia*.[5] (the "*Choose Children* report"). In the *Choose Children* report, the ICM system came up frequently as a source of workers' frustration. More specifically, Ministry workers reported that the ICM is causing inefficiency and increased workload, lost or incorrect/incomplete information, frequent errors, and system crashes.[6] Intake workers also specifically identified "negative service

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[3] Auditor General of BC, *Integrated Case Management System,* March, 2015, online: http://www.bcauditor.com/sites/default/files/publications/2015/Other/report/OAGBC%20Integrated%20Case%20Mgmt%20System_FINAL.pdf at p. 24. Note that $182 million was the budgeted capital funding; MSDSI has deemed the ICM projected completed on time and on budget, however, only one third of the "inflexible, antiquated, fragmented and costly to maintain" legacy systems that were initially slated for replacement were actually replaced (*Ibid* at 24-24).

[4] http://www.integratedcasemanagement.gov.bc.ca/documents/icm-project-timelines.pdf.

[5] BC Government and Service Employees' Union, *Choose Children: A Case for Reinvesting Child, Youth, and Family Services in British Columbia* ("*Choose Children*"), November 2014, online: http://choosechildren.ca/Choose-Children.pdf.

[6] *Ibid at* p. 16.

impacts for clients" resulting from ICM system implementation.[7] The ICM system was also roundly criticized by the Auditor General in a March, 2015 report.[8]

ii. Centralized Intake and the "My Self Serve" Online Portal

An applicant for income assistance or disability assistance must complete the Self Serve Assessment and Application (the "SSAA" or "initial intake application"). This first step of the application is primarily, if not exclusively, done online. It is only available in English, and asks applicants for detailed information about their income, assets, and employment history.

"My Self Serve" is the name of the Ministry's online portal, and is a fairly new service through which the Ministry is increasingly offering its services online. My Self Serve allows users to review their assistance file online (including monthly reports and annualized earning exemption limits), submit monthly report stubs, and upload documents to submit to the Ministry. Clients must have access to a scanner to be able to upload documents to My Self Serve. While this service is still in development and is currently presented as an option, we expect that the Ministry will increasingly be pushing its clients to register for and use this service in the coming months.

iii. Centralized Queue for Telephone Services

The Ministry refers to its "enhanced telephone services" as "telephony". Practically, "enhanced telephone services" translates to increased automation of services, and centralizing the phone queue through use of provincial contact centres rather than having telephone contacts in the same region as the caller. All phone inquiries now go to the Automated Telephone Inquiry phone line ("ATI phone line"). The Ministry is ultimately moving toward a provincial intake process with a single queue.

iv. Reduction of Availability of Face to Face Services

Finally, the Ministry has significantly reduced its in-person services. Fourteen Ministry offices have been closed completely since 2005, and in September 2014, 11 more offices across the province reduced their face to face service hours from eight hours per day to just three hours per day (i.e. 1:00PM to 4:00PM).[9] In addition, at least two

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[7] *Ibid* at p.17

[8] Auditor General of BC, *Integrated Case Management System,* March 2015, online: http://www.bcauditor.com/sites/default/files/publications/2015/Other/report/OAGBC%20Integrated%20Case%20Mgmt%20System_FINAL.pdf

[9] Email from Terri Archer (MSDSI) to Erin Pritchard, dated March 31, 2015 ("Terri Archer Email") (Appendix A, p.7-9). The Terri Archer Email also notes an additional office closure at 1725 Robson Street in Vancouver; however, we understand that this office is actually still open.

Ministry offices in Vancouver have limited drop-in service hours to only two hours per day.[10]

(b) Goals of the Service Delivery Model

The Ministry has repeatedly articulated the underlying goal of the "channel strategy" as a way to *increase* client access to services. According to the 2012/13 BC Budget, the goals of the new service delivery model are "to broaden client access through multiple channels; maximize efficiency; integrate with other ministries and government priorities; and, ensure continuous service improvement."[11] Although the service delivery project and "channel strategy" feature heavily in the Ministry's annual service plans and annual reports, these reports make no mention of the concurrent changes to face to face service delivery—changes which include: i) the reduction of service hours for face to face services, and ii) Ministry workers' active refusal to offer in-person services to clients, instead referring clients to online or telephone services.

This complaint is not about the availability of increased *options* for modes of service. The underlying basis of this complaint is that alongside the move to online services and centralized telephone services, the Ministry has dismantled its personalized face to face services. If the new modes of service co-existed with other *accessible* forms of service, their introduction would not result in the barriers outlined in this complaint.

3. BCPIAC's 2005 Complaint

BCPIAC made a comprehensive complaint to the Ombudsperson in 2005 on behalf of several organizations concerning administrative fairness issues at the Ministry (then Ministry of Human Resources) (the "2005 Complaint"). The 2005 Complaint addressed procedural fairness issues related to the following:

(a) Lack of legal representation for poverty law issues;
(b) Three week waiting period;
(c) Persons with Persistent Multiple Barriers designation;
(d) Ministry home visits;
(e) Medical and other documentation;
(f) Reconsiderations, appeals and administrative reviews; and
(g) Ministry office structures and practices

The issues raised in the 2005 Complaint were unified in being related to Ministry procedures that unfairly or unreasonably limited access to those in need of Ministry

[10] Appendix B, Affidavit of Amber Prince (the "Prince Affidavit") at para. 5.

[11] http://www.bcbudget.gov.bc.ca/Annual_Reports/2012_2013/pdf/ministry/msd.pdf

assistance. The Ombudsperson agreed to investigate all but two of the issues raised in the 2005 Complaint: namely, lack of legal representation for poverty law issues, and discrimination in Ministry practices.

The investigation led to a thorough report by the Ombudsperson in 2009 entitled *Last Resort: Improving Fairness and Accountability in British Columbia's Income Assistance Program*[12] (the "*Last Resort* report") which made a number of important findings and 25 recommendations.[13] The Ministry accepted all but one of those recommendations, and committed to implementing them.

The Ministry has made several positive changes as a result of the Ombudsperson investigation into the 2005 Complaint. For example, *inter alia,* Ministry workers no longer conduct home visits for the purpose of verifying the information provided by benefit recipients, Ministry workers have the legal authority to waive the two-year independence requirement in certain circumstances, and the Ministry has introduced exemptions to work search requirements. Meanwhile, progress on some other recommendations has not been made. For example, the Ministry is still failing to provide consistent and timely access to eligibility interviews for applicants who have an urgent need for assistance.

This complaint deals with new issues not raised in the 2005 complaint. The Ministry's new service delivery model was not yet implemented at the time of the 2005 Complaint, and was therefore not addressed in the *Last Resort* report and the Ombudsperson's subsequent monitoring of the Ministry.

Nevertheless, a central theme throughout the Ombudsperson findings in the *Last Resort* report was accessibility of the services. Unfortunately, as set out in the complaint below, the Ministry has failed in its implementation of new technologies to ensure that its services are accessible to the people who use them, many of whom are extremely vulnerable and marginalized. The massive changes in the Ministry's technology since 2009 have resulted in new institutional barriers. The Complainant Organizations, several of whom participated in the 2005 Complaint, submit that in the Ministry's implementation of new technologies, it has not carried forward the heightened awareness of fairness and access issues it gained from the Ombudsperson's *Last*

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[12] https://www.bcombudsperson.ca/images/resources/reports/Public_Reports/Public_Report_No_45.pdf

[13] In 2006 the Ombudsperson issued an initial report on some aspects of BCPIAC's 2005 Complaint, and it was at this early stage that MSDSI made some changes. See: *Ombudsman Investigation of the Public Interest Advocacy Centre's Complaints about the Ministry of Employment and Income Assistance* (Special Report No. 28 to the Legislative Assembly of British Columbia), March 2006, online: https://www.bcombudsperson.ca/images/resources/reports/Special_Reports/Special%20Report%20No%20-%2028.pdf.

Resort report, and as such, a renewed review of the accessibility of its services is required.

B. BARRIERS TO ACCESS

1. The Automated Telephone Inquiry (ATI) Phone Line

The ATI phone line is the Ministry's toll-free telephone service. Ministry staff at provincial contact centres answer calls from 8:00am until 4:00pm. Like a typical call centre, calls are not connected to a local office and callers cannot opt to speak with a particular staff person. It is very unlikely that a caller will be connected with the same staff person if they need to call the ATI phone line again.

Complainant Organizations uniformly had stories of clients who were turned away from local offices and were told that they instead had to call the ATI phone line with their questions. (Danielle) Didi Dufresne, legal advocate and Director of the Legal Advocacy Program at First United Church, describes this problem in her affidavit:

> Another difficulty that I face regularly in my work as an advocate is with the increasing reliance on the Automated Telephone Inquiry line ("ATI phone line") by the Ministry. The Ministry office in the Downtown Eastside has limited in person services. Some clients who do go to the Ministry for in person services have reported that they are told that they have to call the ATI phone line instead.[14]

The standard practice now, even for time-sensitive issues like crisis supplements and immediate needs assessments, is to call the ATI phone line. Office closures, reduced in-person service hours at local offices, and Ministry workers' refusal to answer questions face to face in local offices mean that the ATI phone line has become the primary way that income assistance and disability assistance recipients can obtain information from Ministry staff.

In BCGEU's *Choose Children* report referenced above, front-line Ministry workers raised the ATI phone line as a significant problem in their work. Workers' concerns with the ATI phone line related to their inability to properly serve clients; their frustration mirrors the issues raised here by Complainant Organizations. BCGEU grouped front-

[14] Appendix B, Affidavit of Danielle Dufresne (the "Dufresne Affidavit") at para. 7.

line Ministry workers' complaints about the ATI phone line into the following categories[15]:

- Callers cannot get through;
- Clients unable to understand the phone system; menus are unclear;
- Due to frustration with the phone system, clients often go directly to nearest office angry and hostile;
- Poor and inadequate [worker] training;
- Extreme call backlogs necessitating so-called "sweepers";[16]
- Incorrect information frequently provided to clients;
- Decreased morale; robotic and undignified mode of work;
- Often results in duplicative service requests; and
- Frequent information discrepancies between call centres and offices

The Complainant Organizations raise a number of similar concerns with the accessibility of the ATI phone line, as set out below:

- Lack of access to reliable phone service;
- Complicated "phone tree" on ATI phone line;
- Lengthy wait times and frequent disconnections on the phone line;
- Clients' discomfort or difficulty with dealing with complex issues over the phone;
- Limited scope of action that Ministry call centre staff can take during a call; and
- Time limits on the length of call.

(a) Access to reliable phone service

Many clients who receive income assistance or disability assistance do not have a phone. Others have cell phones with "pay as you go" plans that frequently run out of minutes. In the North region in particular, there are some areas where cell reception is poor, making it even more challenging to contact the Ministry through the ATI phone line.

Due to the lack of access to reliable phone service, income assistance recipients may have to contact the Ministry using a friend's phone or a phone at a community agency. A number of advocates spoke about the challenges clients face in having to rely on

[15] Appendix C, BCGEU MSDSI (Component 6) Members Survey – BCGEU Choose Children report, November 6, 2014, p.4.

[16] Staff at Ministry call centres are apparently required to 'sweep' calls during high call volumes; during this period, staff are pressured to complete call in two minutes, and must then end the call regardless of whether the caller's issues is resolved. This is discussed in detail in the "Call time limit" section below.

phones at community agencies. For example, Stephen Portman, Interim Executive Director of Together Against Poverty Society stated the following:

> Many of our clients do not have a phone. Unless a client has an appointment with an advocate, there is only one courtesy phone in TAPS' waiting room available for client use. The courtesy phone is located in our waiting room, meaning that clients using this phone must sit on hold in a busy and public environment, and have no privacy when discussing very personal matters with Ministry workers. TAPS' advocates have extremely high caseloads, so the availability of advocates for walk-in appointments is very limited.[17]

Similarly, Amber Prince, an advocate with Atira Women's Resource Society describes the issue as follows:

> Some of my clients do not have a phone. In order to deal with an issue with MSDSI they have to go to another social agency office to use their phone to call MSDSI. Sometimes they have to wait to use this phone. This practically means that they cannot use the "call back" option and have to wait on hold. Sometimes they have hang up before they have gotten through to a staff person at MSDSI because someone else needs the phone at the agency, or because they have other appointments to attend. For other clients that have a phone, they are often on pay-as-you-go cellphones, making waiting on hold very costly for them.[18]

Given the circumstances of income assistance recipients, requiring that they primarily contact the Ministry via the ATI phone line presents an access barrier from the outset. This is further exacerbated by the way the phone line is set up and managed.

(b) ATI phone line navigation

The ATI phone line is daunting to many clients from the first point of contact, in part because of the complicated phone tree a caller must navigate before being connected with a live person.

The automated greeting and initial options on the ATI phone line are provided in English only. At the first stage clients are asked to press "1" if they are receiving Ministry services and have an 8 digit Person ID (PID) number and a 3 digit Personal Identification Number (PIN) or a Social Insurance Number; they are asked to press "2" if they are receiving Ministry services and do not have a number, or for all other inquiries.

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[17] Appendix B, Affidavit of Stephen Portman (the "Portman Affidavit") at para. 9.

[18] Appendix B, Prince Affidavit at para. 7.

Once an option is selected, the client is given an approximate wait time and is given the option to enter their phone number to be called back by a Ministry staff person.

Advocates who work with clients with cognitive disabilities and/or mental illness note that the setup of the automated phone service is particularly difficult for their clients to navigate:

> Before clients even get to the point of being on hold, they first must navigate the automated list of options on the ATI Line (i.e. the "phone tree"). Clients with serious mental illness are often unable to concentrate or focus to be able to do this. Many clients will simply abandon their call once they encounter difficulty. [19]

Other advocates said that clients who do not speak English fluently also find it challenging to access the phone service.[20]

(c) Wait times and disconnections on the ATI phone line

The length of wait times on the ATI phone line has long been a concern, but the problem has been steadily worsening. Data from the Ministry evinces a significant increase in wait times from 2012 to 2014, with wait times in December 2014 averaging 34 minutes[21]:

[19] Appendix B, Affidavit of Kris Sutherland (the "Sutherland Affidavit") at para. 7.

[20] Consultation meetings with community agencies serving English as a second language clients, January 27, 2015 and February 4, 2015.

[21] Data is taken from the response to a request BCPIAC made to the Ministry under the *Freedom of Information and Protection of Privacy Act* regarding wait times and call time limits on the ATI phone line (the "FOI Response"). The Ministry's complete FOI Response to BCPIAC's request can be found at Appendix A, p. 3.

Average Speed of Answer (ASA)

	2012	2013	2014
Jan		0:04:34	0:08:48
Feb		0:06:14	0:11:19
Mar		0:07:43	0:11:13
Apr	0:13:24	0:07:07	0:10:16
May	0:11:15	0:08:14	0:14:36
June	0:09:00	0:09:23	0:16:17
July	0:08:01	0:10:26	0:22:49
Aug	0:06:49	0:09:58	0:23:28
Sep	0:07:21	0:09:15	0:21:35
Oct	0:04:59	0:06:14	0:20:09
Nov	0:05:09	0:07:59	0:33:16
Dec	0:04:12	0:08:28	0:34:01

Client and advocates consistently experience wait times well over those set out in the table above, and often report waiting over an hour on the ATI phone line to speak to a worker.[22]

Given that Ministry services are now primarily delivered through its ATI phone line, the wait time is unsurprisingly a great concern for the Complainant Organizations and the clients with whom they work. A number of advocates described the frustration they and their clients feel due to having to regularly wait on hold for long periods to speak to a Ministry staff person about critical issues:

> TAPS' advocates regularly wait with clients on hold on the ATI phone line to speak to a Ministry worker to resolve clients' issues and concerns. It is normal for advocates to wait on the ATI phone line from between 20-45 minutes. Two weeks ago, one of our advocates waited with a client in excess of an hour on the ATI before they were able to speak to a staff person at MSDSI.[23]
>
> …
>
> The wait times on the Automated Telephone Line ("ATI phone line") are often long. I call the ATI phone line on an almost daily basis and I cannot remember the last time where I did not have to wait at least 20 minutes on hold. I do not find that the call back option is an effective solution. I often have clients scheduled back to back; I cannot deal with private client

[22] Appendix B, Dufresne Affidavit at para. 8; Portman Affidavit at para. 7; Sutherland Affidavit at para. 5.

[23] Appendix B, Portman Affidavit at para. 7.

> information while another client is with me in my office. When I have used the call back option, I often miss the call back and then have to call back again and wait all over again.[24]

Some advocates talked about the impact the wait times have on their ability to assist their clients. For example, one advocate said:

> The wait times on the ATI phone line make it extremely challenging for me to do my work for clients. I advocate on behalf of a large number of clients. I become very stressed when I have to spend an entire day assisting a single client navigate the online application process and ATI phone line. I become doubly stressed when, after an entire day of my time, I do not feel like anything has been accomplished.[25]

Similarly, a review of posts to private email lists for community advocates hosted by PovNet[26] reveals a palpable level of frustration, and excessive wait times on the ATI phone line are frequently discussed.[27]

Even after a lengthy wait on the ATI phone line, a number of advocates from Complainant Organizations state that calls are sometimes disconnected or dropped without the client or advocate ever speaking to a Ministry staff person. [28]

Amber Prince, an advocate at Atira Women's Resource Society, an agency serving women who have experienced violence living in and around the Downtown Eastside, describes the particular impact wait times and dropped calls have on some of the women with whom she works:

> It is very difficult for many of my clients to wait on hold. Some are single mothers who are looking after their small children full-time. Others have medical appointments and training programs they must attend. I have heard from clients that if you call before lunch your call can be dropped or the time you are quoted as having to wait goes up; others have said if you call even

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[24] Appendix B, Affidavit of Angela Sketchley (the "Sketchley Affidavit") at para. 6

[25] Appendix B, Affidavit of David Dickinson (the "Dickinson Affidavit") at para. 10.

[26] PovNet is organization that provides online tools that facilitate communication, community and access to information around poverty-related issues in British Columbia and Canada. In addition to the large number of email lists it hosts, PovNet offers online courses to anti-poverty advocates, and provides news, information and resources on its website. For more information, see www.povenet.org.

[27] See Appendix D.

[28] Appendix B, Portman Affidavit at para. 8; Sutherland Affidavit at para. 5. See also: CBC News, "Wait times at BC Social Assistance Phone Line Triple," online: http://www.cbc.ca/news/canada/british-columbia/wait-times-at-b-c-s-social-assistance-phone-line-triple-1.2962767

> 45 minutes before the end of the day, that your call will be abandoned at the end of the day, without ever having spoken to anyone. I have personally called the ATI phone lines before the office closes, been put on hold for at least ten minutes, and then had my call simply disconnected. There is no way for a client, or advocate on their behalf, to leave a message on the ATI phone line.[29]

As referenced above, the Ministry now offers a "call back option" on the ATI phone line whereby callers can register to leave a number on the automated system, and a Ministry worker will return calls in order of contact. It is a useful option for some clients, but obviously does not work for the many clients that cannot afford a phone and are relying on pay phones and courtesy phones in community agencies.[30] Moreover, the call back option requires that clients and advocates remain near the same phone for a lengthy period of time; if the Ministry's call is missed, the caller must start from the beginning and call the ATI phone line again.

(d) Discomfort or difficulty with describing issue over the phone

Another concern with the Ministry's reliance on the ATI phone line as the primary mode of service delivery is the discomfort some clients have with describing their issues over the phone. A number of advocates from Complainant Organizations described clients who are uncomfortable calling the ATI phone line on their own and felt unable to clearly communicate their concerns over the phone. For example, one advocate said the following:

> Many of my clients have described to me the difficulty they have explaining their issue over the phone once they do get through to speak to someone at MSDSI. Many have physical and/or mental disabilities making it challenging in a variety of ways to be able to communicate their issues over the phone.[31]

Likewise, an advocate at the Kettle Society, an organization that provides support and services to people with mental illnesses, describes the difficulty some of his clients have in communicating over the phone:

> Often our clients (and advocates) need to contact the Ministry to deal with complex issues concerning reporting requirements and monthly deductions – some of my clients tell me is very difficult for them to understand what is happening with their benefits without any visual aids (e.g. where the Ministry

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[29] Appendix B, Prince Affidavit at para. 8.

[30] Appendix B, Portman Affidavit at para. 9; Prince Affidavit at para. 7; Sutherland Affidavit at para. 6.

[31] Appendix B, Prince Affidavit at para. 6.

worker can write things down for the client or show them the computer screen).[32]

(e) Lack of decision-making authority

Advocates and clients consistently note that even once a caller is able to get through to a Ministry worker on the ATI phone line, the worker is frequently not authorized to deal with the caller's request, and instead can only make a service request for some type of follow-up action. Advocates from the Complainant Organizations starkly juxtapose this with the situation a few years ago where advocates could attend a Ministry office in person and have an issue resolved on the spot.[33] This lack of decision-making authority for Ministry workers on the ATI phone line adds further delays.[34] As one advocate explains:

> I used to find it much easier to access support for my clients when we were able to call a local office or attend a local office in person for assistance. There are delays in accessing basic services like crisis supplement requests. Sometimes it is very stressful when I am dealing with a client who is in an emergency and there is no way for me to access Ministry services for her. I often find that the person I speak to on the ATI phone line needs to make a service request for someone else to get back to me.[35]

(f) Call time limits

Another common complaint is that Ministry workers can only stay on a call for a prescribed amount of time. The Ministry has said that the Contact Centre does not have limits on call duration, but that supervisors will be notified if a call exceeds 10 minutes.[36] We understand that after 10 or 11 minutes, a red "call termination" light will start flashing or that, in some cases, some type of notification or warning will flash on the computer monitor.[37]

Our concern with this approach is that Ministry workers may want to stay within such time limits to avoid repercussions from their supervisor for having lengthier calls — whether or not the allocated time is adequate to the meet the caller's needs.

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[32] Appendix B, Sutherland Affidavit at para. 17.

[33] Appendix B, Prince Affidavit at para 5; Affidavit of Amy Taylor (the "Taylor Affidavit") at para. 10.

[34] Appendix B, Sketchley Affidavit at para. 7; Taylor Affidavit at para. 10.

[35] Appendix B, Taylor Affidavit at para. 10.

[36] Appendix A, p.4-6.

[37] BCPIAC conversation with representatives from BCGEU Component 6.

Advocates from Complainant Organizations report that Ministry workers are telling advocates and clients that there is, in fact, a call time limit on the phone line, and that workers often end calls before clients' issues are resolved:

> After a certain amount of time, even if the issue has not been resolved, Ministry workers often tell TAPS advocates or clients that they have to end the call, and that someone will call the client/advocate back. It is not consistent whether the call is returned on the same day or whether it is the same worker.[38]
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> …
>
> I often feel even after we have waited some time to get through to a staff person on the ATI phone line that we are being pushed to finish the call. On one occasion I was told by the staff person that the call needed to end as it had reached the 12 minute mark. It was particularly frustrating for myself and the client as the entire 12 minutes had been spent trying to locate the client information and we had not yet even begun talking about the issue that precipitated the call. The staff person insisted that we had to get off the phone and that she would register a call back. The call back came but I was not available to take the call. It ended up taking several days before I was able to speak to a staff member about the issue the client was facing.[39]

A specified target time limit for calls (whether it is 11 minutes or any other set time) is arbitrary and unfair. A "one size fits all" time target does not correspond with the amount of time it takes to resolve the myriad issues for which clients may contact the Ministry. Many issues are complex and likely impossible to resolve in the short amount of time allotted. For example, the following types of issues generally require more time: requests relating to dental services, medical services, crisis supplements, and moving supplements; issues concerning income reporting; matters relating to BC Hydro; and intake issues including immediate needs assessments.

In the likely event that the call is cut off before the issue is resolved, the client is then required to wait for a call back (if offered) that will not necessarily be on the same day, or call back into the ATI phone line and (a) wait on hold again, and (b) speak to a different staff person.[40] For clients with mental health challenges and/or cognitive

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[38] Appendix B, Portman Affidavit at para. 13.

[39] Appendix B, Sketchley Affidavit at para. 8.

[40] Appendix B, Portman Affidavit at para. 15.

disabilities, it can be particularly challenging to articulate concerns within such a short span of time.

In the BCGEU's *Choose Children* report, front-line workers identified call time limits as an issue, saying that they were being "directed to manage high volumes of work by reducing the amount of time they spend with clients."[41] One Employment Assistance Worker describes how on high volume call days, workers are only allowed two minutes to complete the call:

> Phone agents are required to 'sweep' calls when we experience high call volumes. We are allowed two minutes to complete the call, which means we have to be abrupt and sometimes almost rude to get the caller off the phone so we can meet the 'standard.' By the end of the day of 'sweeping', I feel soul sick. There is just no way to maintain my humanity and still meet the 'sweeping' expectation.[42]

One step that the Ministry has taken in an apparent attempt to resolve some of the time limit issues on the ATI phone line is a three month pilot project called the "Provincial Contact Centre Advocate Pilot." The project started on March 9, 2015 and aims to manage advocate telephone queries that involve requests regarding multiple clients. This project is restricted to multi-client requests and therefore only applicable to service providers calling on behalf of multiple clients.

Under this pilot project, when an advocate calls into the ATI phone line with multi-client requests, the staff person will create a service request, and will then forward it to the Advocate Pilot Team; someone from the Advocate Pilot Team will then call the worker back (if possible, within 24 hours). This project, while addressing a concern of some advocates at least temporarily, does not address the problem of wait times and disconnections on the ATI phone line itself, nor does it address the call time limit problem for clients who are calling about their own complex issues. In some ways, it creates a two-tiered service whereby income assistance and disability assistance recipients who do not have an advocate calling on their behalf will have limited time to speak to Ministry staff, while those with advocates can have access to a special "Advocate Pilot Team" who are able to take longer on the phone.

2. The Online Application

The initial application process for income assistance and disability assistance begins with the completion of the Self Serve Assessment and Application ("initial intake

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[41] *Choose Children, supra* note 5 at p.6.

[42] *Choose Children, supra* note 5 at p. 6.

application" or "SSAA").[43] The initial intake application is lengthy, with over 90 screens[44] for an applicant to complete in order to receive a preliminary determination on their financial eligibility. The Ministry's own website estimates that completion of the form will take between 30 to 90 minutes. The application asks applicants for detailed information about their income, assets, citizenship and immigration, and employment history. Specific questions include: whether the applicant has been homeless in the past 12 months, a description of current living arrangements, a description of any financial help the applicant receives with expenses, whether the applicant is currently looking for work (and if not, why not), and a description of all sources of income, any potential sources of income, bank accounts, and assets the applicant disposed of in the last two years.

The initial intake application is only available in English. Applicants must answer every question before they are able to click through to the next screen. In other words, the form cannot be submitted partially completed. There is no option on the form to request assistance with its completion. There are no specific questions relating to assistance an applicant may require for completion of this stage or the next stages of the eligibility assessment, such as whether an interpreter is needed or whether the applicant has a disability that could affect their ability to communicate with the Ministry.[45]

The Ministry website indicates that applicants can apply for income assistance or disability assistance by completing the Self Serve Assessment and Application tool online. It also indicates that applicants with questions about applying can call the ATI phone line or visit a local office. The Complainant Organizations' understanding is that the initial intake application must be completed online and that applicants who call or go into a local office for assistance with the initial intake application are turned away and asked to complete it online.

Requiring completion of a lengthy and complex online form as the first step to apply for income assistance creates a number of barriers to access. First, many of those applying for assistance do not own or have regular access to a computer, and those with a computer will not generally have internet access. This means that those applicants will have to use a computer in a public place (such as a library, community agency, or kiosk

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[43] https://www.iaselfserve.gov.bc.ca/HomePage.aspx.

[44] Based on the online version of the SSAA.

[45] As of April 27, 2015, the Ministry has modified the application process so that once the online application is complete, the same Ministry worker will be tasked with assisting the client through both of the additional subsequent stages of the application process. We view this is an important improvement over the current process, where one Ministry worker does the Stage 1 interview, and a second worker does the final Stage 2 interview. The new system means that, at least for the application process, the client only has to tell their story once.

in a Ministry office) or borrow a friend or family member's computer.[46] Some public computers, such as those at public libraries, have limits on the length of time people can use them; further, we have heard that applicants using computers in public libraries regularly ask library staff for assistance with the application. The application process is time-consuming. Requiring it be done online may mean lengthy delays for some people who do not have regular access to a computer. Further, some applicants are uncomfortable dealing with matters as deeply personal and private as applying for income assistance on public computers—and in certain cases, that discomfort is directly related to (and exacerbated by) the applicant's disability.[47]

Computer literacy is a further barrier to access related to the online initial intake application. Many people applying for income or disability assistance are not computer savvy, making it challenging for them to complete the lengthy application online on their own. The experience of the Complainant Organizations is that the Ministry does not provide consistent and accessible assistance with the initial intake application. In addition, none of the Complainant Organizations understand that the Ministry offers alternative means for filing the initial intake application other than the online form. Advocate Didi Dufresne states the following in her affidavit:

> I understand the Ministry's position is that there are no Ministry workers available to assist clients with the online application. On a few occasions, I have written a letter to the Ministry on behalf of a client asking them to provide assistance for the client to be able to complete the online application as the client was not computer literate. I was able to follow up with one of the clients for whom I had written such a letter and learned that a security guard at the office was asked to help the client complete the online form.[48]

Kris Sutherland, Manager of Advocacy Services at the Kettle Society, describes this issue as well:

> The majority of our clients are not computer savvy and many are not even computer literate. In my work I have seen that the move toward the increasing use of online services has had detrimental impacts on clients who are older, have mental health challenges or cognitive disabilities, or are too poor to afford a computer and don't want to use public computers to work on such personal matters. This is particularly problematic with the initial income

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[46] Appendix B, Sutherland Affidavit at para. 16; Taylor Affidavit at paras. 3 & 5.

[47] Appendix B, Sutherland Affidavit at para. 16.

[48] Appendix B, Dufresne Affidavit at para. 6.

> assistance application, as it must be done online, and normally takes approximately 40 minutes to complete even with an advocate's help.[49]

David Dickinson, an advocate working in the North region echoes the same complaint about inaccessibility of the online application:

> The online application is also very difficult for my clients to navigate. I am astounded by the level of sophistication required to complete these applications. I feel that the online application system seems to be designed for wealthy people who own significant assets. About 90 per cent of the online application process is irrelevant to my clients.[50]

Angela Sketchley, an advocate at Dze L K'ant Friendship Centre describes a recent interaction with a client who could not do the online application on her own:

> Recently an older client was turned away from the Ministry office and sent to our office for assistance when she told a staff person that she could not fill in the online application. When we complained to the Ministry about this issue, a supervisor got back to us explaining that they didn't have staff people available to assist on site and it would have to be arranged and might take a few days.[51]

Ministry staff are aware of the difficulties applicants have with the application, and, as a matter of practice, refer people to community agencies for assistance. Referring applicants to community agencies for assistance with the online form is an inappropriate transfer of Ministry responsibility onto those agencies. Assisting clients with the application is extremely time consuming, and is a large burden on small, already overextended agencies—further, in some cases, the agencies to which clients are referred are not even resourced to offer such assistance.[52] Amy Taylor, a legal advocate at the Advocacy Centre in Nelson explains the position her agency has taken in the face of increasing Ministry referrals for computer assistance:

> Many of [my clients] do not have access to a computer. The Advocacy Centre decided that we would not provide access to computers to our clients to complete the Ministry's online forms principally because we view this as a further downloading of work from the Ministry onto community agencies. I feel that this puts me in a difficult position as an advocate as I meet clients

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[49] Appendix B, Sutherland Affidavit at para. 16

[50] Appendix B, Dickinson Affidavit at para. 11.

[51] Appendix B, Sketchley Affidavit at para. 9.

[52] Appendix B, Dufresne Affidavit at para. 6; Taylor Affidavit at para. 5.

who have not been able to complete the online forms or have experienced delays in completing their forms because they do not have access to a computer.

Finally, as noted above, the online application itself is available in English only. During consultation meetings, service providers who regularly work with people who do not speak English fluently informed us that they assist applicants with the online initial intake application form as they needed to translate the questions to the applicants. It was the understanding of these service providers that the Ministry's interpretation service is not available to those completing the initial intake application.[53]

3. Reduction of in person services

Concurrent with the enhancement of the telephone service and the development of the My Self Serve online portal, the Ministry has drastically reduced the availability of face to face time with individual Ministry workers. Many offices have closed, and there has been a significant reduction of service hours for offices across the province.

Since 2005, the following 14 offices have closed[54]:

- 610 St. John's Street in Port Moody (2005)
- 5021 Kingsway in Burnaby (2006)
- 33 3rd Avenue in Burns Lake (2006)
- 1023 Davie Street in Vancouver (2006)
- 2100 Lableux Road in Nanaimo (2006)
- 7388 Vedder in Sardis (2007)
- 504 Cottonwood Avenue in Coquitlam (2009)
- 7953 Scott Road in Delta (2010)
- 828 West 8th Avenue in Vancouver (2013)[55]
- 2484 Renfrew St, in Vancouver (2013)
- 60 Needham St, in Nanaimo (2013)
- 475 E. Broadway in Vancouver ("China Creek") (2014)[56]
- 2280 Kingsway in Vancouver ("Killarney") (2014)

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[53] Consultation meetings with community agencies serving English as a second language clients, January 27, 2015 and February 4, 2015

[54] Terri Archer Email, *supra* note 9.

[55] This office did not technically close but stopped providing face to face services to income assistance and disability assistance recipients; these recipients were transferred based on postal code to the China Creek, Mountainview, and Killarney offices. The Killarney and China Creek offices both closed the following year, with these clients then all being transferred to the Moutainview location.

[56] These clients were transferred to the Mountainview location.

- 10095 Whalley Blvd in Surrey (2014)

The Ministry has also reduced the number of hours that many offices in the province are open to assist clients face to face:[57]

- As of May 2011, the Ministry office in Hope went from being open five days a week to two days a week[58]
- In September 2014, the following 11 Ministry offices in the North and the Interior reduced office hours to only three hours a day from 1pm to 4pm Monday to Friday:[59]
    - Nelson
    - 100 Mile House
    - West Kelowna
    - Oliver
    - Prince Rupert
    - Smithers
    - Trail
    - Grand Forks
    - Merritt
    - Dawson Creek
    - Fort St John
- The Kiwassa and Dockside Ministry offices in the Downtown Eastside have limited their drop-in hours to two hours per day from 9am-10am and 1pm-2pm
- The Grandview office in Vancouver has restricted when it will provide certain services to income assistance and disability assistance recipients. Photocopies of identification documents, issuing of recreation passes, confirmation of assistance, administering of cheques, and processing of release of information forms can only be done between 9am and 11am.

Conversely, over the same time period, the Balmoral Outreach Office in Nanaimo was the only Ministry office offering in-person services that opened. The Ministry also opened a Contact Centre in Surrey in October 2014[60]; however, the Contact Centre provides no in-person services, and was created to service the ATI phone line.

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[57] This list is not exhaustive. There may be other service restrictions at other Ministry offices.

[58] During the week in which cheques are issued the Ministry office in Hope is also open on Wednesdays.

[59] These offices are also open from 9:00am to 12:00pm on cheque issue weeks on Wednesday and Thursday.

[60] Terri Archer Email, *supra* note 9.

As set out earlier, advocates report that Ministry staff actively discourage clients from attending Ministry offices in person, and instead direct them to use the ATI phone line.[61] This is particularly problematic for those clients that do not have an advocate.

Being turned away and told to call the ATI phone line is a problem for those who actually are able to make it into an office during its limited designated open hours and speak to a Ministry staff person. For some, it is challenging even being able to get to an office during the times which it is open, and where there is not a long line-up. Office closures and the reductions in office hours limit the availability of face to face Ministry services, which leads to line-ups at many offices. Advocates in the North, Interior and Vancouver's Downtown Eastside reported that there are regularly line-ups at their local offices.

The limited hours at the Ministry office in Hope and at those in the North and Interior pose particular barriers to service access, as those offices serve wide geographic regions, and some clients must travel quite far to make it in to the nearest office. For example, the Ministry office in Hope covers a vast area including Yale, Spuzzum and Boston Bar; the clients in this area have no access to public transit, and the next closest offices are in Chilliwack or Merritt, which are approximately 53km and 120km from Hope, respectively.

David Dickinson describes the difficulty his clients, who reside in and around Hazelton, face in getting to the nearest local Ministry office:

> There is no Ministry office in Hazelton. The closest Ministry office is in Smithers which is approximately an hour car ride away. The bus only goes to Smithers two days a week. Many of my clients do not have enough money to afford the bus ticket. Some have to rely on hitch-hiking or catching a ride with friends or family members on the infamous "Highway of Tears." Even getting to the local Service BC office or our Hazelton office is challenging for many of our clients: I recently had a client desperate to get income assistance who was walking 7 kms one way to get to our office.
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> Recently, the hours were cut at the Ministry office in Smithers so that clients are only offered in person service from 1pm to 4pm on non cheque-issue days. The reduction of in person hours makes it even more difficult for our clients access Ministry services.

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[61] Appendix B, Portman Affidavit at para. 19; Sutherland Affidavit at para. 10; Dickinson Affidavit at para. 7; Dufresne Affidavit at para. 7; Sketchley Affidavit at para. 4.

Similarly, Amy Taylor, an advocate in Nelson, finds that the reduction of service hours for local offices in Nelson, Trail, and Grand Forks has resulted in increased line-ups at the Nelson office, as well as some client being unable to make it to the Ministry office at all due to the mismatch between transport schedules and the three-hour window the office is open:

> Our local Ministry offices not only serve Nelson, Trail and Grand Forks, but also the surrounding areas. I have heard from some people who travel in from the surrounding areas that the reduced in-person hours makes it very difficult for them to be able to make it into the office due to bus schedules or their transportation through friends or community agencies.

The drastically reduced availability of in-person Ministry services has a very real impact on clients, and increases the workload of already overburdened community agencies – clients that require face-to-face services either seek out assistance from community agencies to navigate the Ministry's ATI phone line or the online services for them, or give up trying to access assistance at all.

Reductions in in-person services have also meant delays in accessing income or disability assistance for many people. As an advocate from the Kettle Society explains, fewer in person services has meant delays in determining eligibility as well as delays in assessing whether applicants have immediate needs:

> Since the process of evaluating eligibility for Income Assistance has been removed from the purview of workers located in Ministry offices and assigned to "virtual eligibility review teams" who communicate only by phone, I have noticed a significant change in the time required for our clients to receive their first cheque. Once a client completes an application for Income Assistance online, they must wait until a Ministry worker calls them to participate in the eligibility review interview. If a client does not have a phone, or if they miss the call, their benefit payment can be substantially delayed. Reduced in-person office service has also meant that Immediate Needs Assessments are not being done in a timely way. I have worked on a number of Immediate Needs Assessment cases that were not processed within the required service standard of one day.[62]

While the Ministry has consistently said that it will continue to provide face-to-face services to clients, and that the phone and online services are only options to enhance client convenience and flexibility, the reduction of face to face services through office

[62] Appendix B, Sutherland Affidavit at para. 13.

closures and drastic reductions in hours of service mean that face to face in-person service is not actually a viable option for many.

C. IMMEDIATE NEEDS ASSESSMENTS – NEW SERVICE DELIVERY MODEL ADDS FURTHER DELAY

Delays in providing immediate needs assessments ("INA"), formerly called "Emergency Needs Assessments" were one of the issues raised in BCPIAC's 2005 Complaint. The Ministry is to conduct INAs where an applicant for income assistance or disability assistance has an immediate need for food, shelter or urgent medical attention. The Ministry's Service Standards state that immediate need requests for food, shelter and/or urgent medical attention will be addressed within the same business day.

Since 2009, the Ombudsperson of BC and the BC Auditor General have issued reports documenting delays related to MSDSI immediate needs assessments.

The Ombudsperson recommended in the *Last Resort* report that "[t]he Ministry continuously improve compliance in providing eligibility appointments within one business day to individuals with immediate needs"[63]—a recommendation that the Ministry accepted on February 12, 2009.[64]

As of a March 24, 2014 "Update on Status of Recommendations" by the Ombudsperson (the "March 2014 Update), the progress on the recommendation was listed as "ongoing", with the Ombudsperson commenting that there had been "[n]o progress since last update."[65] As of the March 2014 Update, the Ministry had also failed to conduct any file reviews or audits evaluating compliance with its policy on INAs, although it had accepted the recommendation that it do so.[66]

In its May 2014 report entitled *Disability Assistance: An Audit of Program Access, Integrity and Results*[67], the Auditor General found that the Ministry is unable to show that it is meeting its service standard of conducting INAs within one business day, and recommended that the Ministry report on the timeliness of eligibility decisions by measuring and reporting results against the service standards.

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[63] https://www.bcombudsperson.ca/images/pdf/investigations/Last_Resort_Update_Table_June_2014.pdf at p. 4.

[64] *Ibid*.

[65] *Ibid*.

[66] *Ibid*.

[67] http://www.bcauditor.com/sites/default/files/publications/2014/report_18/report/OAG%20Disability%20Assistance-FINAL.pdf.

Minister for MSDSI Hon. Michelle Stillwell recently said in the Legislature that INA service standards are being met.[68] This is simply not the case. Advocates confirm that the Ministry is not processing INAs within one business day.[69]

Ministry policy and procedure regarding immediate needs assessments require the following steps to be taken, many of which are proactive steps on the part of Ministry staff:

a) At the beginning of the Stage 1 application process, Ministry staff will be proactive in determining whether an applicant has an immediate need for food, shelter or urgent medical attention.

b) If it is determined that an applicant has an immediate need, their eligibility will be determined on an urgent basis. An applicant will be assessed as to whether they are exempt from the requirement to complete a work search. An applicant who is exempt from this requirement will proceed directly to Stage 2 of the application process. Recipients assessed as eligible for Hardship Assistance – Immediate Needs – Work Search Required will receive hardship assistance while they complete either a three- or five-week work search.

c) Staff must ensure the applicant is provided with or informed of and directed to other available resources (e.g., food/sundries vouchers, bus tickets for local travel, shelter referral, providing funds for urgent medical attention such as transportation or referrals to medical centres or Medical Services Plan (MSP), etc.) until an intake interview can be held to determine eligibility. Meeting the immediate need in the interim does not mean the applicant no longer requires an expedited START review and eligibility interview.

d) To obtain the information required to accurately assess whether an applicant has an immediate need, staff must proactively engage applicants in a discussion about their food, shelter and medical needs. Staff must record the decision of the assessment.

e) There may be cases where an applicant will have an immediate need in the reasonably foreseeable future (e.g., eviction notice, disconnection notice, etc. in the next few days). In these cases, staff should determine

[68] British Columbia, Legislative Assembly, Official Report of Debates of the Legislative Assembly (Hansard) Vol. 21, No. 8 (March 11, 2015) at 6683-6684 (Hon. Michelle Stilwell).

[69] Appendix B, Sutherland Affidavit at para. 13.

whether an applicant will soon have an immediate need, taking into consideration the likelihood and timing of the immediate need arising.

f) If an applicant has an immediate need, staff must take steps, including:

   i. Proceeding directly to Stage 2 of the application process and providing the applicant with an expedited eligibility interview. Schedule the first possible eligibility interview.

   ii. If an eligibility interview cannot be completed in time to meet the immediate need, then staff must ensure the applicant's immediate need is addressed within the same business day.

The reduction in the availability of face to face services may be the cause of further delays in processing these applications. Much of the work of determining whether there is an immediate need requires easily accessible face to face contact. There are numerous barriers in the new service delivery environment that would impede a proper and quick assessment of whether a person had an urgent need for support. Online initial intake applications, line ups at offices, referrals to the ATI phone line and online services from staff in Ministry offices, long wait times and call time limits on the ATI phone line all create a service delivery environment that is not equipped to process requests for urgent need. Moreover, the Ministry worker reviewing the immediate need relies on being able to contact the client via telephone—this is obviously unrealistic for clients that do not have phones, and particularly for those who are homeless. In our view, it is unacceptable that this Ministry has not designed its services in a way that it is able to process requests for urgent assistance without delay; this is squarely in the Ministry's mandate to do. It is particularly egregious that in the face of criticism from the Ombudsperson and the Auditor General on the processing of Immediate Needs Applications, the Ministry has made the situation worse by creating more barriers to access.

D. INEFFECTIVE POLICY AND PROCEDURE ON ACCOMMODATIONS

The Ministry has a few limited tools available to address the access issues we have identified. Namely, the Ministry has a number of policies and procedures that provide its front-line workers with some flexibility to accommodate clients and be responsive to their needs. Specifically, these include the Ministry's duty to accommodate policy, and

the related policies and procedures on designated workers, "staff assisting clients", and interpretation services for clients with language barriers.[70]

1. Specific Policies

The Ministry's policy and procedures are set out in its "Online Resource", which the website describes as being a "one-stop source for all BCEA [BC Employment and Assistance] policy, procedures and program information for eligibility for ministry employment and assistance programs."[71]

(a) Duty to Accommodate

The Ministry's online policy guidelines emphasize the Ministry's commitment to BC Human Rights legislation, and acknowledge that the British Columbia *Human Rights Code* (the Code) prevails over Ministry policy and practice, as well as other legislation. Noting that discrimination is "contrary to the standards and values of the Ministry," the policy guideline sets out the Ministry's responsibility to accommodate to clients for needs related to the grounds protected under the Code.[72] The Ministry has a legal duty to accommodate individual needs to the point of undue hardship where the need is based on a protected ground in the Code. The Ministry acknowledges that, "[g]enerally speaking, issues of cost, administrative difficulty or inconvenience will not be sufficient to excuse the ministry's duty to accommodate the individual needs." The policy requires Ministry staff must be proactive in determining whether accommodation should be offered as clients may not want to self-identify a need for accommodation, or may not know to ask.[73] Accommodation is context- and client-specific, but may, for example, involve putting requests in writing for clients who have difficulty with verbal information; assisting clients with cognitive disabilities or language barriers in gathering requested documents; providing access to interpretation services by telephone and in person.

(b) Designated Workers

In its discussion of the Ministry's duty to accommodate, the policy guideline explicitly notes that it sometimes may be appropriate to assign a "designated worker" to a client—that is, a worker that will be solely tasked with managing the client's file and requests. In cases where clients ask for (or are proactively offered) a designated worker, designated

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[70] http://www.gov.bc.ca/meia/online_resource/.

[71] *Ibid.*

[72] http://www.gov.bc.ca/meia/online_resource/program_administration/indivcase/policy.html#5.

[73] *Ibid.*

workers provide clients with their direct line, and are consistently called back by the same front-line worker when they call they ATI phone line.[74]

(c) Staff Assisting Clients

The Ministry's online policy guidelines also specifically include a section entitled "Staff Assisting Clients", which emphasizes that "staff are expected to provide courteous, professional, and consistent services that apply best practices, ministry standards and values."[75] This section of the policy guideline reiterates the Ministry's commitment to clients' needs, and again provides the examples of assisting clients in obtaining requested documents, providing Ministry requests in writing when asked, and proactively review each case individually to determine how a client can best be accommodated—and ask clients questions to assist in this determination.

(d) Interpretation

The Ministry's policy is that interpretation services should be available any time a person is requesting services from Ministry, including through the ATI phone line.[76] If someone calls the ATI phone line with a question and they are clearly having difficulty with English, the Ministry staff on the phone line should provide access to contracted interpretation services via 3-way call.[77] For regions that have a specified contract for interpretation services, if an immediate need for interpretation services is identified that cannot be met by local contracted interpretation services, Ministry staff can access Provincial Language Services (PLS) to acquire an interpreter for clients over the telephone or in person. As set out in the policy on the Online Resource, where appropriate services are not available or the client declines the interpreter offered by the ministry, the client is permitted to use an interpreter of their choice.[78] There is nothing specific in the policy about obtaining interpretation services to assist with completing the initial intake application.

2. Current service delivery design makes these policies ineffective in dealing with access

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[74] http://www.gov.bc.ca/meia/online_resource/program_administration/indivcase/procedures.html.

[75] http://www.gov.bc.ca/meia/online_resource/program_administration/indivcase/policy.html#5.

[76] The interpretation services are set out in the "Interpretation Services for Clients with Language Barriers" policy and procedures, which are located under "Individual Case Management" on the Online Resource. See *supra* note 70.

[77] http://www.gov.bc.ca/meia/online_resource/program_administration/indivcase/procedures.html#3.

[78] *Ibid.*

These tools set out in Ministry policy and procedure and BC's *Human Rights Code* are available to ensure that services are designed in ways that are appropriate to clients' needs. Unfortunately, these tools are not consistently utilized. As set out in the complaint, clients' needs are not assessed when they seek face to face services at a local office and are told to use the ATI phone line instead. Similarly, we understand from advocates that the Ministry very rarely, if ever, offers or provides clients with a designated worker.[79] We have also learned about serious problems with the implementation of the interpretation policy including the following:

- delays in accessing welfare due to delays in scheduling interpretation both in regular cases and in immediate needs;
- failure to identify language barriers to ensure that applicants/clients understand their rights and obligations, including significant access to privacy and the possibility of sanctions/penalties;
- failure to use interpreters/identify language barriers for important meetings with Ministry staff about requirements to remain eligible for funding, resulting in the closure of files because of miscommunication;
- failure to flag a case as one that needs an interpreter if the client has requested/used one in the past;
- failure to promote the availability of interpretation services to welfare users or advocates;
- irregular access to immediate phone interpretation; and
- difficulties in accessing automated phone system and online forms.[80]

The failure to put these accommodation policies into practice is not surprising given the way that the service delivery has been designed. Being aware of—and genuinely responsive to—clients' specific abilities and needs is difficult, if not impossible, where there are time limits to phone calls and reduced in-person services. Clients cannot even get to the point of requesting or being offered individual accommodation if they are unable to reach a front-line worker in the first place. In order for these accommodation policies to have any meaning there needs to be sufficient staff time available to do these types of assessments. Moreover, under the current service delivery scheme at the

[79] Appendix B, Dufresne Affidavit at para. 12.

[80] Consultation meetings with community agencies serving English as a second language clients, January 27, 2015 and February 4, 2015.

Ministry, providing certain clients with designated workers or materials in writing, does not remedy the system-wide barriers that are so prevalent to the entire system design.

E. STEPS TAKEN TO ADDRESS SERVICE DELIVERY BARRIERS WITH MINISTRY

An investigation by the Ombudsperson is urgently needed, as the Ministry is well aware of the concerns outlined above, yet has still failed to adequately address them.

Service delivery access issues are regularly raised on the quarterly regional teleconference meetings between Ministry representatives and advocates.[81] These teleconferences are held in each of the five Ministry regions four times per year and are attended by community advocates and Ministry representatives, including the respective region's Manager of Community Relations and Service Quality. Wait times and call time limits on the ATI phone line, in particular, regularly appear on the meeting agendas.

Second, advocates have sent emails and formal letters of complaint about these issues directly to the Ministry. Appendix E is a letter from social worker Samuel Greenspoon to Jean Lofthouse, Region 2 Manager of Community Relations and Service Quality; a letter from advocate Amber Prince to the Ministry that Ms. Prince later posted to the PovNet list is at Appendix D.[82]

Mr. Greenspoon's letter to Ms. Lofthouse chronicles specific problems he, in his capacity as a social worker working with people who have physical and cognitive disabilities, has encountered with the ATI phone line, including: long wait times, inadequacy of call back option as a solution to wait times, and Ministry workers referring clients to online services after they finally reach a worker on the ATI phone line. More generally, Mr. Greenspoon's complaint observes:

> For people with physical and cognitive disabilities, calling 1-866-866-0800, following the numerous prompts, and then waiting 30 (thirty) minutes or more, does not work, and is often frustrating for the client.[83]

The letters referenced above are only those complaints that have been specifically brought to our attention by their authors; given the level of frustration in clients and advocates alike, we expect that there have been other similar direct complaints to the Ministry about service delivery and access problems. Further, the BC Ombudsperson's

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[81] Appendix B, Portman Affidavit at para. 22.

[82] Appendix D. p.16 & 17.

[83] Appendix E.

2013-14 Annual Report indicates that the Ombudsperson received more complaints about MSDSI than any other government ministry or other authority.[84]

Members of the Official Opposition have specifically brought these service quality issues to the attention of the Minister for Social Development and Social Innovation, Hon. Michelle Stillwell, during legislative debates and questioned the wisdom of the move to more online and telephone-based services,[85] to which the Minister responded that the Ministry is moving in this direction to "offer better service and improve the service that clients currently receive.[86] In one exchange, the Minister stated that the uptake of phone service has been really high, and Michelle Mungall, MLA for Nelson-Creston and Opposition Spokesperson for Social Development, pointed out:

> What's happening on the ground, is somebody will go to a ministry office and be told to call the 1-800 number or find that that's the only option available to them…Then, when they get to an office, if they want to do an intake, it has to be online. They're directed to a computer rather than doing something one-on-one with an intake worker, as it had been done in the past.[87]

The BCGEU's *Choose Children* report also demonstrates a concerning level of frustration and dissatisfaction amongst its Ministry worker members with respect to the conditions of their work.[88] A central problem workers identified in the report related to the lack of training front-line staff had received in the Ministry's new and radically different service delivery model:

> The province-wide centralization of services through local call centres was implemented without appropriate training and the required experience amongst employees working in these facilities. Many members reported a growing incidence of information errors, misdirected calls, unnecessary or duplicate requests, and an overall delay in service to clients.[89]

Ministry front-line workers acknowledged problems with chronic understaffing and an expectation of unpaid overtime. Moreover, front-line workers identified both the ICM and

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[84] https://www.bcombudsperson.ca/images/Ombudsperson_Annual_Report_WEB.pdf at p. 73 & 74.

[85] British Columbia, Legislative Assembly, Official Report of Debates of the Legislative Assembly (Hansard) Vol. 21, No. 8 (March 11, 2015) at 6682 (M. Mungall).

[86] British Columbia, Legislative Assembly, Official Report of Debates of the Legislative Assembly (Hansard) Vol. 21, No. 8 (March 11, 2015) at 6682 (Hon. Michelle Stilwell).

[87] British Columbia, Legislative Assembly, Official Report of Debates of the Legislative Assembly (Hansard) Vol. 21, No. 8 (March 11, 2015) at 6683 (M. Mungall).

[88] *Choose Children, supra* note 5.

[89] *Ibid* at p. 20

ATI phone line as acting as one of the central barriers to being able to effectively deliver services to clients. [90] Problems identified with the ATI phone line included: callers often cannot get through, clients unable to understand the phone system, incorrect information frequently provided to clients, and extreme call backlogs necessitating so-called 'sweepers,' where workers are limited to two minute calls. [91] ICM was described by one Employment Assistance Worker as a "slow, ineffective, unreliable system" that "cannot handle the work we do."[92]

An Employment Assistance Worker in the Lower Mainland describes the daily desperation of clients navigating this new service model:

> Clients having to wait months to be assessed for Income Assistance results in desperation. Delays in being assessed for assistance are creating homelessness. Inevitably, our clients scream, yell, swear, break things, and either verbally or physically assault staff. This problem weighs staff down and creates a stressful work site which over time affects everyone.[93]

In addition to *Choose Children*, which is a public report, the BCGEU also provided the Ministry with a compiled report of the data it gathered from MSDSI front-line workers—data which set out the major barriers to access the Ministry's new service delivery model creates.[94]

The Ministry itself has solicited feedback on preferences about various service delivery channels (face-to-face, online, telephone, email, and mail) from its clients. Most recently, it did this through a Service Satisfaction Survey conducted from March 26 to May 26, 2014. [95] This survey was ostensibly open to all clients receiving Ministry services, but was available online only, and had an extremely low response rate (2.2% of entire Ministry caseload). [96] It is clearly problematic to exclusively use an online survey to determine clients' comfort with online services: to state the obvious, clients who are uncomfortable or unable to use computers (and therefore rely on face to face

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[90] *Ibid* at p. 9.

[91] Appendix C, BCGEU MSDSI (Component 6) Members Survey – BCGEU Choose Children report, November 6, 2014 ("Component 6 Survey"), p.4.

[92] *Choose Children, supra* note 5 at p. 18.

[93] *Ibid* at p. 15.

[94] Appendix C, BCGEU MSDSI (Component 6) Members Survey – BCGEU Choose Children report, November 6, 2014.

[95] MSDSI *Service Satisfaction Summary Report: Regional Services Division* ("Satisfaction Survey"), October 2014, online: http://www.sdsi.gov.bc.ca/PUBLICAT/pdf/SDSI-Service-Satisfaction-Summary-Report-Oct-2014.pdf.

[96] *Ibid* at p. 4.

services) were excluded from participating, and their feedback was not heard. The survey design was heavily criticized by Ministry clients who pointed out that they could not complete the questionnaire because they are too poor to afford the internet, and stated the Ministry denied them a printed copy when they requested one, citing privacy concerns.[97]

Despite this major design flaw, the survey findings still indicated that a strong majority of clients prefer face to face services;[98] the findings also highlight problems with long wait times, inability to make appointments with workers, inaccessibility of offices (hours of service and physical layout), and clients' difficulty dealing with complex issues over the ATI phone line and online. Following this survey, and in an apparent complete disregard of the survey results, the Ministry concluded that it intends to continue moving "towards more technology-enabled and virtually delivered services."[99]

The steps taken above demonstrate that the Ministry has been repeatedly informed, through various means, of the hardship its move toward more technology-enabled and virtually delivered services is causing its clients. Despite this, the Ministry continues to refuse to take these concerns seriously. In the meantime, these access barriers continue to deprive clients of critical, life-sustaining supports—supports to which they are legally entitled. In our view, as the Ministry continues to roll out Phase 4 of the ICM, and its "advanced telephony," it is critical that the Ombudsperson investigate the accessibility of the Ministry's services.

F. JURISDICTION AND SYSTEMIC NATURE OF COMPLAINT

1. Jurisdiction of Ombudsperson

The Ministry of Social Development and Social Innovation is a government ministry and therefore is defined as an "authority" that can be subject by review by the BC Ombudsperson as set out in s.1 and s. 35(1) of the *Ombudsperson Act.* The subject matter of the complaint relates to the policy and practices of the Ministry, all of which are matters that properly fall within the jurisdiction of the Ombudsperson pursuant to s. 11 of the *Ombudsperson Act.*

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[97] At the following link is the Ministry's response to a request under the *Freedom of Information and Protection of Privacy Act* for client responses to the online survey: http://docs.openinfo.gov.bc.ca/D52437114A_Response_Package_MSD-2014-00507.PDF. See also: Vancouver Sun, "Online government survey 'insulting': welfare recipient," online: http://www.pressreader.com/canada/the-vancouver-sun/20141008/281500749490312/TextView.

[98] *Satisfaction Survey, supra* note 95 at p. 8.

[99] *Ibid* at p. 26.

Section 10 (b) and (c) of the *Ombudsperson Act* apply, providing that the Ombudsperson can investigate, with respect to a matter of administration, an act done or omitted, or a procedure used by an authority that aggrieves or may aggrieve a person.

2. The nature of the complaint is systemic

Section 12(1) of the *Ombudsperson Act* provides that a complaint to the Ombudsperson can be made by a person or a group of persons. We are asking the Ombudsperson consider this complaint on behalf of a group of complainants primarily due to the systemic nature of the complaint. The Complainant Organizations are eight non-profit organizations that work directly with individuals in receipt of income assistance and/or disability benefits. Their experience with Ministry is very relevant as they assist thousands of individuals each year in navigating the Ministry's service delivery system.

The issues that are at the heart of this complaint are not ones that lend themselves to individual complaints. The remedy to an individual complaint does not address the widespread flaws in the Ministry's system design. The Ombudsperson's website highlights a number of complaints relating to service delivery issues at the Ministry that have been successfully resolved.[100] While the issue was resolved for each individual complainant, the overall flawed system design remained. For example, while the Ombudsperson may be able to assist one complainant in getting through to a worker on the ATI phone line, this resolution will not prevent the next person from being on hold for an excessive period of time.

While assistance with access issues from either the Ombudsperson or community advocates is very useful, many of the most marginalized Ministry clients are those that are unaware of such resources or are unable to access them for a variety of reasons. This creates a hierarchy of access to critical services, as the Ombudsperson and advocates have access to supervisor phone numbers, and can circumvent the ATI phone line for urgent matters, which is not available to individual clients. As one advocate stated:

> The problem I'm seeing is women who have already been desperately trying the 1-800 numbers before they come to see me. They don't have the direct numbers to the supervisors and often cannot wait until they can meet with me next. It is not accessible or transparent for the average person to contact a CRSQ every time they face a barrier.[101]

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[100] https://www.bcombudsperson.ca/investigations/case-summaries/income-a-community-supports.

[101] Appendix D, p. 7.

The subject matter of the complaint relates to fundamental structural design flaws in how the Ministry has designed its service delivery system. As set out in the complaint, the Ministry has been made aware of these problems on a number of levels and has not engaged in an adequate review of the serious degradation in providing these critical services to some of the most marginalized people in the province. Lorne Sossin, an administrative law academic, has written extensively about the difficulty of addressing the insidious nature of the injustice of bureaucratic and technological barriers vulnerable clients face in trying to access basic necessities.[102] Sossin writes:

> Disentitlement is not always a clear-cut experience of losing or failing to obtain benefits. It is often the accumulation of subtle, difficult to pinpoint 'discouragement practices.' For one applicant, it might be the physical location of a welfare office, for another it might be the inability of welfare officials to cope with demand, leading to long lines, frayed nerves and exhausted staff and applicants, while for still another any one of these could be overcome but together they represent a simply insurmountable barrier.[103]

This complaint relates to these "discouragement practices," which are individually and collectively substantial barriers to accessing assistance – and in many cases, effectively disentitle clients from receiving any assistance at all.

3. Service delivery failures require an investigation and report at systemic level

Income assistance and disability assistance are programs of last resort. These are critical benefit programs must be accessible and designed for the people who use them. As set out in the complaint, the radical changes the Ministry has made in recent years to its service delivery design have created numerous barriers to access at each stage and within every different channel of delivery:

- Local offices have been shut down or their hours have been drastically reduced. This leads to line ups in some offices.
- For some in outlying communities, it is impossible to arrange transportation to ensure that they can meet the three hour window when Ministry staff are available.

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[102] L. Sossin, "Boldly Going Where No Law Has Gone Before: Call Centres, Intake Scripts, Database Fields, and Discretionary Justice in Social Assistance" (2004) 42:3 Osgoode Hall Law Journal 363.

[103] *Ibid* at 372.

- Even when one speaks to a Ministry worker in the office, clients are routinely turned away and asked to call the ATI phone line or use the online services.
- Some clients are comfortable or are unable to explain their issues on the ATI phone line.
- The ATI phone line has long wait times.
- Many clients do not have reliable access to phones; this coupled with the long wait times on the phone line make it impossible for them to get through.
- Even when a client gets on the phone line, they may be subject to a call time limit – not giving them adequate time to explain their question.
- Applicants are forced to apply for assistance online when most don't own computers and many are not computer literate. There are no interpreters available to assist with the online application.

Section 23 of the *Ombudsperson Act* requires that the Ombudsperson make a report following an investigation where an act or omission that was subject to the investigation is found to be "unjust, oppressive or improperly discriminatory," or where it is "related to the application of arbitrary, unreasonable or unfair procedures"

It is the Complainant Organizations' position that the facts as set out in the complaint demonstrate that the current service delivery scheme at the Ministry is "unjust, oppressive and improperly discriminatory." There can be no doubt that the scheme results in serious barriers to access for a vulnerable group of people who are attempting to access critical services to meet their basic needs. Moreover, these barriers are also discriminatory in that particular groups of recipients, like those with mental illness or cognitive disabilities, have greater difficulty in accessing Ministry's services. The service delivery scheme is also discriminatory on the grounds of place of origin and race due to failures to properly implement the Ministry's language interpretation policy, resulting in those who cannot communicate in English being shut out of receiving some Ministry services.

The issues raised in this complaint relate to the Ministry's "application of arbitrary, unreasonable, and unfair procedures." The increasing reliance on the centralized phone line with long wait times and arbitrary time limits for calls, an initial intake application which practically is only able to be completed online, together with the reduction in the availability of face to face services, results in barring or unreasonably delaying access to Ministry services for many.

The service delivery changes at the Ministry are fundamentally flawed in not considering the circumstances of the very people who are attempting to access their services. The kind of unfairness described in this complaint is very type of unfairness that the Ombudsperson is required to report on following an investigation. The complainants are asking the Ombudsperson to investigate the barriers to access at the Ministry set out in this complaint, make a report, and provide recommendations to address the gap between service delivery design and the needs of the users of the income assistance system.

Thank you for your consideration of this complaint.

Sincerely,
BC Public Interest Advocacy Centre

_____	_____
Lobat Sadrehashemi	Erin Pritchard
Staff Lawyer	Staff Lawyer

STATUTORY DECLARATION)
PROVINCE OF BRITISH COLUMBIA)
TO WIT:)

IN THE MATTER OF a complaint to the Ombudsperson of BC

I, Stephen Portman of 302-895 Fort Street, in the City of Victoria, in the Province of British Columbia, MAKE OATH AND SAY AS FOLLOWS:

1. I have personal knowledge of the facts and matters deposed to in this statutory declaration, except where stated to be on the basis of information and belief, in which case I believe the same to be true.

2. I am currently the Interim Executive Director of Together Against Poverty Society (TAPS), and am also the Coordinator of TAPS' Employment Standards Legal Advocacy Project.

3. I have worked at TAPS for approximately five years. TAPS is a non-profit society in Victoria, BC that provides free legal advocacy for people with issues concerning residential tenancy, income assistance, disability benefits, employment standards, and income tax for low-income earners. TAPS' staff and volunteers assist approximately over 5000 people each year. TAPS also provides legal education and training through seminars, and produces a newsletter called Taproot.

4. TAPS has 9 staff members and over 50 volunteers. Several law students also volunteer with us, including students who have practicum placements with TAPS.

5. Prior to my current position, I have worked at TAPS in various capacities, including as an Income Assistance Advocate, the Coordinator of the Volunteer Disability Advocacy Project, and as an Employment Standards Advocate. Throughout my employment at TAPS, I have had regular contact with clients and with the Ministry of Social Development and Social Innovation.

6. Since I started working at TAPS, I have heard from clients on a regular basis about difficulties they experience in accessing assistance and services from the Ministry of Social Development and Social Innovation ("MSDSI" or the "Ministry"). I have noticed that Ministry workers are increasingly directing clients to access Ministry services over the internet using the Ministry's online portal ("MySelfServe") or to call the Ministry's Automated Telephone Inquiry line ("ATI phone line").

<u>Wait times on the ATI phone line</u>

7. TAPS' advocates regularly wait with clients on hold on the ATI phone line to speak to a Ministry worker to resolve clients' issues and concerns. It is normal for advocates to wait on the ATI phone line from between 20-45 minutes. Two weeks ago, one of our advocates waited with a client in excess of an hour on the ATI before they were able to speak to a staff person at MSDSI.

8. Advocates and clients are sometimes disconnected from the ATI phone line after being on hold for an extended period without ever talking to a worker.

9. Many of our clients do not have a phone. Unless a client has an appointment with an advocate, there is only one courtesy phone in TAPS' waiting room available for client use. The courtesy phone is located our waiting room, meaning that clients using this phone must sit on hold in a busy and public environment, and have no privacy when discussing very personal matters with Ministry workers. TAPS' advocates have extremely high caseloads, so the availability of advocates for walk-in appointments is very limited.

10. I have heard that Ministry representatives often recommend that clients who are on hold on the ATI phone line take advantage of its "call back" option, whereby the client leaves a number and a Ministry worker will call them back later. Although the "call back" option is useful for some, it does not work for many of our clients—as noted above, many do not have phones, and cannot wait for a call back on a courtesy line or pay phone that other people are waiting to use.

11. When clients are unable to get through on the ATI phone line, I often advise that they go into a Ministry office and wait in line to talk to a worker in person. Clients frequently inform me that when they finally get to speak to a Ministry worker in person, the worker will sometimes direct them to leave the Ministry office and call the ATI phone line. Alternatively, clients inform me that Ministry workers direct them to use MySelfServe; however, if the client does not have access to a computer or is not computer literate, Ministry workers tell them they must use the ATI phone line.

<u>Call time limits</u>

12. Ministry workers have told me that there are time limits for calls on the ATI phone line, but I do not know what the specific time limit is.

13. After a certain amount of time, even if the issue has not been resolved, Ministry workers often tell TAPS advocates or clients that they have to end the call, and that someone will call the client / advocate back. It is not consistent whether the call is returned on the same day or whether it is the same worker.

14. In my experience, many issues are not possible to resolve in the short amount of time that Ministry workers are allotting for each phone call. For example:

- Any requests relating to dental services
- Medical Services
- Crisis supplement request

- Moving Supplement request
- Income reporting
- Shelter matters relating to BC Hydro
- Intake issue/Immediate needs inquiries

15. Often when calls are cut short or Ministry workers will not hear more than one issue per call, clients or TAPS advocates will have to hang up the phone and redial the ATI phone line and wait for a new Ministry worker to resolve the problem. This is burdensome and a source of frequent frustration for clients, and also TAPS advocates, who are under incredible workload pressures.

16. In my work I have observed that clients with certain disabilities – in particular, mental health challenges and cognitive disabilities—are disproportionately impacted by these limits to call times, as these clients sometimes need more time to fully articulate their concerns.

Office closures/reductions in hours

17. In Victoria, clients that are receiving regular income assistance are assigned to the Ministry office at 908 Pandora Avenue, and clients receiving Persons with Disabilities benefits are assigned to the office at 771 Vernon Avenue (the "Gateway Office").

18. Approximately two years ago, both offices started closing over the lunch hour, between 12:00pm and 1:00pm.

19. While clients are ostensibly able to go into the Ministry offices in Victoria in person, as noted above, clients regularly inform me that Ministry workers asks them to leave the office and call into the ATI phone line.

20. The Ministry has informed TAPS that there will be a major change in how clients are assigned to offices as of April 1, 2015. Instead of dividing clients based on the types of benefits they receive, the Ministry will assign clients to one of the two Victoria offices based on the geographic location of their residential address. Attached and marked as **Exhibit "A"** is the letter from the Ministry notifying clients and stakeholders of the upcoming change in office assignment.

21. The letter at Exhibit A also states that Service BC will start its first face-to-face counter in Victoria at the Gateway Office at that time as well. I understand that workers at the Gateway Office will be cross trained to provide Service BC and MSDSI services. I am concerned about the added complexity for workers in doing both jobs, given the already very complex nature of Employment and Assistance Workers' (EAW) positions.

Ministry communications

22. TAPS participates in MSDSI-advocate regional quarterly calls and regularly communicates the service quality concerns detailed above to Ministry representatives. Attached and marked as **Exhibit "B"** is an example of an email thread in which I personally communicated concerns about the ATI phone line to a Ministry representative.

23. On July 18, 2013, Kelly Newhook, TAPS' Executive Director (on leave) contacted the Office of the Ombudsperson by phone to make a complaint about the ATI phone line and its inaccessibility to clients. On July 31, 2013, TAPS received a letter from Ian MacCuish, Manager of Intake & Early Resolution for the Office of the Ombudsperson. Mr. MacCuish's letter suggested that TAPS refer individual clients to the Office of the Ombudsperson to resolve their issues with the ATI phone line, and also noted that the Ombudsperson monitors ongoing issues to determine whether it is appropriate to look into matters on a broad, systemic level. Attached and marked as **Exhibit "C"** is the July 31, 2013 letter from Mr. MacCuish.

24. 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.

SWORN BEFORE ME in the)
City of Vancouver, in the Province)
of British Columbia, this 17th day)
of March 2015)
)
)
_____)
A Commissioner for taking)
Affidavits in British Columbia)

_____
Stephen Portman

Erin Pritchard
Barrister & Solicitor
BC Public Interest Advocacy Centre
208 - 1090 West Pender Street
Vancouver, BC V6E 2N7

This is Exhibit "A" referred to in the affidavit of Stephen Portman sworn before me at Vancouver this 17th day of March, 2015

A Commissioner for Taking Affidavits within British Columbia

BRITISH COLUMBIA

Date

Name
Title
Office/Organization
Address Line 1
City BC Postal Code

Dear MLA/CAs:

The Ministry of Social Development and Social Innovation has partnered with Service BC, specifically at the ministry's Gateway office location on Vernon Avenue.

Starting in March 2015, Service BC will begin its first face-to-face service counter in Victoria by integrating service delivery with the ministry at the Gateway office.

This new Service BC office will provide citizens one-stop access to services not previously available or were accessed through multiple in-person locations. In addition to this service delivery enhancement, service office changes are being implemented based on the geographic location of the client's residential address and proximity to the closest service office.

As of April 1, 2015, some Income Assistance and Persons with Disabilities clients previously served by the Gateway office will now be served primarily through the Vefra office located at:

908 Pandora Avenue
Victoria BC V8V 3P3

Similarly, some Income Assistance and Persons with Disabilities clients previously served by the Vefra office will now be served primarily through the new Gateway Service BC office located at:

403 - 771 Vernon Avenue
Victoria BC V8W 9R5

../2

There is no change to telephone service, which is available by calling 1-866-866-0800. Clients whose main office has changed are being notified by mail. There will be no disruption to their income assistance or disability assistance.

If you have any questions, please contact me at 250 619-2811or by e-mail at Jeannine.Bousquet@gov.bc.ca.

Sincerely,

Jeannine Bousquet
Community Relations and Service Quality Manager

Erin Pritchard

Subject: FW: TAPS - Specific Examples of CAll resolution Challenges

This is Exhibit "B" referred to in the affidavit of Stephen Portman sworn before me at Vancouver this 13th day of March, 2015
A Commissioner for Taking Affidavits within British Columbia

From: D'Gal, Judy SDSI:EX [mailto:Judy.DGal@gov.bc.ca]
Sent: February-06-15 1:56 PM
To: ED
Subject: RE: TAPS - Specific Examples of CAll resolution Challenges

Thanks kindly Stephen, this is very helpful.

I'll send this to Jan and Linda, as they were both on the call yesterday.

Judy

From: ED [mailto:ED@tapsbc.ca]
Sent: Thursday, February 5, 2015 1:58 PM
To: D'Gal, Judy SDSI:EX
Subject: TAPS - Specific Examples of CAll resolution Challenges

Greetings Judy,

I appreciate you taking the time to follow up on the matter of challenges with frontline resolution of issues during calls to the 1866 #. As I suspected advocates reported a variety of specific areas that are challenging to resolve with EAW's in one call. The specific challenges reported are as follows:

1. Any dental related request
2. Medical Services
3. Crisis Grant Request
4. Moving Supplement
5. Income Reporting
6. BC Hydro Matters in relation to shelter
7. Inaccurate reporting challenges
8. Intake issue/Immediate needs Inquiries

In addition, advocates report that EAW's on the 1866 line will cut the call short or are unable to resolve more than one issue per call. In these cases our staff will hang up the phone and redial 1866 waiting for a fresh EAW to resolve the challenge. This is of course burdensome and a source of frequent frustration for our staff who are under incredible workload pressures.

I imagine a resolution from your end would be additional training and more staff. Two things we always need more of in any social service provision organization. Thanks again for chairing today's conversation there was lots of good infromation.

Sincerely,

Stephen Portman
Interim Executive Director

Together Against Poverty Society
Lekwugen Territories

#302 - 895 Fort Street
Victoria BC V8W 1H7

web: www.tapsbc.ca
Phone: (250) 361-3521
Fax: (250) 361-3541

TAPS
Together Against Poverty Society

Please consider the environment before printing this e-mail.

Ombudsperson
B.C.'s Independent Voice For Fairness

General Inquiries: (250) 387-5855
Toll-Free: 1-800-567-3247
Fax: (250) 387-0198
www.bcombudsperson.ca

947 Fort Street
PO Box 9039 Stn Prov Govt
Victoria BC V8W 9A5

This is Exhibit "C" referred to in the affidavit of File: 13-12677 Stephen Portman sworn before me at Vancouver this 17th day of March, 2015

A Commissioner for Taking Affidavits within British Columbia

Ms. Kelly Newhook
Together Against Poverty Society
#302 - 895 Fort Street
VICTORIA BC V8W 1H7

Dear Ms. Newhook:

I am writing to follow up on your July 18, 2013 telephone conversation with Christine Morris, Early Resolution Officer with the Office of the Ombudsperson. You expressed your organization's concerns about the 1-866 contact line for the Ministry of Social Development & Social Innovation. You said that the 1-866 line is completely inaccessible and frustrating to many clients of the Ministry as well as the staff at the various advocacy offices.

One of the services provided by the Office of the Ombudsperson is an early resolution option. This is available to people who contact us when they have been unable to access a particular public agency or have not received a response from a public agency. Early resolution may be an appropriate option for your clients if they have made a reasonable effort to contact the ministry through the 1-866 numbers, without success.

You may wish to refer clients to our office. In the early resolution process, an Early Resolution Officer will try to facilitate communication between the ministry and your client within 5 working days. If that is not successful, a more formal investigation may occur by one of the Ombudsperson's investigative teams.

We also monitor ongoing issues to consider whether we will look into a matter on a broad, systemic level. When we have investigated individual complaints regarding a particular matter, substantiated a number of those complaints, and identified patterns of recurring unfairness, that information is taken into consideration in our assessment of whether a systemic is useful and appropriate.

Thank you for bringing this matter to our attention. If you have any questions about this letter, please contact me at 250-387-0191.

Yours sincerely,

Ian MacCuish
Manager of Intake & Early Resolution

STATUTORY DECLARATION PROVINCE OF BRITISH COLUMBIA TO WIT:	)))	IN THE MATTER OF a complaint to the Ombudsperson of BC

I, Kris Sutherland of 1725 Venables Street, in the City of Vancouver, in the Province of British Columbia, MAKE OATH AND SAY AS FOLLOWS:

1. I have personal knowledge of the facts and matters deposed to in this statutory declaration, except where stated to be on the basis of information and belief, in which case I believe the same to be true.

2. I am the Manager of Advocacy Services at The Kettle Society, and have worked there for approximately 8 years. The Kettle Society is a non-profit organization that serves low-income people living with mental health issues. In addition to managing our team of advocates, I also provide one-on-one direct advocacy assistance on issues like access to housing, welfare and other legal and mental health resources. In addition to me, The Kettle Society currently has 3 full time advocates.

3. For the 2014 year the advocacy program assisted approximately 1500 clients with legal issues.

4. The majority of our clients receive income assistance or disability benefits from the Ministry of Social Development and Social Innovation (the "Ministry"). In my work with these clients, I have noticed that the Ministry has increasingly been providing its services through the telephone and online, regardless of the clients' comfort level or ability to access these technologies.

Automated Telephone Inquiry Line

5. I am aware that the wait times on the Ministry's automated telephone inquiry line at 1-866-866-0800 (the "ATI Line") have gotten very long. Clients and advocates are frequently on hold for almost an hour, and the wait time is almost never less than 30 minutes. Sometimes even after this lengthy wait, the call is disconnected without the client / advocate ever speaking to a worker.

6. Many of our clients cannot afford phones, and rely on the courtesy phones in community agencies which are often in public areas, and have line-ups of other people waiting to use them. Others use pay-as-you-go phones, and waiting on hold for such extended periods uses up their minutes. Although the Ministry offers a "call back" option so that clients do not have to wait on hold, this is not a solution for clients without their own phones. Also, where advocates call the Ministry with clients and then register for a call back, clients may be unable to wait at our office until the call is returned, which could be over an hour later. At times, the call back never comes. While these accessibility issues would pose a barrier to any Ministry client, the impacts are exacerbated for mental health clients.

7. Before clients even get to the point of being on hold, they first must navigate the automated list of options on the ATI Line (i.e. the "phone tree"). Clients with serious mental illness are often unable to concentrate or focus to be able to do this. Many clients will simply abandon their call once they encounter difficulty.

8. Each time a client gets through on the ATI Line, they are speaking to a different Ministry worker. In my experience, there is significant inconsistency in responses between workers based on their level of experience.

9. Once clients and advocates reach a Ministry worker on the ATI Line, Ministry workers will not assist advocates with more than one client per call – advocates are sometimes told they have to call the ATI Line separately for each client. It is not consistent whether workers will assist with more than one issue per client.

Ministry Office Services

10. Our clients are having difficulty in accessing in-person service in Ministry offices. Clients who go into Ministry offices are regularly told to leave and call the ATI Line.

11. Our clients mainly go to the Grandview, Dockside, Kiwassa, and West End (Robson) Ministry offices. Several Ministry offices have closed in recent years, which has resulted in clients that were previously assigned to the closed offices being shuffled around to different ones. For example, the Ministry office closures at China Creek and Killarney in 2014 led to clients with certain postal codes in East Vancouver being assigned to offices in the Downtown Eastside. I have heard from some of these clients that they do not want to attend the offices in the Downtown Eastside, as they have addictions and/or mental health concerns, which are triggered resulting in them feeling unsafe in offices located in the Downtown Eastside. Offices closures have also led to clients being assigned to offices that are much farther for them to travel, which I have noticed is particularly burdensome for those with mobility issues and / or small children.

12. Another example of diminishing in-person services is the reduction in office hours at the Grandview Ministry office. As of July 2014, the Grandview Ministry office will only give clients photocopies of their ID, recreation passes, confirmation of assistance, and administered cheques, as well as process releases of information forms between 9:00 and 11:00am. Attached and marked as **Exhibit "A"** is the email from the Ministry announcing this change.

13. Since the process of evaluating eligibility for Income Assistance has been removed from the purview of workers located in Ministry offices and assigned to "virtual eligibility review teams" who communicate only by phone, I have noticed a significant change in the time required for our clients to receive their first cheque. Once a client completes

an application for Income Assistance online, they must wait until a Ministry worker calls them to participate in the eligibility review interview. If a client does not have a phone, or if they miss the call, their benefit payment can be substantially delayed. Reduced in-person office service has also meant that Immediate Needs Assessments are not being done in a timely way. I have worked on a number of Immediate Needs Assessment cases that were not processed within the required service standard of one day.

14. I understand that decision-making on client requests has largely been removed from office level and is done by Ministry "teams"— it is unclear to clients and advocates where these "teams" are located. It is very difficult to locate and contact the decision maker on a given issue, and Ministry District Supervisors seem to be able to do little more than send an internal email to the appropriate "team."

Overall Impact on Mental Health Clients

15. In my daily work with low-income mental health clients I see reliance on phone service as antithetical to offering quality service to them, as these clients in particular require in-person contact to build trust. Not only do Ministry workers frequently refer clients to the ATI Line, but certain things are done exclusively over the phone, like both stages of the initial income assistance eligibility interview.

16. Similarly, our clients have overwhelmingly expressed discomfort with and distrust of online communications. Many have told me they uncomfortable dealing with matters as important and deeply personal as their financial assistance and benefits online. The majority of our clients are not computer savvy and many are not even computer literate. In my work I have seen that the move toward the increasing use of online services has had detrimental impacts on clients who are older, have mental health challenges or cognitive disabilities, or are too poor to afford a computer and don't want to use public computers to work on such personal matters. This is particularly problematic with the initial income assistance application, as it must be done online, and normally takes approximately 40 minutes to complete even with an advocate's help.

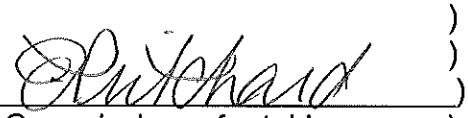
17. Often our clients (and advocates) need to contact the Ministry to deal with complex issues concerning reporting requirements and monthly deductions – some of my clients tell me is very difficult for them to understand what is happening with their benefits without any visual aids (e.g. where the Ministry worker can write things down for the client or show them the computer screen).

18. Some of our clients tell me that they preferred the former "case management" system, where their case was assigned to a single worker with whom the client could build a relationship.

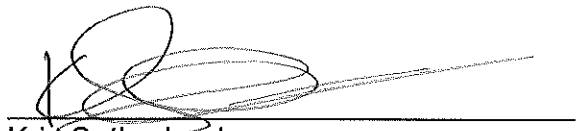
19. As people with mental health and cognitive disabilities have a disproportionately high rate of contact with government bodies, it is important to take these clients specific needs seriously in determining how income assistance is administered.

20. 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.

SWORN BEFORE ME in the City of Vancouver, in the Province of British Columbia, this 18th day of March 2015



A Commissioner for taking Affidavits in British Columbia



Kris Sutherland

Erin Pritchard
Barrister and Solicitor
BC Public Interest Advocacy Centre
208-1090 West Pender Street
Vancouver, BC

Erin Pritchard

Subject: FW: Grandview MSD office service cut

This is Exhibit "A" referred to in the affidavit of Kris Sutherland sworn before me at Vancouver this 18th day of March, 2015
A Commissioner for Taking Affidavits within British Columbia

-----Original Message-----
From: Harris, Sherri L SDSI:EX [mailto:Sherri.Harris@gov.bc.ca]
Sent: Tuesday, July 08, 2014 3:22 PM
To: 'Kris Sutherland'
Subject: RE: Grandview MSD office service cut

Hi Kris, these are specific to this office due to the amount of clients we have walk through our doors on any given day. (200 per day non issue week) We only give out photocopies of ID, ROIs, recreation pass, confirmation of assistance between 9 and 11:00 am and we also only give out administered cheques from 9-11. There were signs in the waiting long before we made the changes and administered clients were told far in advance about weekly or mid month chq pick ups. We are not busy in the morning and the crowds usually start around 11. We routinely tell clients if they want to avoid long wait times they should come in the morning.

Hope this helps.

-----Original Message-----
From: Kris Sutherland [mailto:ksutherland@thekettle.ca]
Sent: Tuesday, July 8, 2014 3:15 PM
To: Harris, Sherri L SDSI:EX
Subject: FW: Grandview MSD office service cut

Hi Sherri,

One of our houring workers noticed the signs at the entrance to your office about the timing of certain service requests. Is this Vancouver-wide and what is driving it? I am concerned that this poses another barrier to our clients. Please let me know.

Thanks and have a good day,

Kris

STATUTORY DECLARATION)
PROVINCE OF BRITISH COLUMBIA)
TO WIT:)

IN THE MATTER OF a complaint
to the Ombudsperson of BC

I, Amy Taylor of 521 Vernon Street, in the City of Nelson, in the Province of British Columbia, MAKE OATH AND SAY AS FOLLOWS:

1. I have personal knowledge of the facts and matters deposed to in this statutory declaration, except where stated to be on the basis of information and belief, in which case I believe the same to be true.

2. I work as a Poverty Law Advocate & Family Law Information Worker at the Advocacy Centre in Nelson, British Columbia ("Advocacy Centre"). I have worked at the Advocacy Centre for approximately 17 years and have been in my current role as a Poverty Law Advocate for approximately 8 years. I provide one-on-one direct advocacy assistance for low-income people in the West Kootenay region. I do advocacy work related to the income assistance system, tenancy, family law information, and debt issues. Most of my clients receive provincial income assistance. Much of my daily work is focused on assisting people navigate the income assistance system.

3. Many of my clients have mental and physical disabilities. Many have been impacted by abuse and trauma. Many of my clients live in unstable housing; some are homeless. Some of my clients do not own a phone or a computer. Many of the clients who do have a phone rely on a cell phone with "pay as you go" minutes.

4. In my experience working as an advocate I have witnessed how difficult it is for some clients to access services from the Ministry of Social Development and Social Innovation ("the Ministry"). In my view, it has become even more difficult in recent years with the move to more automated services, particularly the focus on the Ministry's Automated Telephone Inquiry Line ("ATI phone line") and the online application process.

5. The online application process to apply for income assistance has been very difficult for many of my clients. Many of them do not have access to a computer. The Advocacy Centre decided that we would not provide access to computers to our clients to complete the Ministry's online forms principally because we view this as a further downloading of work from the Ministry onto community agencies. I feel that this puts me in a difficult position as an advocate as I meet clients who have not been able to complete the online forms or have experienced delays in completing their forms because they do not have access to a computer.

6. Through my work at the Advocacy Centre I have seen that the move to the ATI phone line has been very challenging for clients who do not have phones. These clients have to use friends' phones or the phones at community agencies; I have heard clients explain that the wait times on the phone line make it difficult to stay on the line as other people are waiting to use the phone. Some clients have told me that the menu on the ATI phone line is difficult to navigate, and requires them to enter in their personal identification numbers ("PIN"). I have also heard that from clients with "pay as you go" minutes on their cellphones that they do not want to call the Ministry and wait on hold

as this cuts into the limited minutes they can afford for their phones. Some clients expressed frustration about waiting on hold, then having their called dropped, and having to call back and speak to a different worker.

7. Given the difficulties my clients are facing in accessing services, I find that I have to call the Ministry for them more frequently. When I call the Ministry I often use the "call back" feature. When I use this feature, I have to make sure that I can sit at my desk for an hour at a time so that I will not miss the call. Since I know that I cannot get through to a Ministry staff person if I call when the client is in the office with me, I usually have the client sign a release of information form which I fax to the Ministry. I then have to wait 24 hours before I can make the call so that the release of information will have been processed and attached to the client's Ministry file. This process adds further delay to my client being able to request assistance.

8. As of fall 2014 the hours of the three Ministry offices in our region – Nelson, Trail and Grand Forks – were severely reduced. These Ministry offices are now open on non-cheque issue days from 1pm to 4pm for in person appointments with staff. I have heard from some of our clients that the lines ups in the Ministry offices in the afternoons are considerable.

9. Our local Ministry offices not only serve Nelson, Trail and Grand Forks, but also the surrounding areas. I have heard from some people who travel in from the surrounding areas that the reduced in-person hours makes it very difficult for them to be able to make it into the office due to bus schedules or their transportation through friends or community agencies.

10. I used to find it much easier to access support for my clients when we were able to call a local office or attend a local office in person for assistance. There are delays in accessing basic services like crisis supplement requests. Sometimes it is very stressful when I am dealing with a client who is in an emergency and there is no quick way for me to access Ministry services for her. I often find that the person I speak to on the ATI phone line needs to make a service request for someone else to get back to me.

11. 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.

SWORN BEFORE ME in the)
City of Nelson, in the Province)
of British Columbia, this BLANK day)
of April 2015)
)
)
)
A Commissioner for taking)
Affidavits in British Columbia)

Janet Connolly
TYLEEN K. UNDERWOOD
LAW OFFICE
Barristers & Solicitors
200 - 507 Baker Street
Nelson, B.C. V1L 4J2

Amy Taylor

Average Speed of Answer (ASA)

	2012	2013	2014
Jan		0:04:34	0:08:48
Feb		0:06:14	0:11:19
Mar		0:07:43	0:11:13
Apr	0:13:24	0:07:07	0:10:16
May	0:11:15	0:08:14	0:14:36
June	0:09:00	0:09:23	0:16:17
July	0:08:01	0:10:26	0:22:49
Aug	0:06:49	0:09:58	0:23:28
Sep	0:07:21	0:09:15	0:21:35
Oct	0:04:59	0:06:14	0:20:09
Nov	0:05:09	0:07:59	0:33:16
Dec	0:04:12	0:08:28	0:34:01

Table 2: Target values	Historical Target Values				
	2012-04-01	2012-07-01	2012-10-01	2013-01-01	2014-04-01
Average Speed of Answer (ASA)	0:10:00	0:09:31	0:09:04	0:08:37	0:08:11

Ref: 184540

Bruce Ralston, Chair
Committee on Public Accounts
Parliamentary Committees Office
Legislative Assembly of British Columbia
Ron.Wall@leg.bc.ca

Dear Mr. Ralston:

NR

NR

In regard to the questions you had around telephone service delivery, our call centre receives about 125,000 calls each month—about 1.5 million calls every year.

I recognize there are times when high call volumes can cause delays for people trying to access services through our call centre. We are always looking for ways to improve our service to clients and ensure we're treating people fairly and respectfully.

We have introduced new phone technology province-wide to give people even better service. The new features include:

- The option to leave a phone number for a call back—a great option so people are not using up their cell minutes waiting on hold.
- Wait-time announcements for callers entering the phone system.
- Streamlining call options to get people to the right staff person on their first call.
- Improved self-service options on the 1-866 toll-free system available 24/7, allowing clients to access their information at a time that is convenient to them and reducing the need for them to speak to a worker.

The Contact Centre does not have limits on call duration. Callers are able to articulate their needs, which become service requests that may have different response times based on their level of urgency. Callers are advised of the time frames for each service request, and our phone system has the capability to notify supervisors if the call exceeds a set timeframe (currently 10 minutes). The supervisor can then offer support

to staff if needed. We have been consistently completing requests and call backs within our service standards.

Thank you for taking the time to review this information.

Sincerely,

Sheila Taylor
Deputy Minister of Social Development and Social Innovation

Individual BC Ombudsperson Complaint Form on MSDSI Service Delivery Issues

Background:

Over the last five years, the Ministry of Social Development and Social Innovation has made radical changes to the way it delivers its services. Income assistance services are now delivered primarily through a centralized phone line and over the internet. Wait times on the centralized phone line are long, and when callers finally get through, the Ministry places limits on the length of the call. The initial application for income assistance is confusing, lengthy and must be done online, and the Ministry does not assist applicants with its completion. While local Ministry offices still exist, in-person, face to face services have been dramatically reduced.

In May 2015, BCPIAC filed a large complaint with the BC Ombudsperson on behalf of nine community agencies from across the province about these issues. The complaint asked the Ombudsperson to conduct a systemic investigation, report on the barriers to accessing Ministry services set out in the complaint, and provide recommendations to address the gap between service delivery design and the needs of the users of the income assistance system.

On June 23, 2015, BCPIAC received a letter from the BC Ombudsperson informing us that she was declining to investigate the issues outlined in our complaint, in large part because she did not agree that the issues we raised in the complaint require a systemic investigation, and suggested the best way to deal with these issues is through individual complaints.

Description and Purpose of Attached Individual Complaint Form:

As noted above, former Ombudsperson Kim Carter was of the view that welfare services delivery issues did not warrant a systemic investigation, and that individual complaints about these issues were the best approach. We strongly disagree. One of the major points of our systemic complaint was that individual remedies will not address the serious barriers to access that all Ministry clients currently face.

Despite this disagreement, we have developed the attached form to simplify the process of making an individual Ombudsperson complaint about specific service delivery issues. We plan to collect a large number of individual complaints, and to file them with the Ombudsperson—and in doing so, demonstrate that these issues are (a) impacting a large number of people, and (b) based in system design, and cannot be resolved on an individual basis.

What You Can Do:

If your client encounters one or more of the service delivery issues listed on the form, please complete the form and forward it to BCPIAC in one of the following ways:

Mail: BCPIAC
208 – 1090 West Pender Street
Vancouver BC
V6E 2N7

Fax: 604-682-7896

Email: support@bcpiac.com

Please do not send the form directly to the BC Ombudsperson, as BCPIAC intends to collect a large number of complaints and submit them as a single package.

Complaint to the BC Ombudsperson
With Regard to the Ministry of Social Development and Social Innovation (the "Ministry")

CONTACT INFORMATION

Name: _____

Address: _____City: _____

Postal Code: _____ Phone Number: _____

Email:_____

I am (or was at the time of this complaint) a recipient of the following benefit:

☐ Income Assistance ☐ PPMB ☐ PWD ☐ Hardship Assistance

MY COMPLAINT IS ABOUT: *(check all that apply)*

1-866 Phone line

☐ I was waiting on hold on the 1-866 phone line for _____ minutes. _____ dd/mm/yyyy

☐ Call got disconnected before I spoke to a Ministry worker. _____ dd/mm/yyyy

☐ After speaking to a worker for _____ minutes, the Ministry worker told me they had to end the call, even though I felt we had not finished discussing my issue. _____ dd/mm/yyyy

☐ I was not offered an interpreter when I needed one. I am not comfortable communicating in English._____ dd/mm/yyyy

☐ Other_____

_____

Online Application

☐ The Ministry refused to help me with the online application when I asked for help _____ dd/mm/yyyy

☐ The Ministry would not give me a paper copy of the application when I asked for one. _____ dd/mm/yyyy

☐ The Ministry referred me to _____ (*e.g. library, security guard, community agency*) for help with filling in the online application. _____ dd/mm/yyyy

☐ Other_____

_____

In-person Services

☐ I asked to meet with a Ministry worker in person, and was told I could not have an appointment.

_____ dd/mm/yyyy

☐ I went into a Ministry office, but was told I had to leave and call the 1-866 phone line _____
dd/mm/yyyy

☐ I went to a Ministry office and waited in line for ___ mins. [I*f applicable:* I had to leave before speaking to a worker because_____.] _____
dd/mm/yyyy

☐ Other_____

_____

Do you have a disability? *(If yes, please describe your disability/disabilities)*

_____

Do you have difficulty communicating (reading and/or speaking) in English?

_____

Do you have your own phone? *(If not, what phone, if any, do you use to call the 1-866 phone line? If you do have a phone, is it a pay-as-you-go cell phone with limited minutes?)*

_____

Do you have a computer? *(If yes, do you have regular internet access? If no, is there a computer you can use regularly to access the internet?)*

_____

What was the impact on you by the issues you checked off in this complaint?

_____

_____

_____

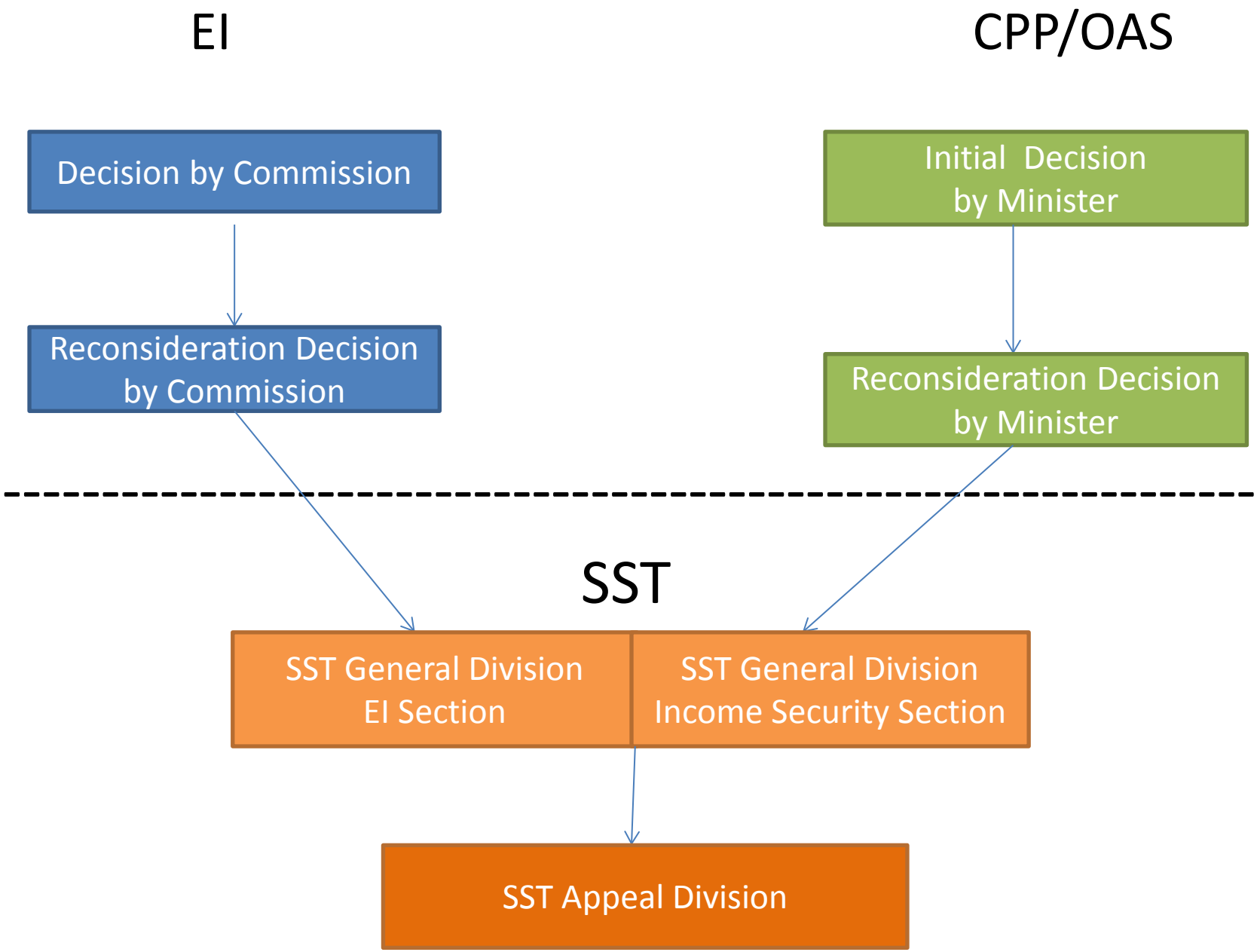
Do you want the Ombudsperson's Office to conduct a <u>systemic review</u> in service delivery problems you have identified? *(A systemic review looks at fairness issues affecting a large number of people that cannot be adequately resolved on an individual basis.)*

☐ Yes ☐ No

☐ **Yes, I consent to my information being shared with BC Public Interest Advocacy Centre.**

_____ _____
Date Signature of Complainant

Navigating the New Social Security Tribunal


EI
CPP/OAS
Decision by Commission
Initial Decision by Minister
Reconsideration Decision by Commission
Reconsideration Decision by Minister
SST
SST General Division EI Section
SST General Division Income Security Section
SST Appeal Division

Reconsideration

- Now mandatory for EI as well as CPP/OAS!
- Deadline for EI is 30 days from date decision is communicated.
- Deadline for CPP/OAS is 90 days from date decision is communicated.
- Still governed by *EI Act, CPP, OAS Act* .

Reconsideration: How to Apply

- **EI:** There is a form.
- **CPP/OAS:** No form. Must be in writing and signed by client.
- Drop off or mail to Service Canada.
- Representatives must send in authorization.

Reconsideration: Requesting the File

- File not sent automatically.
- Must request under *Privacy Act.*
- Can request online.

  www.tbs-sct.gc.ca/atip-aiprp/index-eng.asp
- Direct request to Employment and Social Development Canada.

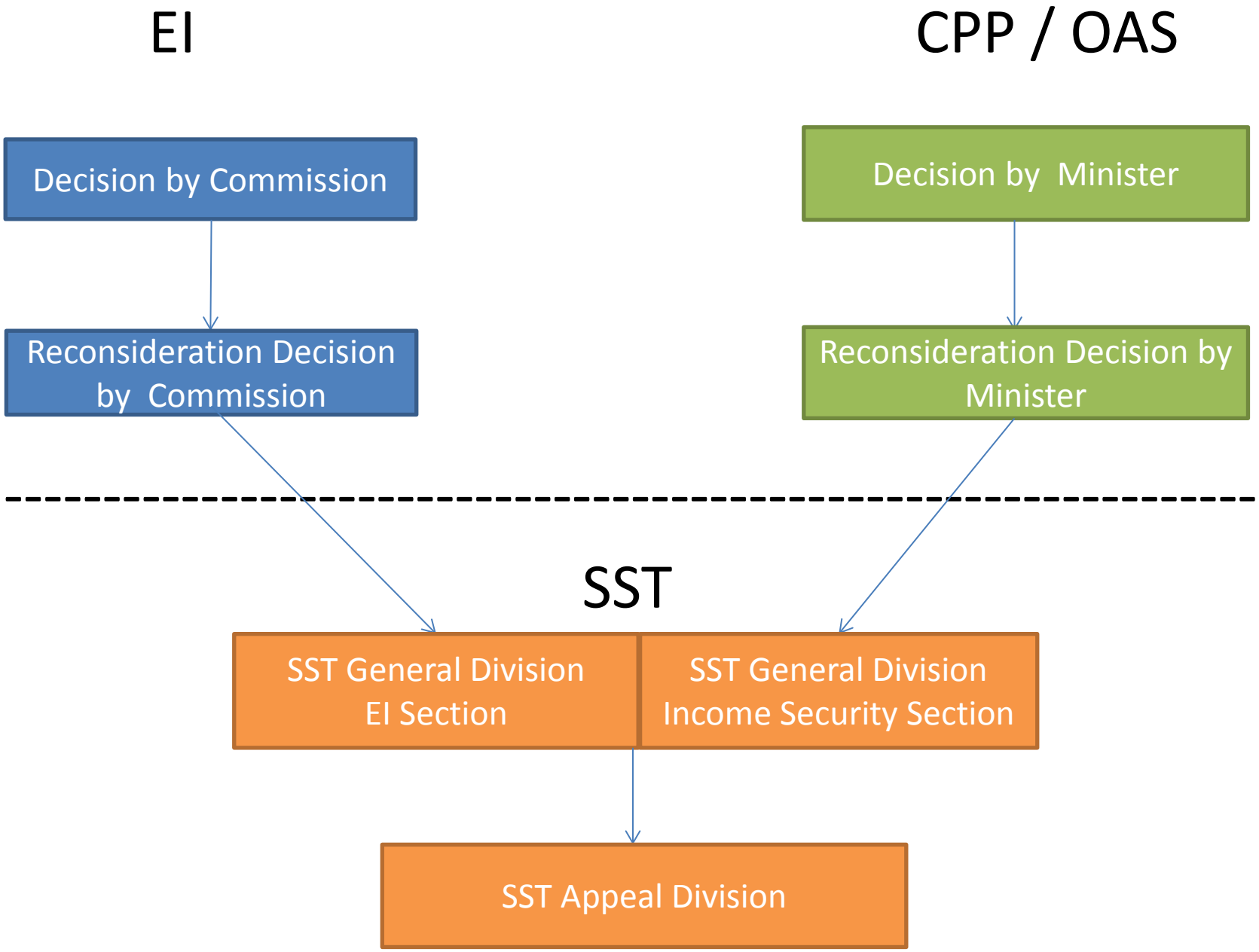
Reconsideration: The Decision

- No hearing. Reconsideration officer will:
  - Review the file and new information.
  - Obtain other relevant information.
  - Ensure decision consistent with evidence and law.
- Written decision will be mailed out.

The Social Security Tribunal

- Two divisions:
  - General Division.
  - Appeal Division.

- General division has two sections:
  - The EI Section.
  - Income Security Section (CPP and OAS).


EI
CPP / OAS
Decision by Commission
Decision by Minister
Reconsideration Decision by Commission
Reconsideration Decision by Minister
SST
SST General Division EI Section
SST General Division Income Security Section
SST Appeal Division

The SST General Division

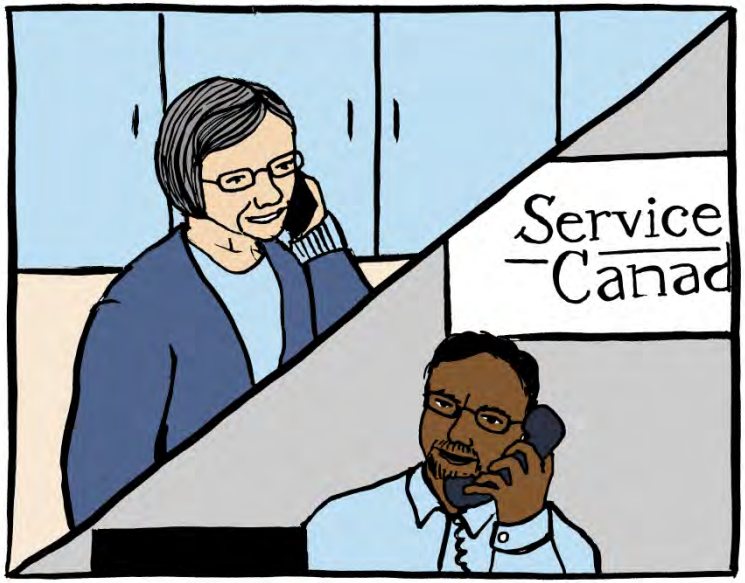
- EI: Deadline is 30 days from date decision is communicated.
- CPP/ OAS: Deadline is 90 days from date decision is communicated.
- No extensions beyond one year.
- Mail or fax Notice of Appeal (available on SST website).

The SST General Division: The Notice of Appeal

- Will not be accepted until ALL required information on notice of appeal is filled out.
- New policy on incomplete appeals.
- If Notice or Appeal is incomplete, SST will notify appellant and give 30 days to provide missing info.
- If Application, provides info on time, appeal will not be considered late.

Communicating with the SST

- Call centre, call backs in three business days.
- Use of email is unclear.
- Deemed to receive documents:
  - Regular mail: 10 days.
  - Fax or email: Next business day.
  - Courier or registered mail: Day someone signs or delivered to last known address.



SST General Division: Summary Dismissal

- If there is no reasonable chance of success, must dismiss.
- SST will give you a final opportunity to explain why appeal could succeed.

SST General Division
EI Section

- You should get a “docket” that includes the Commission’s reconsideration file.
- Docket should contain representations from the Commission.
- Can submit new evidence / submissions up until hearing, risk adjournment if not sent in advance.

SST General Division Income Security Section

- You should receive the Minister's recon file.
- You submit new evidence and submissions.
- Minister will send submissions.
- 365 day rule not enforced (at least for now). Deadlines generally set in notice of hearing.

SST General Division Settlement Offers

- Minister will sometimes make offer to settle.

- Two ways to finalize settlement:
  - Submit consent order to SST (note SST not obligated to accept settlement).
  - Sign agreement, withdraw appeal.

SST General Division: The Hearing

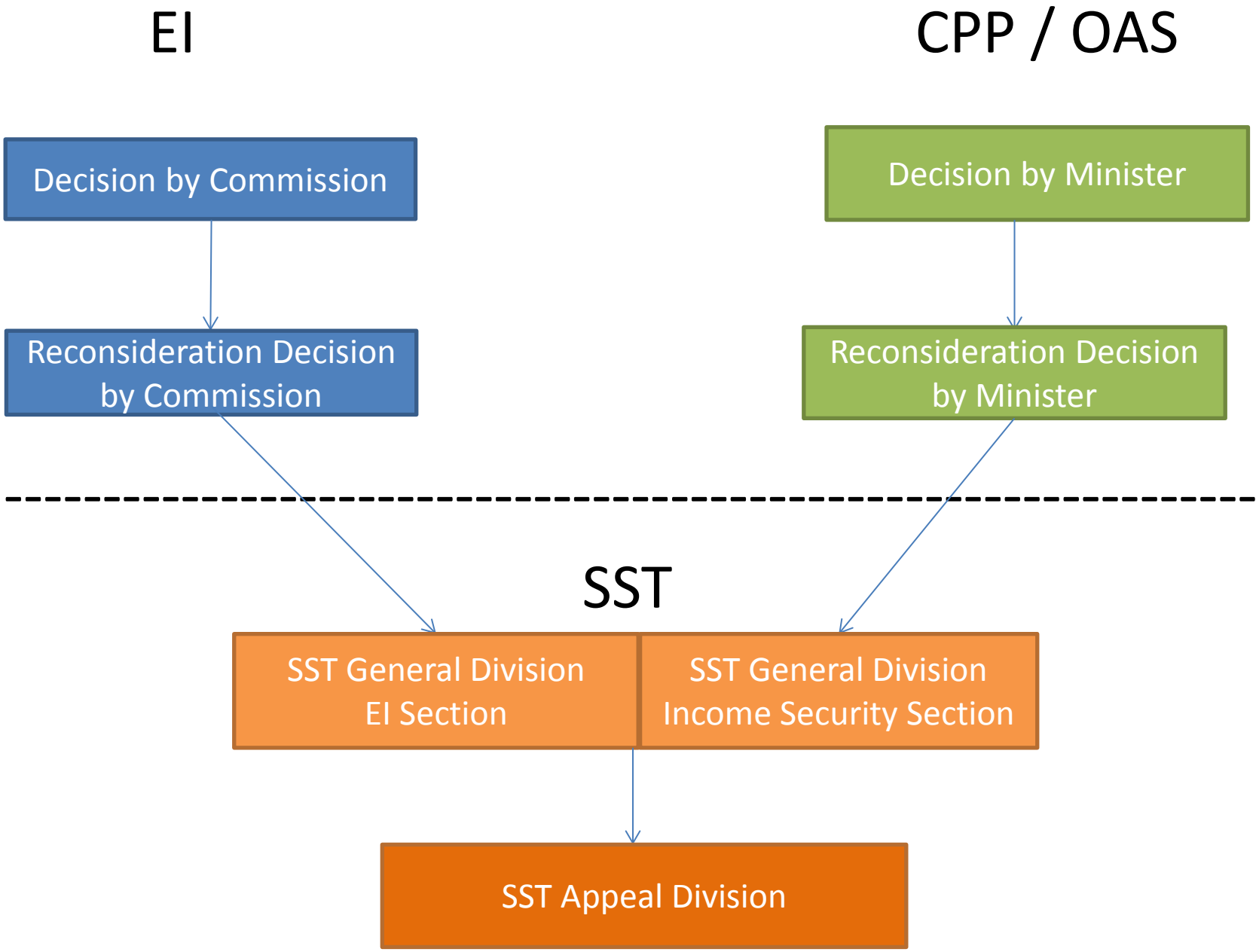
- Hearings can be held several different ways:
  - Written question and answer.
  - Teleconference.
  - Video conference.
  - In person hearing.
- Income Security Section does not always hold a hearing! Decision can be made on the record.

SST General Division: Rescheduling and Adjournments

- 48 hour window to reschedule.
- After that, must request adjournment, provide reasons.
- Second adjournment only in “exceptional circumstances.”

SST General Division: At the Hearing

- Decision made by one SST Member.
- Minister rarely sends a representative.
- Basic structure of hearing is the same.
- Decision will be mailed out after hearing.


EI
CPP / OAS
Decision by Commission
Decision by Minister
Reconsideration Decision by Commission
Reconsideration Decision by Minister
SST
SST General Division EI Section
SST General Division Income Security Section
SST Appeal Division

SST Appeal Division

- Need leave to appeal: Reasonable chance of success.
- Exception if summarily dismissed, do not need leave.
- ***EI:*** Deadline is 30 days from date decision is first communicated.
- ***CPP/OAS:*** Deadline is 90 days from date decision is first communicated.

SST Appeal Division: Grounds for Appeal

- Breaches of natural justice.
- Jurisdiction.
- Errors of law.
- The decision is based on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

Note: new evidence generally not allowed.

SST Appeal Division: What happens if you get leave?

- 45 days to file written submissions.
- Appeal Division does not have to hold a hearing.
- If Appeal Division does hold a hearing, will send a Notice of Hearing.

SST: Reopening Decisions

- Can reopen on new evidence.
- Same tests apply.
- One year time limit.

SST: Research

- Law is unfortunately spread out over many statutes and regulations.
- SST website has links at bottom to law and cases.
  - “Decisions” for SST Decisions
  - “Reference Documents and Links” for statutes, regulations, and other cases.
- Most statutes, regulations and decisions also available through Canlii, which is searchable by keyword.

Research: The Law

- Law about the particular benefits:
  - *CPP* and *CPP Regulations*
  - *Employment Insurance Act* and *Regulations*
  - *Old Age Security Act and Regulations*

- Procedure at the SST:
  - *Department of Employment and Social Development Act* – Part 5
  - *SST Regulations*
  - *SST practice directives*
  - Transitional files - *Jobs, Growth and Long Term Development Act*

Research: Cases

- Previous cases from Federal Court and Federal Court of Appeal. Available through Canlii.

- Previous SST Cases: All Appeal Division cases will now be published on SST website and Canlii.

- Decisions from old Pension Appeals Board (CPP) and Umpire (EI).
  - Old PAB decisions available on SST website. Not searchable by keyword so essentially useless unless you know exact case you are looking for.
  - Old Umpire decisions still available in EI Jurisprudence Library.

Wrap Up

- PovNet runs courses.
  povnetu@povnet.org
- Disability Alliance BC guidebooks.
  www.disabilityalliancebc.org
- Community Legal Assistance Society
  www.clasbc.net

the Social Security Tribunal

A Self-Help Guide for Canada Pension Plan Disability Appeals

UPDATED 2015

prepared by Disability Alliance BC
Community Legal Assistance Society

funded by Law Foundation of BC

original funding from Law Foundation of Ontario

dabc disability alliance bc

CLAS

THE LAW FOUNDATION OF BRITISH COLUMBIA

Contents

The Social Security Tribunal: A Self-Help Guide for Canada Pension Plan Disabiity Appeals was prepared by Disability Alliance BC (formerly BC Coalition of People with Disabilities) and Community Legal Assistance Society (CLAS), thanks to generous funding from the **Law Foundation of BC** and original funding from the **Law Foundation of Ontario**.

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See our online web library for more free self-help resources at www.disabilityalliancebc.org/library.

dabc disability alliance bc | we are all connected

CLAS

THE LAW FOUNDATION OF BRITISH COLUMBIA

About this Guide

This Guide has been produced by Disability Alliance BC and the Community Legal Assistance Society. It is designed to help people who are representing themselves with Canada Pension Plan Disability (CPP-D) appeals to the Social Security Tribunal (the "Tribunal"). Representatives may also find the Guide helpful if they have clients with appeals before the Tribunal.

The Tribunal replaced the previous Review Tribunal in April 2013. When it started, the Tribunal inherited a substantial backlog from the previous Review Tribunal. The Tribunal's backlog has grown since that time and it has made a number of changes to its appeal process to address this. The Tribunal is continuing to refine its operating procedures, and has advised the authors of this guide that it hopes to provide clearer guidelines for all parties in the summer of 2015.

In this Guide and Appendices, we refer to several legal decisions. **Although some readers may feel intimidated by legal material, your ability to present a good appeal will be strengthened, if you have some understanding of past legal decisions.**

We wish to thank the Social Security Tribunal for taking the time to review the previous version of this Guide and providing valuable feedback. We would like to acknowledge the support that the Law Foundation of Ontario contributed to this work. Last but by no means least; we wish to sincerely thank the Law Foundation of British Columbia for generously providing the funding needed to complete this Guide.

It should be noted that while the state of the law and legal decisions are reviewed in this document, please be aware it is a guide only and should not be taken as legal advice. This Guide is disseminated for information and self-help purposes only. Anyone who feels the need for actual legal advice should see a lawyer or such other qualified professional.

The Social Security Tribunal–General Division

Process Overview

- The Appellant receives the reconsideration denial letter.
- The Appellant files a *Notice of Appeal* form, within 90 days.
- The Tribunal acknowledges the *Notice of Appeal*.
- The Tribunal sends the Appellant the Minister's File.
- The Appellant sends additional information and/or submissions in support of the appeal.
- The Ministry sends its submission.
- The Appellant and Ministry respond to each other's submissions.
- The Tribunal asks the parties to complete a *Hearing Information Form*.
- The parties submit a *Hearing Information Form*.
- The Tribunal sends a letter to the parties indicating it is ready to proceed and the file will be assigned to a Member.
- A *Notice of Hearing* is sent to all parties (or a notice that the appeal will proceed based on the written record, without a hearing). The Tribunal might also send another complete copy of the Hearing File with the Notice.
- The parties are given an opportunity to provide additional information and submissions.
- The parties are given an opportunity to respond to any new information or submissions.
- The hearing is held or a decision is made based on the written record.
- The Tribunal makes a decision.

Starting Your Appeal

You must file an appeal in writing with the General Division of the Social Security Tribunal, within 90 days of receiving the Reconsideration denial letter from CPP.

Assess the Merits of Your Case

Before you invest time in preparing an appeal, we recommend you assess your chances for success. There are some situations where the Social Security Tribunal will have no choice but to dismiss your appeal.

- There are no provisions in the Canada Pension Plan and Old Age Security Act which give a Tribunal the power to grant an appeal on compassionate grounds. No matter how compelling your situation may be, the Tribunal must apply only the law to the facts.
- If you do not have sufficient contributions to CPP, the Tribunal will deny your appeal.
- If you do not have any medical evidence to show you were too disabled to work at any job on a consistent basis when you last qualified for benefits (Minimum Qualify Period), the Tribunal will deny your appeal.
- If you have been receiving early retirement benefits for more than 15 months before you applied, or became disabled after you started receiving early retirement benefits, the Tribunal will have no option but to deny your appeal.

Notice of Appeal

To start an appeal, you need to complete the Tribunal's Notice of Appeal form which is available on its web site or by calling the Tribunal. See Appendix A, Resources, for the Tribunal contact information.

Most of the information required on the Appeal form is contact information. Section C asks you to explain why you are appealing the decision and why you think it is wrong. You should provide an explanation about why you are appealing, but it is not necessary to go into great detail at this stage. You will be able to make a more detailed submission at a later date.

We recommend completing your remarks under Section C with a comment such as:

> I will be providing additional information, after I have had a chance to review my complete CPP-D File. I am prepared to provide my evidence under oath and to answer any questions the Tribunal or the Ministry may wish to ask me.

Section D of the Appeal form asks you to attach any documents you may have to support your appeal. **The only document you must attach is the CPP decision letter.** The Tribunal needs to see this letter before it will accept an appeal. **If you do not include the decision letter or neglect to complete all parts of the form, your Notice of Appeal will not be accepted.**

It is a good idea to wait until you have reviewed the Minister's File (see below), before you add too much additional information. You need to be sure any new information does not contradict information already in your file.

Late Appeals

The Tribunal has the power to accept an appeal that is past the 90-day deadline. **Section B** of the Appeal form allows you to explain why you have filed your appeal past the deadline. If your appeal is not late, do not complete this section. Legislation prevents the Tribunal from accepting an appeal that is filed more than a year after a reconsideration decision was received. See **Appendix C** for more detailed information about late appeals.

Tribunal Response

If you have sent all the necessary documents and your Notice of Appeal Form has been properly completed, the Tribunal should send you a letter of acknowledgement in about two weeks. If you do not receive a letter within four weeks, contact the Tribunal to confirm it has received your appeal.

The Minister's File

In the acknowledgement letter, the Tribunal will advise you that they will be obtaining a complete copy of your CPP File. They will ask Employment and Social Development Canada for all relevant CPP-D information gathered during the application and reconsideration process. This includes your CPP-D application, medical information, doctors' letters, a record of earnings, CPP contributions, decision letters, and adjudication summaries.

Because of its backlog, it could be six months or more before the Tribunal provides you with a copy of the Minister's file. In addition, it could take up to two years before new appeals are dealt with by the Tribunal. You will therefore have sufficient time to gather additional information.

Decision-making Process

Social Security Tribunal decisions are made by a single Tribunal Member. **There is no automatic right to an in-person Oral Hearing.** Decisions can be made in any of the following ways.

Summary Dismissal

If the Tribunal believes your appeal has no reasonable chance of success or it has no legal authority to allow it, it can summarily dismiss your appeal. The Tribunal must advise Appellants in writing before summarily dismissing an appeal and give the Appellant a chance to provide a written response. There is an automatic right to appeal a summary dismissal decision. This type of decision can be made at any time during the appeal process.

Decision Based on the Written Record

The Tribunal could decide not to hold any type of hearing and make a decision based on the written record alone. A Tribunal Member can grant an appeal based on the written record or dismiss it. This type of decision will be made after the parties have reviewed the Minister's file and provided any new information or argument related to the appeal. **There is no automatic right to appeal this type of decision.**

The Tribunal uses this form of hearing when: the issues are not complex; there are no gaps in the information in the file or need for clarification; credibility is not a prevailing issue. See **Appendix E** for more discussion about hearings based on the written record.

Employment and Social Development Canada (ESDC) [formerly known as Human Resources and Skills Development] is responsible for CPP. ESDC has been asking the Tribunal to dismiss almost every appeal without a hearing. Do not be alarmed if the Ministry asks the Tribunal to do this with your appeal. The Tribunal Member deciding your case has the final say about whether or not to hold a hearing.

Hearing by Written Question and Answers

If the Tribunal Member deciding your appeal needs more information, he or she can send you questions in writing, which you will answer and send back. The Tribunal may use written questions and answers if there are gaps in the evidence that require more information, but the issues are not complex and credibility (who to believe or not believe) is not an issue.

Telephone Hearing

The Tribunal could decide to hold a hearing by teleconference. All parties will be given instructions on how to connect to the conference call. The Tribunal tends to use conference calls when there are gaps in the evidence, but there is only one person participating in the hearing and credibility is not a prevailing issue.

Videoconference

The Tribunal could hold a hearing by videoconference. You will go to a Service Canada centre that has a videoconferencing room; you do not use your own computer. Videoconferences may be used if there are gaps in the evidence and credibility is an issue, the case is complex, or there will be multiple people at the hearing.

In Person Hearings

The Tribunal could hold an in person hearing where everyone gets together in the same place. In person hearings are most often held because there are serious issues of credibility. However, in person hearings may also be appropriate in other circumstances. For example, an in person hearing may be appropriate if the issues in the appeal are unusually complex, if there will be many people participating at the hearing, or if someone participating in the appeal has a disability that will make it difficult to understanding what is said by telephone or videoconference.

Preparing Your Case

Reviewing the Minister's File

It is very important to carefully review and familiarize yourself with all the information in the File. The Tribunal Member reads the file–it gives the first impression of your case.

The pages in the file will be numbered at the bottom right hand corner. The first section starts with the number GD1-1 and contains the appeal that was filed with the Tribunal. The second section starts with the number GD2-1 and contains the complete file that the Tribunal received from the Ministry.

As you go through the File, look for any important missing information. **In particular, read all the medical letters and reports, check the CPP contribution record, and look at ESDC's adjudication summary notes for the application and reconsideration decisions.** Keep the following questions in mind as you review the File:

- Is there information in the File you were not aware of?
- Has important information been left out?
- Which information supports the appeal?
- Which information weakens the appeal?
- Do the ESDC adjudication notes give you more insight into why the application was turned down?

The answers to these questions will help you decide your next steps. **Focus on identifying the things you need to do or obtain to support your case before the Tribunal.**

Time Lines

As we have mentioned previously, the Tribunal has a substantial backlog. At the time of writing this guide, the Tribunal was setting hearing dates for appeals that were 3 years old. The Tribunal has indicated that it hopes to provide a clearer picture of when appellants can expect to have their appeals dealt with in the near future.

The Tribunal has indicated it will expedite some new appeals if there are compelling reasons to do so. If, for example, there is medical evidence to suggest an Appellant might not survive a long delay or their condition will deteriorate to the point they may not be able to participate in a hearing, the Tribunal will give the appeal priority. Financial hardship may also be a factor, however, because most Appellants will be having financial difficulties, extraordinary circumstances will be needed. The Tribunal will not expedite an appeal without clear evidence there is a need to do so. Any request to speed things up must be made in writing.

Although it may take some time for the Tribunal to act, the sooner you provide additional information and let the Tribunal know you would like to proceed with your appeal, the better. The Ministry will also be providing submissions in support of its position. Sometimes people get confused by documents that the Ministry submits because they are sent to them by the

Tribunal. Some appellants think the documents are written by the Tribunal – they are not. These documents represent the Ministry's position.

After you and ESDC have had a chance to make submissions and add additional information, the Tribunal will advise you when it considers the appeal ready to proceed and will be assigning your appeal to a Tribunal Member.

Obtaining Additional Information

In making its decision, the Tribunal can consider any information that was previously submitted to ESDC during the application and reconsideration process. It can also consider new information you or ESDC provide.

One of the most important things you can do to prepare for a hearing is to gather new information that supports your appeal.

Current letters from doctors or specialists can help. Make sure your doctors understand that CPP disability benefits can only be paid if you are unfit for any form of work and your condition is not likely to improve in the foreseeable future. If your qualifying date (MQP) is sometime in the past, make sure your doctors are aware of this date. You must be able to provide medical evidence indicating you were disabled as of your qualifying date and continuously since that time.

If the medical information in the Hearing File is out of date, or if you have started seeing new health professionals, you should make every effort to ask for new letters and medical records that will address your current health-related restrictions. It may be necessary to clarify medical information that is already in the hearing file.

Medical information is not the only material that may help your case. You may be able to obtain other documents to support your argument that you are incapable of working or being retrained for alternative work. Some examples are:

- letters from previous employers or others who know how your disability limited your ability to work,
- statements from teachers who have seen you struggle in a retraining program, or
- comments from employment counselors or other vocational specialists who have evaluated your capacity to work.

It is best not to send new information to the Tribunal in bits and pieces. Wait until you have all of the documents you plan to rely on and include them as attachments to a single submission.

Research

A little research may be a great benefit in preparing your case. Understanding previous appeal decisions, and why they were made, will help you understand how Tribunals make decisions.

Visit your local library or the law library at a Court House or Law School. Find a copy of the *Annotated Canada Pension Plan and Old Age Security Act* (published by Wolters Kluwer). This annual publication provides summaries of past decisions and includes a disability case table that covers many types of disabilities. A librarian can help you locate a copy of most decisions. Many of the decisions mentioned in the *Annotated Canada Pension Plan and Old Age Security Act* are Pension Appeals Board decisions. The Pension Appeals Board made decisions about CPP before it was replaced by the Social Security Tribunal. A Link to these decisions can be found on the Tribunal's web site under **Reference Documents and Links**.

We recommend you review **Appendix D** of this Guide, **Using Case Law**. We have selected excerpts from a number of important decisions and provided comments on how they relate to common appeal issues.

Please also be sure to read **Appendix B**, **Key Definitions** which looks at the key issues that are often central to the appeal process.

The Tribunal posts a selection of its decisions on its website under **Decisions**. It also provides links to other websites that have may contain decisions.

Dispute Resolution and Settlements

The *Department of Employment and Social Development Act* contains new provisions that allow the Tribunal to ask the parties to participate in a dispute resolution process, in order to resolve appeals without a hearing. In addition, any party to the appeal can ask the Tribunal to hold a settlement conference to attempt to resolve any part of the appeal. It is not yet clear how the Tribunal will use these new provisions.

If you provide new medical information or other compelling evidence, we are aware of appeals where CPP has offered to settle appeals without a hearing. If CPP offers a settlement it will usually offer the same amount of benefits that a Tribunal would allow if a hearing was held and the appeal was allowed. CPP will send a settlement agreement along with Notice of Withdrawal form and ask the appellant to sign and return both documents to their office. CPP will then complete its part of the documents and send them to the Tribunal. When the Tribunal receives the settlement agreement and the Notice of Withdrawal it will discontinue the appeal. CPP will then process the claim. Generally speaking, this is the preferred method of settlement.

In some exceptional circumstances, a party might want the Tribunal to issue a formal decision in which it acknowledges the settlement. This would involve the parties signing a settlement agreement and asking the Tribunal to make a formal decision without a Notice of Withdrawal. This method of settlement will take longer.

Witnesses

Your oral testimony is the most important source of information for the Tribunal. You are also allowed to call witnesses who can give testimony in support of your appeal.

The Social Security Tribunal usually schedules hearings to last an hour and a half. You should only call witnesses who are genuinely helpful to your case. Avoid calling unnecessary witnesses or witnesses who are just going to repeat what has already been said. If possible, ask your witness(es) to prepare a statement that you can submit before the deadline for adding new documents has passed.

You can also ask a friend or family member to attend the hearing for support. Tribunals are often swayed by witnesses who know you well (adult children, spouses/partners, close friends) and can provide evidence about how your life has changed over time because of your disability. It is not necessary to have a witness at the hearing, but it can help if there is someone who has direct knowledge of your personal history.

One of the best witnesses, from the Tribunal's perspective, is a health professional. Most CPP-D cases are decided based on information about the degree of the Appellant's health-related limitations. Unfortunately, many doctors are unable to take the time to attend a hearing and they may expect to be paid for their time. However, you can make arrangements with the Tribunal to have a witness provide testimony by phone. A doctor may be more willing to help with the appeal without charge, if they can call in from their office.

Job placement or vocational counselors are also good potential witnesses because they know the skills required in the job market.

The Tribunal does not pay any costs or expenses except in special circumstances. The Tribunal may consider paying some expenses you incur as a result of attending a hearing, but you will have to contact the Tribunal in order to receive special approval for any expense claim.

Tips About Witnesses

If a potential witness cannot come to the hearing, ask them to provide a letter to include as written evidence. Alternatively, you can make arrangements with the Tribunal to let the person give evidence by phone.

If someone does agree to testify, be sure to speak to them before the hearing. You do not want to be surprised by unhelpful testimony, so know what the person can say that will benefit your case. Do not use a witness, unless they support your appeal.

Go over the issues you want them to address. Let your witness know they should expect to answer questions from the Tribunal member and the ESDC representative.

Your Written Submission

There are many reasons to submit a written submission in advance of the hearing. If you have poor English reading and writing skills, consider asking someone else to help you prepare your submission.

- Your written submission should address the key issues under appeal.
- The Tribunal will probably form some opinions about your appeal after reading the Hearing File in advance of the hearing. The Ministry will also be providing written arguments before the hearing. You should address the Ministry's position before the hearing, so the Tribunal has a balanced view before the hearing starts.
- Making a presentation at a Tribunal hearing is stressful for most people. When you are nervous, you can forget important things you want to say. With a written submission, you will not have to depend on your memory.
- Writing a submission will help you organize the information you want to present and stay on track during your presentation.

Submission Guide

Use these guidelines to help write your submission.

- **Prepare a brief biography: your place of birth, early family life, education, work history and so on.** You want to tell the Tribunal who you are. Include details about your life leading up to your application for CPP disability benefits.
  - If you have a degenerative condition, when did you start noticing symptoms? When did you stop working and when were you unable to work because of your disability? It is important to make the Tribunal aware of all of your limitations.
  - If you tried to work but could not, explain how your disability made it impossible to work.
  - If you looked for work, explain how the disability made it impossible to find a job. A lack of jobs in your region is not a valid reason. Decisions are based on your ability to work, not the job market.
  - If you have been doing some work, explain why it is not "substantially gainful" (see **Appendix B, Key Definitions**), either because your attendance at work was unpredictable or the amount of earnings is not significant.
  - If your record of earnings shows income for any year you claim you could not work, explain the earnings.
  - If you received regular Employment Insurance (EI) benefits during a time when you claim to have been disabled, explain why you indicated on your EI forms that you were "ready, willing and able to work." Perhaps you were overly optimistic about your condition or were not ready to accept that your disability made you unable to work. Pride can be a legitimate explanation. Although the Minister may make arguments about Appellants receiving regular EI, past Tribunals rarely rejected appeals for this reason.

- Address the Minimum Qualifying Period. Double check your record of earnings. Make sure the Ministry did not make a mistake in its calculations–this sometimes happens. State whether you agree or disagree with the Ministry's date. For more information about the MQP, see **Appendix B, Key Definitions**.
- Provide details about your medical condition(s) and list current medications.
  - Which health professionals have you seen and when?
  - If there are conflicting reports, it is best to address this directly and explain which report should carry more weight. Which doctor was more thorough? Who spent more time with you? In the case of specialists, are they providing information about their area of specialization or commenting on something that is more appropriately addressed by a family doctor?
  - Provide details of the treatments you have tried and how effective they have been.
  - If a doctor has referred you to specialists and has not followed up, why not? Are specialists available? Are you on a wait list? Are treatments available where you live? Can you afford them?
- Describe why your disability is long term and of indefinite duration (prolonged).
- Describe why your disability is severe and how it has stopped you from working. Bear in mind your MQP, especially if you last qualified a number of years ago.
- Explain why doing a different kind of job or being retrained is not a realistic option.
- Add a conclusion that summarizes your most important points.
- Use case law, if appropriate. See **Appendix D, Using Case Law** for past decisions that may be relevant to your situation.

Use sticky notes to identify the documents from the Hearing File that you refer to in your submission. Mention the page number of the document you want the Tribunal to look at. Create a numbered outline when you type your submission, so paragraphs and points can be referred to easily. The Tribunal asks that submissions not be bound.

Pre-Hearing Notices

Hearing Information Form (HIF)

The Tribunal will send a *Hearing Information Form (HIF)*. In April 2014 the Tribunal sent this form to all appellants who filed their appeals with the Review Tribunal. It is not clear when the Tribunal will be sending this form for new appeals but it is assumed that it will be sent before a *Notice of Hearing* is issued. This document asks appellants to indicate if they have a representative, have any witnesses, and whether or not they require the assistance of a translator.

The *HIF* will also ask the parties to indicate what type of hearing they could not participate in. The choices give are:

- Written questions and answers
- Videoconference (at a Service Canada Centre)
- Teleconference (by telephone)
- Personal appearance of the parties (at a Service Canada Centre)

It is important that you provide clear reasons why you might not be able to participate in some types of hearings. For example, if you have poor English skills or have difficulty writing, a hearing based on the written record might not be appropriate. If you have a hearing impairment and communicate through sign language or read lips, only some type of face to face hearing would work. Be specific. The Tribunal has a duty to accommodate people with disabilities.

Even if you would ultimately be willing to participate in more than one type of hearing, do not be afraid to let the Tribunal know what type of hearing you think is most appropriate. For example, if you feel that an in person hearing is appropriate because there are serious issues of credibility in your case, let the Tribunal know. Again, be specific.

The Tribunal will also ask the parties to provide dates when they may be unavailable for a hearing. You will also be asked which days of the week and the time of day when you would prefer a hearing to be scheduled.

Notice of Assignment

When the Tribunal is ready to proceed with an appeal, it will send a letter indicating that it considers the appeal ready to proceed and will be assigning it to a Tribunal Member. It is at this stage that you should gather any last minute documents that you want to provide to the Tribunal. You will be given a deadline for sending new documents soon after you receive the Notice of Assignment.

Notice of Hearing

If the Tribunal decides to hold a hearing, they will send a *Notice of Hearing* and specify the date, time, place, and form of hearing.

If the hearing is to be held by teleconference, the parties will be provided with a teleconference number, ID, and security code to connect with the hearing.

When a party receives the *Notice of Hearing* they will be given two days to contact the Tribunal if there is a problem with the hearing date. If a party contacts the Tribunal in two days, the hearing date can be changed. If a party does not contact the Tribunal in two days and later asks for a new date, this will require a good reason and will be considered an adjournment. Unless there are exceptional circumstances it is unlikely that the Tribunal will grant more than one adjournment. Make sure to contact the Tribunal right away if there is a problem with the date on the *Notice of Hearing*. If you disagree with the type of hearing the Tribunal has decided to hold, you should write to the Tribunal and let them know why it is not appropriate.

If the Tribunal decides not to hold a hearing, it will send a notice saying that the decision will be made on the basis of the documents and submissions in the file (written record). The Tribunal will use this form of decision making if: the issues are not complex; there are no gaps in the information in the file or need for clarification; credibility is not a prevailing issue–see **Appendix E**. Again, if you disagree with the Tribunal's decision not to hold a hearing, you should write to the Tribunal right away and explain why.

The *Notice of Hearing* (or the notice advising that there will be no hearing) will also include final deadlines for providing new information and submissions. The parties will be given at least 30 days to provide any new documents and submissions. They will then be given a further 30 days to provide a response to the other party's submission. If new information or arguments are provided after the deadlines given, they will only be accepted at the Tribunal Member's discretion.

Along with the *Notice of Hearing* the Tribunal might provide another copy of its file with all the additional documents submitted by the Appellant or the Ministry. The pages in the new Hearing File will be numbered slightly differently. The numbering will start with the letters GT instead of GD and will include new sections for any submissions each party might have made.

You may want to compare any new Hearing File with the Minister's file and the submission that you made to ensure that there is no missing information.

At the Hearing

When the day comes for your hearing, allow extra time so you arrive early. Do not arrive late. If the hearing is held at a Service Canada office, make sure you bring some identification with you. Some Service Canada offices will not allow appellants into the hearing room without photo ID.

Do not forget to bring all your documents.

Special Accommodation

Make sure that you indicated that you require a translator or other form of assistance on the *Hearing Information Form*. The Tribunal must be notified well in advance of a hearing if special accommodation is required.

Hearing Outline

- The Tribunal will:
  - Welcome you and ask everyone present to introduce themselves.
  - Ask you and any witnesses to swear they will tell the truth.
  - Let you know that you are free to move around or take a break if you need one.
  - Check that everyone has a complete Hearing File, including any information sent to the Tribunal after the Minister's File was compiled.
  - Ask both parties if they agree on the Minimum Qualifying Period
- The Appellant makes their presentation first. The Tribunal and Ministry representative (if one is present) ask questions. A representative may not be present if the Ministry has asked for a decision based on the written record.
- The Ministry representative, if present, lays out their case. The Appellant may respond.
- The Appellant makes closing remarks.
- The Tribunal will eventually make a decision and send a written copy of its decision to both parties.

Your Presentation

The Tribunal will usually ask you to present your case first. Tribunals hear many appeals where Appellants are unrepresented by a lawyer or an advocate. As a result, some Tribunal Members can be more hands-on than others–they may direct the proceedings more than you expect.

Try to approach the hearing as if it were a conversation. It is your job to start the conversation, but do not be surprised if the Tribunal asks a question that takes the conversation in a different direction. You will also be able to provide information about issues the Tribunal may not have asked about.

If you have a witness who is also a support person, have the person testify first. This way, they will not be asked to leave the hearing room (this may not be an issue if it is a telephone hearing). Witnesses may be asked to leave the room before they testify so their evidence will not be affected by other witnesses or evidence. The Appellant is allowed to be present when witnesses present their testimony. The Tribunal or the Ministry's representative (if present) may also have questions for any witness.

The Ministry's Presentation

Do not be surprised if the Minister does not send a representative to the hearing.
The Minister has not sent a representative to any hearing before the General Division that the writers of this guide are aware of.

Final Steps

After all the evidence and testimony has been presented, you will be given the chance to make closing remarks. You don't have to cover every point in your written submission. It depends on what was said during the hearing. If all the key points from your submission were made, and you think the Tribunal is sympathetic toward your position, keep your closing remarks brief. If it seems the Tribunal is not sympathetic, you may want to go over the most important points of your appeal in more detail.

Tips for the Hearing

- Be yourself. The hearing is your opportunity to tell your story in your own words. The proceedings are meant to be as informal as possible. You do not need to dress formally, but you want to be respectful.
- If you are nervous, take a few deep breaths or pour yourself a glass of water before the hearing begins.
- Be honest about your lack of experience with this type of presentation. The Tribunal will guide you.

- If it is a telephone hearing be sure to describe things that the Tribunal Member can't see – are you using a cane, do you have body tremors, do you have problems using your hands – try to give the Member a picture of how your disability may have an impact on you physically.
- Stay focused on the reason you are there: to explain why you think you meet the eligibility criteria for CPP-D. Remember, the Tribunal cannot allow an appeal based on compassionate grounds or on the basis of financial need. It is your job to explain why you think the facts of your case satisfy all the eligibility requirements.
- Be prepared to answer some difficult questions. The Tribunal may focus on the weak parts of the appeal. Be truthful and straightforward when you answer. It is better to say "I don't know" than to guess. The Tribunal will be assessing your credibility, as well as the facts of your case.
- Tribunal members cannot give you medical or legal advice about the appeal. Their role is to hear all the facts of your case and make a decision based on the CPP legislation.
- You cannot know what the Tribunal Member is thinking. Do not make assumptions, other than assuming the Tribunal has an open mind.
- Be respectful to everyone at the hearing, even if you become frustrated or angry. Try to stay calm and avoid blaming the Minister's representative for past decisions. If you disagree with something that is said, you will usually have a chance to express your point of view, so do not interrupt when someone else is speaking. Write down what you want to say and wait for the time when you are given the chance to respond.
- Always follow the direction given by the Tribunal.

After the Hearing

The Tribunal's Decision

After you and the ESDC representative have left the meeting room, or been disconnected from the telephone hearing, the Tribunal Member will review all of the evidence. Hearings are now recorded, so the Tribunal member can refer back to the statements made during the hearing. The Tribunal will decide if there is enough evidence to rule in your favor. They will provide written reasons for their decision.

The Tribunal will advise you to expect a written decision in about two months.

Social Security Tribunal-Appeal Division

If you are still unhappy with the decision made by the General Division, you can apply for leave (permission) to appeal to the Appeal Division. You do not automatically get to appeal to the Appeal Division. You will only be given permission to appeal if you convince the Appeal Division that your appeal has some reasonable chance of succeeding. The Minister can also ask for leave to appeal if they disagree with the General Division's decision.

There is an exception if your case was summarily dismissed by the General Division. If your case was summarily dismissed, you get to appeal automatically and you do not need permission.

Before filing your Leave to Appeal Request, it might be a good idea to obtain a copy of the hearing record. You can write to the Tribunal and ask for a copy of the audio or audio visual record. You can review the tape in order to refresh your memory about what took place.

The Deadline

The deadline is 90 days from the date you first found out about the decision, regardless of whether you are applying for leave to appeal or appealing a summary dismissal. It is very important that you write the date you first found out about the decision on your application. If you fail to do this, the Appeal Division may treat your application as late even though it is not.
If you miss the deadline, you can ask for an extension of time. You will need to explain how:

- There is a reasonable explanation for why you did not appeal in time;
- You really did mean to appeal all along;
- There is some reason to believe your case could win if you get to appeal; and
- Allowing you to appeal late will not prejudice (make life difficult for) the other people involved in the appeal, most commonly the Commission or your employer if they are participating.

Like the General Division, the Appeal Division cannot extend the deadline to appeal beyond one year from the date you first found out about the decision.

The Application

The Application Requesting Leave to Appeal to the Appeal Division is available on the tribunal's website: http://www.servicecanada.gc.ca/eng/common/sst-tss/forms-formulaires/SST-ARLTAT-TAD.pdf

If your case was summarily dismissed by the General Division, you can appeal automatically by filling out an Application to Appeal to the Appeal Division, which is also available on the SST's website: http://www.servicecanada.gc.ca/eng/common/sst-tss/forms-formulaires/SST-ATATTAD.pdf

The forms are very similar, so make sure you have the right one. It is important that you fill in all mandatory sections because your application will not be accepted if it is missing any mandatory information. You must attach a copy of the General Division decision you are trying to appeal.

Reasons for Appeal

You must state your reasons for appealing (Box 3D on the Application for Leave to Appeal; Box 3C on the Application to Appeal a summary dismissal). When filling out this section, it is important to remember that the Appeal Division works much differently than the General Division. The Appeal Division cannot just allow your appeal because it disagrees with the General Divi-

sion's decision. The law says that the Appeal Division can only allow your appeal if the General Division made certain types of mistakes, which are listed in section 58(2) of the *Department of Employment and Social Development Act*. Unfortunately, the government used very complicated legal language to describe theses mistakes, so we will review each of them in turn:

The General Division failed to observe a principle of natural justice.
The Principles of Natural Justice require that the General Division use a fair process to decide your appeal and that the person who made the decision against you appears to be unbiased. To ensure the process is fair, the General Division must let you know the case against you and what evidence it will be considering, and then give you a fair chance to present your side of the story. For example, if the General Division determined that you were not telling the truth, but did not give you a chance to explain yourself at an oral (live) hearing, that might be contrary to natural justice because you did not get a proper chance to present your side of the story.

Allegations of bias should not be made lightly. Just because the Tribunal Member disagrees with you or asks tough questions at the hearing does not mean that he or she is biased. Bias might include situations where the Tribunal Member makes nasty personal remarks about you or situations where the Tribunal Member had a close personal or business relationship with someone involved in your appeal.

These are just examples. It is impossible to cover all the different ways that the appeal process can be unfair so you will need to think about your own case and what made the process unfair. Keep in mind that we are talking about unfairness in the process that the General Division used, not unfairness in the ultimate decision that the General Division made. You may think that the General Division's decision is totally unfair and full of mistakes, but that does not necessarily mean that the process the General Division used was unfair and contrary to natural justice. We will be discussing other grounds for review through which you can challenge the General Division's ultimate decision.

The General Division acted beyond its jurisdiction or refused to exercise its jurisdiction.
This is just a fancy way of saying that the General Division did something that it did not have the legal power to do, or refused to do something it had a legal obligation to do.

The General Division erred in law in making its decision, whether or not the error appears on the face of the record.
This simply means that General Division misinterpreted the law relating to your case. Often this will mean that the General Division applied the wrong legal test when deciding your appeal. The words "whether or not the error appears on the face of the record" are just an old fashioned, confusing way of saying that the Appeal Division can look beyond the General Division's decision and the evidence in your file when deciding whether there has been an error of law. Practically speaking, you can just ignore these words and explain the error of law.

The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.
The General Division's findings of fact are its conclusions about what happened (i.e. who did what, when, where and how). The General Division will also make findings of fact about the nature of your disability. It can be very difficult to challenge the General Division's findings of fact. The Appeal Division will not interfere just because it would have come to a different conclusion than the General Division did. The Appeal Division will only set aside the General Division's decision if there is no way the evidence in your file can reasonably support the General Division's version of the facts. So long as there is some evidence that can reasonably support the General Division's findings of fact, the Appeal Division is not going to second guess the General Division's findings.

Reason for Leave to Appeal

If you are filling out an Application for Leave to Appeal, you must also explain why your appeal has a reasonable chance of success (Box 3C). This is the test the Appeal Division will use to decide whether or not to give you leave to appeal (The Application to Appeal a summary dismissal does not have this section because you get to appeal automatically).

This section can be a little confusing and repetitive because whether or not your appeal has a reasonable chance of success will likely come down to whether your reasons for appeal have some merit (see the previous section on Reasons for Appeal). However, it may be worth reminding the Tribunal that the question at this point is not whether you should win or lose, but only whether there is some reasonable chance you might win. In other words, you want to highlight or explain how your reasons for appeal will have some chance of succeeding if you are allowed to fully present your appeal.

The Appeal Division does not have to agree that all your reasons for appeal have some merit. As long as at least one of your reasons could ultimately succeed, you should get leave. However, the Appeal Division may only let you pursue the reasons for appeal that it feels have a reasonable chance of success.

New Evidence

Generally you are not allowed to send in new evidence to the Appeal Division that the General Division never had a chance to consider. However, there are exceptions. If you are alleging that the General Division breached the rules of natural justice, you will generally be allowed to submit new evidence to show what the General Division did wrong.

For matters not relating to natural justice, the Appeal Division still has the ability to let you submit new evidence if it would be in the interests of justice to do so. But keep in mind that there is a separate process through which the General Division can reconsider its decision if you have new evidence (see the section below on "Rescinding or Amending a Decision"). Generally, this is the proper way to deal with new evidence. However, if you have started an appeal and you discover new evidence that is really important to your case, you can always send it in with an explanation of why you did not send it to the General Division.

Decision About Whether or not You Will Get Leave to Appeal

The Appeal Division will review your Application Requesting Leave to Appeal. Generally, the Appeal Division does not hold any kind of hearing before deciding whether or not to give you leave to appeal, although it may ask for further information in writing from you or give the other parties (most often the Minister) a chance to respond. If the Appeal Division finds that your appeal has no reasonable chance of winning, you will not get leave to appeal and that will end your case (subject to a process called judicial review, which is not covered in this guide). If the Appeal Division finds that your appeal has a reasonable chance of success, you will be given leave to appeal. In either case, the Appeal Division will send you written reasons for its decision. If you are appealing a summary dismissal, there will obviously be no decision about leave to appeal because you can appeal automatically and do not need permission.

The Appeal Process

If you are given leave to appeal, there is no need to fill out a separate Notice of Appeal to confirm that you want to appeal. The Appeal Division will automatically move on and start the process for deciding your appeal. Remember that getting leave to appeal does not mean that you win. It just means that your case has a reasonable chance of winning, so the Appeal Division will give you an opportunity to fully present your case. You still need to convince the Appeal Division that you should actually win.

Once the Appeal Division makes its decision to let you appeal, you will have 45 days to file written submissions arguing why your appeal should win. Note that this deadline starts running from the date the Appeal Division makes its leave decision, not the date you first found out about it. If you are appealing a summary dismissal, your written submissions are due 45 days after you file your Application to Appeal a summary dismissal.

Your submissions to the Appeal Division will likely look a little different than your submissions to the General Division. You need to focus on the mistakes in the General Divisions decision and/or why the process the General Division used was unfair. Avoid long or ranting submissions, but make sure you say all that you have to say. The Appeal Division is not required to hold a hearing, so your written submissions may be your last chance to state your case.

If the Appeal Division does decide to schedule a hearing, you will get a *Notice of Hearing* setting out the time and place, or instructions on how to connect by telephone. Keep in mind that the same rules about rescheduling or adjourning a hearing also apply in the Appeal Division.

If the Appeal Division does schedule a hearing, it will be much different than your hearing at the General Division. You will not be presenting your evidence all over again or calling witnesses because new evidence is generally not allowed at the Appeal Division. Once again, you should focus on explaining the mistakes in the General Division's decision or why the process the General Division used was unfair.

The Decision

After considering all the evidence and submissions, the Appeal Division will make its decision. If the Appeal Division decides that your appeal should win, there are several things that could happen. The Appeal Division may decide to take charge and make the final decision about the case. However, often the Appeal Division will send your case back to the General Division so they can make a new decision without repeating the same mistakes. This can be frustrating because it means that your case is not necessarily over even though you won at the Appeal Division.

If the Appeal Division denies your appeal, that will end your case (subject to judicial review, which is not covered in this guide). If you are considering judicial review, you should talk to a lawyer.

Rescinding or Amending a Decision (Reopening)

Sometimes you discover new evidence that would have helped your case after the Tribunal (either the General Division or the Appeal Division) has already made a decision. In these cases, you can apply to rescind or amend the decision. Often this is referred to as "reopening" the decision. If the General Division made the decision you want to reopen, you direct your application to the General Division. If the Appeal Division made the Decision you want to reopen, you direct your application to the Appeal Division. This is the biggest difference between an appeal and an application to reopen; when you appeal you go up a level (i.e. you appeal the General Division's decision to the Appeal Division) but when you apply to reopen, you go back to the same level that made the decision.

The Deadline to Apply

You must apply to reopen a decision within one year of the day the decision was communicated to you. You may only apply to reopen a particular decision once. Also keep in mind that applying to reopen a decision does not stop the deadline for filing an appeal. For example, if you apply to reopen a General Division decision based on new facts and your application is denied, you will be out of time to appeal that same decision if more than 90 days have passed since it was communicated to you. If you are unsure whether to appeal a decision or reopen based on new facts, you should try to get legal advice.

How to Apply

You can apply to reopen a decision by filling out the Application to Rescind or Amend (Reopen on New Facts) form, which is available on the Tribunal's website: http://www.servicecanada.gc.ca/eng/common/sst-tss/forms-formulaires/SST-ATROA.pdf

As with all forms, you must make sure that all the required information is filled out or it will not be accepted. You must attach a copy of the decision you are trying to reopen. Once you have completed the form, you can mail or fax it to the Tribunal. Contact information for the Tribunal is listed on the form. Presently it is unclear whether you can email the form to the Tribunal, so it is best to avoid email for now.

What Counts as New Facts?

The Tribunal will only reopen a decision if there is a new fact that you could not have discovered with reasonable diligence at the time of your hearing. You have an obligation to gather up all the relevant evidence before your hearing and the Tribunal will not reopen a decision later on just because you missed something. The new fact must also be material in the sense that it could reasonably be expected to affect the outcome of the case.

The Process

The Tribunal will send your application to the other people involved in your appeal (most often, the Minister) to give them a chance to make submissions by a certain deadline. After the Tribunal gets everyone's submissions or the deadline passes, the Tribunal will decide whether or not to hold a hearing. There is no obligation for the Tribunal to hold a hearing for an application to reopen.

- If the Tribunal decides not to hold a hearing, they will simply make a decision about your application and mail the decision to you.
- If the Tribunal does decide to hold a hearing, they will send a *Notice of Hearing* to everyone involved. The *Notice of Hearing* will set out what type of hearing will be held. The different types of hearings and the process for scheduling a hearing are discussed in more detail in the "Social Security Tribunal - the General Division" section of this guide.

Disclaimer

It should be noted that while the state of the law and legal decisions are reviewed in this document, please be aware it is a guide only and should not be taken as legal advice. This Guide is disseminated for information and self-help purposes only. Anyone who feels the need for actual legal advice should see a lawyer or another qualified professional.

APPENDIX A | Resources

Disability Alliance BC
#204 - 456 West Broadway, Vancouver, BC V5Y 1R3
Phone: 604-872-1278; Toll Free: 1-800-663-1278
http://www.disabilityalliancebc.org/

Community Legal Assistance Society
300 – 1140 West Pender Street
Vancouver, BC V6E4G1
Tel: 604-685-3425
www.clasbc.net

CLAS only helps people with judicial review (going to Court), and occasionally appeals to the Social Security Tribunal - Appeal Division. CLAS cannot help before you have received some decision from the Social Security Tribunal.

PovNet
This community organization has a web site that lists other advocacy organizations in BC and across Canada.

Visit: http://www.povnet.org/find-an-advocate

Canadian Legal Information Institute (CanLII)
This website publishes a selection of decisions by the Social Security Tribunal.
http://www.canlii.org/en/ca/sst/index.html

Social Security Tribunal
Notice of Appeal Form
Get a copy of the form at: http://www.servicecanada.gc.ca/eng/common/sst-tss/forms-formulaires/SST-NOA-GD-IS-CPP.pdf. Please note you can fill out the form online and print it, but you cannot save a completed copy on your computer. You also call the Tribunal to request a form.

Mail the completed form to the Tribunal or fax it to their toll-free number.

Social Security Tribunal,
PO Box 9812, Station T CSC,
Ottawa, ON K1G 6S3

Email: info.sst-tss@canada.gc.ca
Web Site: http://www.canada.ca/en/sst/index.html
Telephone (toll-free in Canada and the USA): 1-877-227-8577
From outside of Canada and the USA, call collect: 613-952-8805
TTY (for people with hearing loss only): 1-800-465-7735

Fax (toll-free in Canada): 1-855-814-4117
Office hours: 7:00 a.m. to 8:00 p.m. Eastern Time - Monday to Friday

On the Tribunal's home page there is a section titled Social Security Tribunal links. In this section there is a link a selection of its decisions as well as a link to past Pension Appeals Board decisions (reference documents and links).

Canada Pension Plan
http://laws-lois.justice.gc.ca/eng/acts/C-8/index.html

Canada Pension Plan Regulations
http://laws-lois.justice.gc.ca/eng/regulations/C.R.C.,_c._385/index.html

Department of Employment and Social Development Act
http://laws-lois.justice.gc.ca/eng/acts/H-5.7/index.html

Social Security Tribunal Regulations
http://laws-lois.justice.gc.ca/eng/regulations/SOR-2013-60/index.html

APPENDIX B | Key Definitions

The following are definitions and issues that are often central to a denial of CPP disability benefits. This section will help you to understand them and how they may relate to your appeal.

Eligibility

In order to be eligible for CPP disability benefits a person must:

- Be between 18 and 65 years of age;
- Have a severe and prolonged disability; and
- Have made sufficient contributions to the Canada Pension Plan.

Contributions

Occasionally, a denial will involve the issue of contributions. These types of cases rarely go to a hearing because it is usually clear whether or not someone has made enough contributions to qualify for CPP disability benefits. In order to determine if the Ministry made a mistake when it calculated your Minimum Qualifying Period, the following information might be helpful.

Minimum Qualifying Period

This is the minimum period of time that a person must have worked and contributed to CPP. It is calculated by counting the number of most recent calendar years you have made contributions. Under the rules, if a person has worked only four years, they must have made the required contributions in each of these years. If they have worked more than four years, valid contributions must have been made in four out of the last six years. This is known as the "four out of six year rule." A person must prove they were disabled by the end of the MQP in order to qualify for disability benefits. The end date of a person's MQP is usually December 31st of their last qualifying year.

Late Applicant Provision

This provision applies to a person who is applying for CPP-D, but stopped working so long ago they no longer have CPP contributions in four of the last six years. If a person meets all the other conditions of eligibility, they may still be eligible for a benefit. As long as the person had enough years of CPP contributions when they first became severely disabled, and as long as they are considered to be continuously disabled (as defined by CPP legislation) from that date up to the present time, they may be eligible.

The rules about how to calculate the minimum qualifying period have changed over time. Sometimes, late applicants will be found to have become disabled so long ago that different rules apply.

- If CPP determines that a person became disabled between January 1, 1987 and December 31st, 1997, then they must have worked and contributed to CPP in either two of the last three years, or five of the last ten years before becoming disabled.
- If CPP determines that a person became disabled between January 1, 1998 and December 1, 2006, they must have worked and contributed to CPP in four of the last six years before becoming disabled.
- If CPP determines that a person became disabled after December 1, 2006, they must have:
  - worked and contributed to CPP in four of the last six years before becoming disabled; or
  - worked and contributed to CPP for at least 25 years, including three of the last six years before becoming disabled.

Date Applicant Deemed to Have Become Disabled	MQP (made minimum CPP contributions in…)
Between Jan 1, 1987 and Dec 31, 1997	2 of last 3 years; or 5 of last 10 years
Between Jan 1, 1998 and Dec 1, 2006	4 of last 6 years
After December 1, 2006	4 of last 6 years OR 3 of last 6 years & 25 years of contributions

Definitions

Disability

S. 42(2) of the Canada Pension Plan and Old Age Security Act defines disability as follows:

(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,

> (i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and
>
> (ii) a disability is prolonged only if it is determined in the prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death.

The most common reason ESDC gives when defending a denial of CPP-D is that the Appellant's condition is not severe and prolonged. We will look at these terms in some detail.

Severe

The term "severe" requires a realistic assessment of the whole person, taking into account age, education level, language proficiency, and past work and life experience. However, it is not the diagnosis of a condition or disease that is considered, but its effect on the person (*Villani v. Canada (A.G.) [*2001] FCA 248

It may be possible for an Appellant to argue that their condition is indeed severe, by answering the following questions.

- In what ways do the Appellant's condition(s) prevent working?
- Has the Appellant attempted to work, but found they were not able to?
- Has the Appellant attempted to look for work, but even the search was impossible because of their disability?
- Does the Appellant have chronic unpredictable pain and/or fatigue which interferes with working, even some of the time? Does the person experience nausea, incontinence, anxiety attacks, low energy, low motivation, dizziness, drowsiness, difficulty with concentration or memory or other symptoms?
- Would a prospective employer consider the Appellant for employment, given their education, language proficiency, and past work and life experience?
- Do the person's medications cause side-effects which contribute to the inability to work predictably or at all?

Prolonged

The term "prolonged" has been interpreted to mean there is no medical evidence to show the Appellant is able to return to "substantially gainful" work in the foreseeable future. If there is a reasonable expectation of recovery, the appeal may fail. Short-term disability benefits are not available.

The Appellant must show they have made reasonable efforts to follow up on medical advice and appointments.

If there is evidence of any ability to work, the Appellant must show that he/she has tried to find work and has been unable to do so because of a mental and/or physical condition [(*Inclima v. A.G. Canada* (2003 FCA 117). It may be possible to argue that all reasonable efforts have been made to become employed, to no avail.

Some questions the Tribunal may ask in relation to an appeal are:

- Is there any evidence that the Appellant has the ability to work?
- Have they collected regular EI benefits in the past two years?
- Has the Appellant tried medication, surgery, therapies, counseling, exercise or other recommendations by their doctor(s) that have not mitigated their conditions or symptoms to the extent that they can work regularly?

- Are there any plans or possibility in the future of surgery, medication or other medical approaches that could result in the Appellant being able to work?
- Has the Appellant remained unable to work continuously since their MQP?

Incapable Regularly
This term means you cannot work or commit yourself to a work schedule with reliability or predictability (Swalwell; Chandler).

It may be possible to argue the employer was accommodating the Appellant's disability in ways that most employers would not. In this case, they could be considered a "benevolent employer" and therefore the job was not "regular" employment.

- Before the Appellant became unable to work, or during an attempt to return to work, did their condition cause them to miss shifts, arrive late, leave early, require help from other employees to satisfy the requirements of their position, change to lighter duties or otherwise not fulfill the full duties required by the employer?

Substantially gainful occupation
The Tribunal's approach to this subject is on a case-by-case basis, considering the specific Appellant's circumstances, including earnings, hours of work and rates of pay. There is no rule at the Tribunal stage about how many hours of work or what rate of pay will be considered "substantially gainful."

It may be possible to argue that the person's employment was not substantially gainful.

ESDC has a Canada Pension Plan Adjudicative Framework it has developed for its Medical Adjudicators. Tribunals do not have to accept arguments that use the Framework, but there are times when the Framework's definitions can be helpful. The framework can be found at : http://www.esdc.gc.ca/eng/disability/benefits/framework.shtml

Special Provisions

The following provisions should be considered, if there is a denial based on insufficient contributions.

Child Rearing Dropout | Parents and guardians who have taken time out of work to raise children under the age of seven and received the family allowance or child tax credit may apply for this provision. Under this provision, years when the parent or guardian had little or no earnings because he or she was caring for their child(ren) can be excluded from the 4 out of 6 year rule calculation. Although they would still need 4 years of valid contributions, this provision can be used to extend a Minimum Qualifying Period.

Credit Split | When a couple (married or common-law, including same-sex couples) separates or divorces, a request can be made to CPP to split the CPP contributions made by a partner during the time they were living together. This means the lower earning person would acquire extra contributions. A credit split may not be applied to years in which the partner had very little

earnings covered by CPP. A split can provide additional contribution years and could provide a person with enough contributions to qualify and /or increase the monthly benefit.

Employment Outside of Canada| If the Appellant worked in another country that has a social security agreement with Canada, contributions to the social security program in that country may be used to help meet the CPP contribution requirement.

Proration | This provision applies to people who do not have sufficient earnings covered by CPP in the year they became disabled, so the year would ordinarily not count as a valid year in their minimum qualifying period. In these cases, CPP can prorate the basic exemption for that year (the required minimum earnings) to reflect the fact that the person could only work part of the year because of disability.

For example, in 2014, the basic exemption was $5,200. So a person must have made CPP contributions on more than $5,200 for that year to count towards their minimum qualifying period. Suppose Mary only earned and paid contributions on $2,800 in 2014. At first blush, it does not appear that Mary has enough earnings for 2014 to count towards her minimum qualifying period. However, if she can show that she became disabled in June, 2014, the basic exemption for 2014 would be prorated to $2,600 to reflect the fact that Mary could only work 6 months. So Mary would indeed have enough contributions in 2014, and 2014 would count as a valid year in her minimum qualifying period.

Incapacity | If an Appellant was unable to apply for CPP disability benefits due to the severity of their condition, the Tribunal may be able to approve additional retroactive benefits (s. 60 of the Act). The term “incapacity” has been referred to by the Courts as “narrow and precise.” An application must have been made after a person has regained the capacity to do so, and within a year after they regained capacity (see Weisberg v. MSD, CP21943 PAB December 2004). This provision came into effect in 1991.

APPENDIX C | Late Appeals

If you are filing your appeal more than 90 days after your received the letter denying your reconsideration request, you will have to provide reasons why your appeal is late. You will be expected to provide answers to all of the following questions in section B of your Notice of Appeal :

- Is there is a reasonable explanation as to why you delayed filing your appeal?
- Can you show that you always intend to file and appeal?
- Is there an arguable case in support of your appeal?
- Will anyone experience prejudice because of the delay? (Does the delay make it too difficult for the Minister or anyone else to be able to properly respond to your appeal?)

If you are aware at the time of submitting your appeal that the 90-day appeal period has expired, it is recommended that you answer each question listed above and provide any other information you feel is relevant in Section B of your Notice of Appeal (use a separate sheet of paper and say “see attached” if necessary). If you do not fully answer these questions, the Tribunal will send you a letter before it accepts your appeal and ask you to provide more information. This could create even more delay and make it harder for your appeal to be accepted.

See *Canada (Minister of Human Resources Development Canada) v. Gattellaro*, 2005 FC 883

Legislation prevents the Tribunal from accepting an appeal that is filed more than one year after the reconsideration letter was received by an appellant.

APPENDIX D | Using Case Law

The Tribunal must follow decisions of the Courts. The Tribunal will often follow its previous decisions as well, although it does not necessarily have to.

Court decisions are available from the Canadian Legal Institute's website, better known as Canlii. (www.canlii.org). Selected decisions by the new Social Security Tribunal are also available through Canlii, and are also published on the Tribunal's website under the "Decisions" tab (http://www.canlii.org/en/ca/sst/). You should focus on the cases involving the Minister of Human Resources and Skills Development (now Employment and Social Development Canada).

The Tribunal is often persuaded by decisions of the former Pension Appeals Board, which was replaced by the Appeal Division of the Social Security Tribunal. There is a link to old PAB decisions on the Social Security Tribunal web site under Reference Documents and Links. The problem with using this link is that you need the name of the parties or the appeal number in order to locate a specific decision. You cannot just browse them. If you use the *Annotated Canada Pension Plan/Old Age Security Act* (Wolters Kluwer) to do a little research, it provides the names of the parties and case numbers for cases that might interest you.

Using case law in a submission can be a powerful tool. When making oral submissions at a hearing however, a little restraint might be wise. Provided that you have made a written legal argument, don't be overly legalistic in your closing remarks. The Tribunal has provided all Members with legal training. Assume that the Tribunal has read your written submission. Remind the Tribunal of the legal principal you are relying on and refer to the cases you have cited but focus your closing remarks on the facts not the law.

Always provide a citation for decisions that you use [i.e.: *Villlani* (PAB CP24087, November 27, 2006)] or for Social Security Tribunal decision *G. D. v. Minister of Human Resources and Skills Development* 2014 SSTGDIS 3]. It is wise to attach a full copy of any decision you cite to your submission unless it is one that that can be accessed easily by the Minister or the Social Security Tribunal on line. A full copy of an unpublished decision is needed so that the other parties can read it in its entirety.

Decisions of Interest

One of the leading CPP disability decisions is *Villani v. Canada* (A.G.) [2001] FCA 248 This decision is a must read for advocates. Two important passages are as follows:

> [29] Accordingly, subparagraph 42(2)(a)(i) of the Plan should be given a generous construction. Of course, no interpretive approach can read out express limitations in a statute. The definition of a severe disability in the Plan is clearly a qualified one which must be contained by the actual language used in subparagraph 42(2)(a)(i). However, the meaning of the words used in that provision must be interpreted in a large and liberal manner, and any ambiguity flowing from those words should be resolved in favour of a claimant for disability benefits.
>
> **(c) The Appropriate Legal Test for Disability under the Plan**
>
> [37] Except for one case, none of the recent decisions of the Board has analyzed fully the text of subparagraph 42(2)(a)(i) of the Plan. That one occasion was the Board's relatively recent decision in *Patricia Valerie Barlow v. Minister of Human Resources Development*, CP 07017 (November 22, 1999). It is worth repeating the central passage of the Board's decision in that case:
>
> Is her disability sufficiently severe that it prevents her from regularly pursuing any substantially gainful occupation?
>
> To address this question, we deem it appropriate to analyze the above wording to ascertain the intent of the legislation:
>
> Regular is defined in the Greater Oxford Dictionary as "usual, standard or customary".
>
> Regularly – "at regular intervals or times."
>
> Substantial – "having substance, actually existing, not illusory, of real importance or value, practical."
>
> Gainful – "lucrative, remunerative paid employment."
>
> Occupation – "temporary or regular employment, security of tenure."

> Applying these definitions to Mrs. Barlow's physical condition as of December, 1997, it is difficult, if not impossible, to find that she was at age 57 in a position to qualify for any usual or customary employment, which actually exists, is not illusory, and is of real importance.
>
> [38] This analysis of subparagraph 42(2)(a)(i) strongly suggests a legislative intention to apply the severity requirement in a "real world" context. Requiring that an applicant be incapable regularly of pursuing any substantially gainful occupation is quite different from requiring that an applicant be incapable at all times of pursuing any conceivable occupation. Each word in the subparagraph must be given meaning and when read in that way the subparagraph indicates, in my opinion, that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, it follows from this that the hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience.
>
> [39] I agree with the conclusion in Barlow, supra and the reasons therefore. The analysis undertaken by the Board in that case was brief and sound. It demonstrates that, on the plain meaning of the words in subparagraph 42(2)(a)(i), Parliament must have intended that the legal test for severity be applied with some degree of reference to the "real world". It is difficult to understand what purpose the legislation would serve if it provided that disability benefits should be paid only to those applicants who were incapable of pursuing any conceivable form of occupation no matter how irregular, ungainful or insubstantial. Such an approach would defeat the obvious objectives of the Plan and result in an analysis that is not supportable on the plain language of the statute.

Another important case is *Inclima v. A.G. Canada* (2003 FCA 117). This case was decided after *Villani*. The Ministry often cites the following passage from this decision to argue that an Appeal should be denied because the Appellant has not made sufficient effort to look for work:

> [3}… an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition. (emphasis added)
>
> **Some of the original words have been bolded because they support the proposition that Appellants do not have to look for work if they are not capable of working.**

For those who do try to work, the Ministry will often argue that any earnings after a MQP is a sign that the Appellant is capable of gainful employment. In *Tasse v. M SD* (PAB CP24087, November 27, 2006) the Board examined the issue of what constitutes gainful employment and looked at the question of employment and entitlement to CPP disability benefits. The Board wrote at page 3:

> [7] To her credit in 2005, she resumed employment as a sales clerk, at Zehrs, a grocery store, which involved working 21.50 hours per week at an hourly rate of $7.75.
>
> [8] She was forced to return to work because she and her husband were in dire financial straits, as the husband was unemployed for some time. She was unable to continue at the end of the six months and resigned due to her health problems. She later worked for a three month period at a nursing home in 2006. Based on a 32 ½ hour work-week on alternate weeks at the same rate of pay, i.e. $7.75 per hour.

…

> [15] Does the fact that the Appellant returned to work for brief periods in 2005 and 2006 preclude her from obtaining a pension? In my view it does not. The Federal Court of Appeal has held that it is the responsibility of the Appellant to attempt to return to work at a lighter, sedentary type of employment, if they cannot return to their original job. The Appellant is required to show that he or she has made an attempt to do so, and has been refused due to disability, or if successful, are unable to continue because of their incapability to continue. See *Inclima v. Canada (Attorney General)* 2003 FCA 117.

…

> [20] The evidence adduced also raises another issue which needs to be addressed, namely, whether the amount of wages earned by the Appellant during her brief stints of employment following her stoppage of work in 2000, constitutes "a substantially gainful occupation." Ms. Tasse worked a 32½ hour week on alternate weeks and received $7.75 per hour or $501.85 per month, for a period of six months. For the three month period in 2006, while employed at a nursing home her weekly take home pay calculated at 21½ hours per week at $7.75 amounted to $166.63 per week or $675.00 per month.
>
> [21] This meager sum is substantially below the "poverty line" as referred to by Statistics Canada. Had her previous work prior to her disability occurring, been at the same hours and wage, this issue would not arise.

> [22] Different considerations however are present in this appeal. Ms. Tasse was previously working a regular 40hour week for a period of approximately ten years. She subsequently was capable of sporadic employment at different jobs, with reduced hours.
>
> [23] Her family physician agrees that she is incapable of working longer hours. A disability is "severe" only if by reason thereof the person is incapable regularly of pursuing any substantially gainful occupation. (Emphasis added in original)
>
> [24] "Regular" has been defined as 'with consistent frequency." The Oxford Dictionary defines "substantially" as "having substance, actually existing, not illusory." The Webster Dictionary defines "gainful" as "profitable, lucrative." In my view, the legislature, by prefacing the word "gainful" with substantially, intended that the employment would be in excess of gainful.
>
> [25] The Appellant has established that she has a combination of both physical and mental disabilities i.e. bipolar disorder and chronic fatigue.
>
> [26] In addition I find that on incontrovertible evidence that she lacks the capacity to pursue with consistent frequency any substantially gainful occupation, due to disabilities. The Appellant therefore succeeds in her appeal.

Chronic pain is one of those conditions that often results in a hearing because there are often few objective tests to explain its cause. The issue comes down to one of credibility which can only be tested through oral evidence. The Board in *Mullaney v. MSD* (CP24444 February 2007) wrote:

> [25] Before the Supreme Court of Canada in the case Re: *Nova Scotia (Workers' Compensation Board) v. Martin* [2003] SCC 54, the Court was persuaded beyond doubt that chronic pain was a legitimate medical condition and was entitled to constitutional protection as falling within the enunciated ground of "physical disability" within Subsection 15(1) of the Charter. In his judgment at paragraph 1 Gonthier, J. stated:
>
> > Chronic pain syndrome and related medical conditions have emerged in recent years as one of the most difficult problems facing workers' compensation schemes in Canada and around the world. There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack

> of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real. While there is at this time no clear explanation for chronic pain, recent work on the nervous system suggests that it may result from pathological changes in the nervous mechanism that result in pain continuing and non-painful stimuli being perceived as painful. These changes, it is believed, may be precipitated by peripheral events, such as an accident, but may persist well beyond the normal recovery time for the precipitating event. Despite this reality, since chronic pain sufferers are impaired by a condition that cannot be supported by objective findings, they have been subjected to persistent suspicions of malingering on the part of employers, compensation officials and even physicians … [Emphasis added in the original.]

At times there may not be a clear diagnosis for a condition. In *B.K. v. MHRSD* (CP25269 PAB January 4, 2008) the Board wrote:

> [8] Her concentration and memory are both very poor. This in my view was quite obvious as she gave her evidence. She was unable to continue a thought for more than a few seconds. She was also diagnosed as having a major depressive disorder in 2001 with a GAF score of 55-60 which is not that of a well functioning person...
>
> [10] A great deal of focus has been placed on the fact that there has been no definite diagnosis of MS. Dr. M. Hohol her main neurologist while unable to give a definite diagnosis has not excluded its possibility…
>
> [17] Clearly she is suffering from a multiplicity of problems both now and as of December 2002. Whether she has MS or not is in my view not relevant. A definitive diagnosis is not required. The fact is that these health problems are real and prolonged. Mrs. BK is not employable now nor was she in 2002.
>
> [18] This woman now and in 2002 could not function either physically or mentally. She is now and was then incapable of regularly pursuing any substantially gainful occupation.
>
> [19] The appeal is allowed ..

Also in *P.R. and M.H.R.S.D.* (2014 SSTGDIS 1) the Social Security Tribunal wrote:

> [40] Regarding the Respondent's point about a lack of "serious pathology", it is true that the investigations have not uncovered any serious pathology however it is a leap to conclude the Appellant should, therefore, be able to work. The very nature of fibromyalgia is such that it does not appear on diagnostic tests. Still the label of fibromyalgia is not sufficient to satisfy a severe finding; the Tribunal must look at the effect on the individual (Petrozza v. MSD, (October 27, 2004) CP 12106 (PAB)). In this case, the Appellant has been largely home-bound since leaving the workforce. He describes pain throughout his body. His family doctor lists numerous functional limitations in the CPP Medical Report, notably that the Appellant is unstable while standing, has pain on rising from the seated position, suffers multiple tender trigger points, has a loss of strength (due to pain) in his knees, hips and elbows. He is only able to walk short distances with aid of cane (often two). At the hearing, the Appellant reported that he spends most of his days lying on a couch. He requires assistance in travelling to medical appointments and doing his groceries. He is even unable to walk across the street to go to the coffee shop. Given his extensive limitations, when considered in a "real world" context (*Villani v. Canada (A.G.)*, 2001 FCA 248 (CanLII), 2001 FCA 248), the Tribunal is satisfied that the Appellant's disability is severe since he left work in February 2007.

"Real world" considerations as set out in *Villani* (age, education, English literacy skills, etc.) are often important when determining the appellant's capacity to work or to be retrained.

In K.A v. MHRSDC (CP25289 PAB December 2007) the Board decided:

> [15] In considering Mrs. KA's condition it must be remembered that she has only attended school to Grade 8 in her native country of Guyana. Her language skills in English are very limited. Her work experience involved a labour intensive job which she can no longer do because of her disabling condition. In 2002 she completed a program which was intended to qualify her for work more suitable to her condition. This was not successful and she did not obtain re-employment.
>
> [16] Taking into account the evidence of the Appellant and that of her daughter who testified as a corroborative witness, it is my opinion that Mrs. KA was in January 2003, incapable regularly of pursuing any substantially gainful occupation and that she has continued to be thus disabled since then. The evidence also supports the conclusion that her disability is prolonged in that it is likely to be long continued and of indefinite duration.

> [17] The appeal is therefore allowed with the date of onset of the disability deemed to be 15 months prior to the date of application for benefits being March 2005.

In P.R. v. MHRSDC (CP25115 PAB January 2008) the Appellant was 60 years old, had a grade 8 education, and English was not her first language. The Board wrote:

> [17] It has been submitted on behalf of the Minister that Mrs. P.R. has not made any effort to retrain or to obtain employment that might accommodate her condition. It has been held in prior decisions that in order to establish a severe disability applicants must not only show a serious health problem, but where there is evidence of work capacity, must show effort at obtaining and maintaining employment has been unsuccessful by reasons of the health condition. (*Inclima v. Canada (Attorney General)* [2003] FCA 117.)
>
> [18] With respect to work capacity, Mrs. P.R. stated that she tried to return to her job as a packager but was not able to continue because of her medical problems. She also stated that when it was known that she was not going to get better that she thought she was too old to learn new skills.
>
> [19] Mrs. P.R. came to Canada with limited education and limited ability to speak or to write in English. Because of work and family responsibilities she has not improved her abilities in these areas.
>
> [20] In my view, given her age, medical condition and limited education and language skills, it would not be realistic to expect her to retrain. I found her to be an honest witness and that she did not exaggerate or embellish her difficulties.
>
> [21] Taking into account all of the evidence, I find that the Appellant does suffer from a disability that is severe which renders her incapable of regularly pursuing any substantially gainful occupation and that such condition is prolonged and has persisted since her fall at the end of November 2001.
>
> [22] The appeal is allowed and I would determine the date of onset of the disability to be 15 months prior to the date of her application in October 2004.

APPENDIX E | Hearings Based on the Written Record

It is always difficult to know why a Tribunal Member might choose this form of hearing. It could be that the Member has been persuaded by the information you provided and feels that the time and effort to hold a hearing is not needed and is prepared to allow your appeal. It could also mean that the Member has been persuaded by the Minister's argument and might dismiss it.

You may feel that you have provided a strong case and may want a decision based on the written record. You could also prefer a written decision for other reasons.

If you would prefer to have an oral hearing it is important that you make a strong case as to why you think an oral hearing is necessary when making your submissions or when you complete the *Hearing Information Form*.

If an appeal has some chance of success, it is difficult to imagine what type of circumstance would exist for the Tribunal to dismiss an appeal based on the written record alone.

In Singh v. Minister of Employment and Immigration, [1985] 1 SCR 117, the Court wrote:

> 59. I should note, however, that even if hearings based on written submissions are consistent with the principles of fundamental justice for some purposes, they will not be satisfactory for all purposes. In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an Oral Hearing...Appellate courts are well aware of the inherent weakness of written transcripts where questions of credibility are at stake and thus are extremely loath to review the findings of tribunals which have had the benefit of hearing the testimony of witnesses in person....I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.

The vast majority of CPP-D denials are made because of the way the CPP Medical Adjudicators interpret the written medical record. They often conclude the individual's subjective experience does not match the Adjudicator's interpretation of the medical evidence. They conclude the applicant "should be capable of engaging in some type of work."

The credibility of an applicant is, therefore, of crucial importance in most CPP-D appeals and that credibility is difficult to establish, unless there is an opportunity to provide oral evidence under oath.

When the Tribunal decides to make a decision based on the written record it indicates that "credibility is not a prevailing issue". When making your final submission based on the written record, you might want to consider writing something such as:

The Tribunal has indicated that "credibility is not a prevailing issue" in my appeal. I assume that this means that it finds that the evidence I have presented to be credible. If the Tribunal has any doubts about the credibility of my position, I ask it to hold an oral hearing where I can present my evidence under oath and answer any questions that the Tribunal or the Minister may wish to ask me. ■

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Welfare: Options for helping clients who receive lump sum payments: trusts, RDSPs & other strategies

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When a client receives a lump sum of money, an advocate's mind may turn automatically to thinking about whether, or how, the client can set up a disability trust or open a Registered Disability Savings Plan ("RDSP").

While disability trusts and RDSPs are valuable tools for many clients, does your particular client need one, or does the welfare legislation offer them other ways to exempt assets that fit well with their priorities? And what if your client is not eligible to have a trust or RDSP? (e.g. they could not get the PWD designation, or qualify for the Disability Tax Credit). What options do those clients have for dealing with lump sums they receive? This handout explores those questions.

Lump sums under the Welfare legislation

Clients may receive lump sums of money from several sources[1]. Some examples include:

- An ICBC settlement;
- An inheritance;
- Life insurance proceeds from a deceased loved one;
- A gift from a friend or family member;
- A residential schools settlement;
- A family law settlement or court order for property division.

How the welfare legislation treats such lump sums will depend on the specific source of the lump sum, the amount of the lump sum, and the type of benefits

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[1] *Note that all clients of the Ministry of Social Development and Social Innovation ("MSDSI") **must** report their receipt of all such funds to MSDSI as soon as possible.* If they do not do so, they risk:

- being assessed overpayments;
- being assessed sanctions for non-reporting; and
- the possibility of criminal prosecution for fraud in relation to welfare benefits; and
- losing the opportunity to structure their situation so that their ongoing benefits from MSDSI are affected as little as possible.

your client receives (in other words, what your client's general asset exemption level is).

Where to start:

MSDSI considers money to be "income" in the month that it is received. In months after that, MSDSI considers the funds to be an "asset."

Where a client receives non-exempt income that is greater than their regular benefit rate, the client will ineligible for regular benefits for one month due to "income in excess."

Where a client receives money that the welfare legislation treats as non-exempt assets, the client will not be eligible for further welfare benefits until their non-exempt assets are below their general asset exemption level. A chart setting out MSDSI's general asset exemption levels is attached as **Appendix One**.

Therefore, if your client receives, or is about to receive, a lump sum of money, the questions an advocate should ask themselves are:

1. How does the welfare legislation treat the lump sum?

    a. Does the welfare legislation exempt the lump sum as income in the month it is received?

    b. Does the welfare legislation exempt the lump sum as an asset?

2. If the lump sum is not exempt, other than creating a trust or RDSP, what options does your client have for managing the excess asset under the welfare legislation?

1. How does the welfare legislation treat the lump sum?

a. Income analysis: Does the welfare legislation exempt the lump sum as income in the month it is received?

The answer to this question depends on the source that your client received (or will receive) the money from.

If the welfare legislation classifies your client's funds as non-exempt income, your client will be ineligible for one month due to income in excess. However, several sources of income are classified as exempt income. You will need to check the welfare legislation carefully each time to determine if the particular type of funds is considered exempt income:

- A full listing of income exemptions is found in Schedule B to the EA Regulation (for income assistance and PPMB benefits); and in Schedule B to the EAPD Regulation (for PWD benefits);

- The income exemptions for hardship benefits (either regular or PWD hardship) are *slightly different* than the income exemptions for income assistance and disability assistance. For a full list of the income exemptions for hardship benefits, see section 6 of Schedule D to the EA and EAPD Regulations.

For example, let's say your client Martha receives a residential schools settlement. Residential schools settlements are considered exempt income, except money paid as income replacement in the settlement, under EA Regulation section 11(1)(v) and EAPD Regulation section 10(1)(v). So, if Martha's residential school settlement does not include an amount for income replacement, then it will not be considered income in the month in which it is received, and Martha will not lose her benefits for one month due to excess income. *Nonetheless, Martha must still report to MSDSI that she has received these funds.*

There are a few rules about income exemptions that I think are often forgotten:

- insurance paid as compensation for a destroyed asset is exempt income. This would include, for example, money from ICBC for a car that was written off. This exemption is contained in paragraph d) of the definition of "unearned income" in section 1 of the EA and EAPD Regulations.

- a "one time," or isolated, gift is not considered to be income. Rather MSDSI considers it to be an asset at the time it is received. So, a one-time gift that is below your client's asset exemption level will not affect their ongoing benefits, although the client must still report their receipt of these funds to MSDSI. This 'one time" gift rule is based on an unreported 1996 decision of the Supreme Court of BC in *Morris v. BC (Income Assistance Tribunal)*. MDSI's policy on one-time gifts is in the Online Resource, at http://www.gov.bc.ca/meia/online_resource/verification_and_eligibility/assets/policy.html , under "loans, credit and gifts."

- Section 7(c) of the Schedule B to the EA and EAPD Regulations exempts, as unearned income, "a criminal injury compensation award **or other award**, except the amount that would cause the family unit's assets to exceed, at the time the award is received, the limit applicable under section 10 *[asset limits]* of this regulation." This section provides room to argue that an award, such as eviction compensation, or an ICBC settlement, should be considered exempt income if it is below the client's general asset exemption level.

Your client's eligibility for regular benefits after that one month depends on the welfare rules about assets.

b. Asset Analysis: Does the welfare legislation exempt the lump sum as an asset?

Again, MSDSI considers money to be "income" in the month that it is received. In months after that, MSDSI considers the funds to be an "asset." Assets are classified either as being "exempt," or "non-exempt."

To determine if the funds your client has are exempt assets, you need to carefully check the welfare legislation to see how your client's situation fits within it.

- A full listing of asset exemptions is found in sections 11, 12 and 13 of the EA Regulation (for income assistance and PPMB benefits); and in section 10, 11 and 12 of the EAPD Regulation (for PWD benefits);

- The asset exemptions for hardship benefits (either regular or PWD hardship) are slightly different than the asset exemptions for income assistance and disability assistance. For a full list of the asset exemptions for hardship benefits, see section 6 of Schedule D to the EA and EAPD Regulations.

To continue with Martha's case as an example, a residential schools settlement is also considered to be an exempt asset, except money paid as income replacement in the settlement; (see EA Regulation section 11(1)(v) and EAPD Regulation section 10(1)(v)). So, if Martha receives a residential school settlement that does not include an amount for income replacement, then it will not be considered income *or* an asset, and she will not lose her benefits at all.

TIP: Spending Funds that are exempted by the welfare legislation: record keeping

If your client receives funds that are exempt as assets (like a residential schools settlement), your client can use those exempt funds to buy other things, including assets that would not normally be considered an exempt asset for someone receiving welfare benefits. In doing this**, the client must keep detailed written records and receipts** so they can prove to MSDSI that any assets that are normally considered non-exempt, were purchased directly with the exempt funds.

For example, let's say some of the exempt funds are used to buy a second vehicle (which is normally considered a non-exempt asset). Unless the client can prove to MSDSI that they purchased the second vehicle using exempt funds from their residential schools settlement, MSDSI may view the second vehicle as an excess asset, and tell the person they are no longer eligible for benefits. Because of this, it may be a good idea for a client to keep exempt funds in a separate bank account, so they can more easily show what the exempt funds are used to purchase. For relevant policy, see the Online Resource at http://www.gov.bc.ca/meia/online_resource/verification_and_eligibility/assets/policy.html under "compensation payments."

2. What options does the client have for managing a non-exempt (excess) asset under the welfare legislation?

First, let's debunk a common myth about this issue.

Myth: If a client tells an Employment and Assistance Worker ("EAW") that they have received a lump sum of money, it seems quite common for an EAW to tell the person

that they will be off welfare now, and that they must live off the money at a rate of no more than $2 000 per month. Sometimes the EAW will even give a time frame saying, for example, "you received $10,000 so don't come back to this office for at least 5 months."

The information from the EAW in this example is not correct.

Fact: Any welfare recipient who receives a sum of money that is not exempt as an asset and that is over their general asset exemption limit, has at least three – and may have as many as five - options for managing their assets, in addition to simply living off the funds.

Options:

Options a client *may* have for managing non-exempt assets so as to minimize their impact on their welfare eligibility include **any or all of**:

1. **Using some or all of the funds to pay just debts** (**see tip on record keeping below)*

   "Just debts" means debts that they can prove (in writing) that they validly owe. For example, credit care debts, student loans, inter-personal loans documented by an IOU or promissory note, etc.

   A debt to a family member, or anyone else, which was not properly documented in writing, should NOT be paid. If a client cannot prove to MSDSI that they legally owed someone a debt, and they give money to that other person, it may appear to MSDSI that they are simply giving money away for no good reason, and MSDSI may allege that the person is disposing of assets for inadequate consideration, and is therefore not eligible for benefits (see below).

   Where a client owes an undocumented debt to a family member, or anyone else, the client and the person to whom money is owed may be able to satisfy the Ministry that this debt is in fact justly owed, by swearing statutory declarations describing the origin of the debt, its amount, and what the parties agreed about when and how the debt would be repaid.

2. **Using some or all of the funds to buy exempt assets** (**see tip on record keeping below)*

   There are 10 categories of exempt assets that someone receiving regular income assistance, PPMB or PWD benefits can purchase.

   Attached as **Appendix Two** is a list of those ten categories. They include prepaid funeral costs, an RESP of any value, a life insurance policy with an uncashed value up to $1500, etc.

A full list of exempt assets is found in section 11 of the EA Regulation (for income assistance and PPMB); and section 10 of the EAPD Regulation (for PWD benefits). Note that the rules about exempt assets are different for all forms of hardship benefits (regular hardship, PPPB or PWD hardship) See section 6 of Schedule D to the EA and EAPD Regulations.

You must review the complete list of relevant exempt assets with each client who is deciding how they should manage a lump sum that they have received. Some clients may find that their priorities for the money they have received fit well with the available asset exemptions. For example, a parent concerned with providing for a child's education may wish to purchase an RESP, and a house. Someone concerned with providing for themselves and their spouse may decide to pay for pre-paid funeral costs, and a life insurance policy with an uncashed value of up to $1500.

3. Keeping funds up to their general asset exemption level

For example, a single person on income assistance is eligible for benefits again once they have non-exempt assets of up to $2 000 left. A chart setting out MSDSI's general asset exemption levels is attached as **Appendix One**.

4. **Putting some or all of the funds in a disability trust** (if they qualify to have a trust)

   Other sections of this panel presentation deal with this option.

5. **Putting some or all of the funds in an RDSP** (if they qualify for the Disability Tax Credit from the Canada Revenue Agency)

   Other sections of this panel presentation deal with this option.

Remember that any combination of these options can be used.

For example, a single person on income assistance who receives $14 000 (and who is not eligible to have a disability trust or RDSP) might choose to:

- use $5 000 of it to pay just debts;
- spend $5000 on an exempt asset such as a car or RESP;
- live off the funds for one month (spending $2 000).

They would then be eligible for income assistance again once their remaining non-exempt assets are $2000 or less. If they buy the car or RESP and pay their debts *in the same month that they receive the funds as income,* they would be ineligible for income assistance benefits for only one month due to income in excess. That is because, in the month following their receipt of the income, they would not have assets

in excess of the allowed asset exemption levels. If they person bought the car or RESP and paid their debts in the month *after* they received the funds as income, they would be ineligible for income assistance benefits for two months (i.e. one month for income in excess, and one month for assets in excess).

Tips for clients who pay just debts or buy exempt assets:

Record Keeping

If a person chooses to pay just debts or purchase exempt assets, it is ***essential*** *that they keep clear and thorough records, and copies of all receipts and proofs of payment, so that they can show MSDSI how they spent the funds they received. If they pay debts, they must also be able to show MSDSI documents that prove to MSDSI that they in fact owed the money they paid.*

If a client does not keep careful records and cannot prove to MSDSI how they spent the funds, there is a strong likelihood that MSDSI will allege that the client is not eligible for benefits because they disposed of assets, either without adequate consideration, or in order to make themselves eligible for benefits (refer to section 14 of the *EA Act* and section 13 of the *EAPD Act).*

Disposing of assets for inadequate consideration means giving away assets or selling them for less than they are worth. If MSDSI finds that a client disposed of assets either for inadequate consideration or to make themselves eligible for benefits, MSDSI may either declare the client ineligible for benefits, or reduce their benefits. This is where the EAW's initial $2 000/month "rule" comes from. Under section 31 of the EA Regulation, and section 27 of the EAPD Regulation, MSDSI may declare the client ineligible for benefits for one month for each $2 000 in assets that MSDSI thinks the client disposed of for inadequate consideration, or to reduce their assets.

This is where the importance of careful record keeping and documentation comes into play. If a client can provide documentation to prove that they used a lump sum to buy exempt assets and/or to pay justly owing debts that are equal in value to the lump sum, they have not disposed of assets at all. Instead, they have spent a sum of money to either acquire exempt assets equal in value to what they spent, or to erase a justly owed debt that they were otherwise liable for.

Appendix 1

MSDSI General Assets Limits (as of September 30, 2015)

Income Assistance and PPMB

Single person	$ 2 000
Couples or one or two parent families	$ 4 000

Disability Assistance**

Single person	$ 5 000
Couples or one or two parent families	$10 000

*** The general asset exemption levels for disability assistance apply to:*

a) *Family units in which at least one person has the PWD designation*
b) *Family units in which someone is applying for the PWD designation (either has applied and is waiting for a decision, or MSDSI believes they have a genuine intention to apply for PWD); and*
c) *People residing in a private hospital, special care facility or in a hospital for extended care (other than an alcohol or drug treatment centre).*

Appendix 2
What exempt assets can a client buy? (other than trusts and RDSPs)

This list applies to people who are receiving regular income assistance, PPMB or PWD benefits. The list is drawn from section 11 of the *EA Regulation*, and section 10 of the *EAPD Regulation*

This list does **not** apply to people receiving hardship benefits of any form (for rules applicable to hardship assistance, see section 6 of Schedule D to the *EA* and *EAPD Regulations*)

- clothing and necessary household equipment;
- a family unit's place of residence;
- a motor vehicle:
    a) If the person or their spouse has the **PWD designation**: there is no limit on the amount of equity in one motor vehicle used for day to day transportation needs.
    b) If the person receives **income assistance**, or they or their spouse have the **PPMB designation**: one motor vehicle with up to $10 000 of equity in it if it is used for day to day transportation needs. More than $10 000 in equity will be exempt if:
        (i) the motor vehicle has been significantly adapted to accommodate the disability of someone in the person's family unit;
        (ii) the motor vehicle is used to transport a disabled dependent child, or
        (iii) the motor vehicle is used to transport a disabled "supported child" (e.g. a foster child, a child for whom the person receives child in the home of a relative benefits from MDSI, or kith and kin benefits from MCFD), if the child is in the care of someone in the persons' family unit.
- prepaid funeral costs;
- a registered education savings plan ("RESP") *(note: since 2007, there has been no annual limit for contributions to RESPs and the lifetime limit on the amounts that can be contributed to all RESPs for a beneficiary is $50,000. A person can set up an RESP for themselves, or for a dependent child or spouse in their family unit.*
- a life insurance policy with a cash surrender value of $1500 or less;
- business tools;
- seed required by a farmer for the next crop-year;
- essential equipment and supplies for farming and commercial fishing;
- fishing craft and fishing gear owned and used by a commercial fisher.

The Registered Disability Savings Plan and the Disability Tax Credit

Revised: January 21, 2015

What is the RDSP?

- The RDSP is a savings plan introduced by the federal government for people with disabilities and their families.
- The RDSP has incentives to encourage individuals and families to save money.
- These incentives include generous **grants and bonds** form the federal government.

Who Qualifies?

- People with disabilities who are under 60 years of age.
- Canadian residents

To be eligible, applicants must:

- Have a social Insurance Number
- Be eligible for the Disability Tax Credit

To qualify for federal contributions you must be up-to-date with filing income tax returns.

RDSP Eligibility: The Disability Tax Credit (DTC)

- To qualify for the RDSP, you must first be eligible for the Disability Tax Credit.
- Even though someone may have qualified for federal or provincial disability benefits, they may not qualify for the DTC.
- Some people with disabilities (eg. mental health) can have difficulty qualifying and maintaining eligibility for the DTC.
- People who do not have taxable income rarely apply for the DTC – until now.

DTC Application Process

- The Disability Tax Credit Certificate (T2201) must be completed by a qualified practitioner.
- Eligibility for the DTC can be back dated.
- Once submitted, the federal government may ask the doctor to provide additional information.
- The CRA will send out a DTC eligibility decision letter to the applicant – this often includes how long the DTC has been granted for.

DTC Eligibility

A qualified practitioner must certify that the applicant has a **severe** and **prolonged** impairment in mental or physical functions.

Tests for **severity** include:

- Being markedly restricted in at least one basic activity of daily living (speaking, feeding, hearing, walking, elimination, dressing and **mental functioning necessary for everyday life)**

OR

- Being severely restricted in two or more of the basic activities of daily living.

An impairment is **prolonged** if it is expected to last at least 12 months.

Markedly Restricted

- An applicant is markedly restricted if, all or substantially all of the time they are unable (or takes an inordinate amount of time) to perform one or more of the basic activities of daily living, even with therapy and the use of appropriate devices and medication.

- It is the disorder, and not each and every of its defining symptoms, that must be present substantially all of the time. The disorder must none-the-less cause a marked restriction in function.

Basic functioning for everyday life falls into these areas:

- vision
- speaking
- hearing
- walking
- elimination (bowel or bladder functions)
- feeding
- dressing
- mental functioning necessary for everyday life
- Undergoing life sustaining therapy

Mental functions necessary for everyday life

Mental functions necessary for everyday life include:

- adaptive functioning (for example, abilities related to self-care, health and safety, abilities to initiate and respond to social interaction, and common, simple transactions);
- memory (for example, the ability to remember simple instructions, basic personal information such as name and address or material of importance and interest); and
- problem-solving, goal-setting, and judgement, taken together (for example, the ability to solve problems, set and keep goals, **and** make appropriate decisions).

A person does not have to have a marked restriction in all three of the above areas to qualify for the DTC – one should be sufficient.

Life sustaining therapy

- Life sustaining therapy must has to be both:

- Needed to support a vital function, even if symptoms are alleviated.
- AND
- Must be needed at least three times per week, for an average of at least 14 hours per week.

- The set up for portable devices (ie. Insulin pump) may count towards the 14 hour per week requirement but the amount of time spent but the time taken to deliver the therapy does not count.

The cumulative effect of significant restrictions

Applies from 2005

People who don’t meet the criteria for markedly restricted may still qualify for the Disability Tax Credit if it can be shown that they are restricted in two or more of the following areas:

- vision
- speaking
- hearing
- walking
- elimination (bowel or bladder functions)
- feeding
- dressing
- mental functioning necessary for everyday life.

- If the doctor will confirm two or more areas are significantly restricted, that those restrictions are present at least 90 % and the overall cumulative impact is equivalent to being markedly restricted in one area then it may be possible to still qualify.

- Please note you cannot include the time spent in life-sustaining therapy.

Issues of Concern

- Government does not compensate qualified practitioners for completing the DTC Certificate.
- Limited resources to assist people with applying for the DTC
- Even if the DTC is granted, a person may be requested tor reapply in the future.
- If a DTC application is denied, the appeals system can be onerous.
- If a person loses their DTC status, they may have to collapse their RDSP.

- Those who lose the DTC status but are likely to obtain it again in the future can keep their RDSP open (but it will be dormant).
- A doctor must confirm that you are likely to requalify for the DTC.
- The RDSP can stay open for 4 years after DTC is revoked.

RDSP Benefits

- For those who qualify, it is an excellent savings plan for people with disabilities.
- Someone in their 30s who contributes as little as $250 per year for 20 years will accumulate over $100, 000 in their RDSP by 60
- Many provincial and federal benefits (PWD, OAS, CPP, GIS, GST) are not reduced as a result of RDSP assets or payments.

Considerations for people on social assistance

- Age restrictions, DTC eligibility, money management issues, and the pay back rules make the RDSP an unrealistic option for some people.
- If you receive a lump-sum payment, you can use the RDSP to exempt assets, set up a trust, or do both.
- If you want to take advantage of the grants and bonds, you cannot touch the money for a long time.
- Find out if your bank allows RDSP withdrawals when you need them.

Putting Money into an RDSP

- An adult with a disability can set up their own RDSP: they are both the plan holder and the beneficiary.
- The plan holder can contribute to their RDSP and give permission for anyone else to deposit money.
- Life time maximum of $200, 000 in contributions.
- Tax is deferred and income earned is tax – sheltered.
- Contributions are not tax – deductible
- A person can only have 1 RDSP at a time.

RDSP Grants

- The **grant** program can provide **up to $70, 000** over the beneficiary's life time until they turn 50.

- The grant amount is based on the beneficiary's family income.

Family Net Income	Matching Grants on Annual RDSP Contributions	Maximum Annual Grant
Less than or equal to $89, 401	On the first $500 in annual contributions ($3 for every $1 contributed)	$1500
	On the next $1000 in annual contributions ($2 for every $1 contributed)	$2000
Greater than $89, 401 or no information available for the CRA	On the first $1000 ($1 for every $1 contributed)	$1000

RDSP Bonds

- **Bonds** are available to people with disabilities living on low incomes. The federal government will pay **bonds** up to $1000 per year.
- The beneficiary can receive a $1000 bond every year for 20 years even if the person makes no personal contribution. The maximum is $20, 000.

Bond Eligibility

- Full $1000 bond: net family income below $26, 021*.
- Partial bond: net family income between $26, 021* - $44, 701*.
- A beneficiary cannot qualify for the bonds once they turn 50 years per age.

* These amounts are for 2015 and are indexed and increase annually.

- Before 2014 all Grants and Bonds received in the previous 10 years would have to be repaid if there was any withdrawals from the RDSP.

- New rule states that for each $1 withdrawn, only $3 of any grants or bonds paid into the plan would need to be given back.

Taking money out of an RDSP

- The RDSP is designed to be a *long-term* savings plan, so there are several restrictions and regulations about making withdrawals.

- There are two types of payments:
- **Life Disability Assistance Payments (LDAPs)**
- **Disability Assistance Payments (DAPs)**

- Before 2014 both payments would trigger the “10-year rule”

Lifetime Disability Assistance Payments (LDAPs)

- Must begin at age 60, but can begin sooner.
- Once started, the payments do not stop until the funds are used.
- The annual amounts of the LDAP are set by a legislated formula (it considered fair market value of the plan and life expectancy of the beneficiary).

Withdrawals when there are no federal contributions (grants or bonds)

- If an RDSP only contains one's own money, or money from friends and family, there are no restrictions from the government on withdrawing money.

- Once someone turns 60 minimum annual payments will need to start coming out of the plan.

- However, some banks insist on applying formulas that restrict payments – you should ask the bank about their withdrawal policy before setting up the RDSP

Building savings above MSDSI asset levels

- A single person with no dependants on PWD is allowed to have up to $5, 000 in assets. An RDSP allows people to save money over their asset levels.

- By claiming the $1000 bond alone, the funds in the RDSP will grow each year, even if no personal contributions are ever made.

- The sooner the RDSP is set up the greater the financial benefit.

Endowment 150

- **Endowment 150** is a grant available form the Vancouver Foundation.

o When someone on social assistance in BC opens up a RDSP with $25, they can apply for a $150 grant.

o Eligibility: people who received income assistance after January 1, 2008

o Applications are made to the Vancouver Foundation

RDSP and DTC Resources

- Disability Alliance BC Resources: www.disabilityalliancebc.org

Help sheets, Manual, Online Video

- PLAN Resources: www.rdsp.com
- Canada Revenue Agency

www.cra-arc.gc.ca/tx/ndvdls/tps/rdsp-reel/

MSDSI and Trusts

A trust takes on legal ownership of an asset or assets. The trust can be controlled by either the beneficiary or a third party.

A trust can be set up by an individual or by a third party.

- At the office level a EAW should complete a Trust Query Cover form and then all documentation is passed on to the LLAB who contacts the Ministry of Justice (JAG) to get their legal opinion.
- LLAP issues a decision letter based on the JAG's opinion.
- Note: JAG's opinions are protected by solicitor-client privilege. The local offices cannot release them automatically.

14 DISABILITY ALLIANCE BC
HELPSHEET
BC DISABILITY BENEFITS

2015

Registered Disability Savings Plan and the Disability Tax Credit

This Help Sheet is funded by the Health Sciences Association of British Columbia.

What is it?

The Registered Disability Savings Plan (RDSP) is a savings plan that has been introduced by the federal government. The RDSP is designed to help people with disabilities and their families save money for their long-term financial security.

What does the RDSP allow you to do?

With an RDSP you can:

- Make up to a maximum of $200,000 in contributions. The tax on the money is deferred which means you do not pay tax on your savings while it is in the savings account. Contributions cannot be made to the RDSP after you turn 60 years old.
- Qualify for the Canada Disability Savings **Grant** (CDSG) and get up to $3,500 annually. The CDSG is an income-tested grant from the federal government. Here's how it works: if your family income is under $89,401*, you may receive $1,500 on the first $500 of contributions and $2,000 on the next $1,000 contributions. You can receive a lifetime maximum of $70,000 from this grant until you turn 50.
- Qualify for the income-tested federal Canada Disability Savings **Bond** (CDSB). This is an annual amount of $1,000 up to a lifetime maximum of $20,000 that you may receive if your family income is below $26,021*. If your family income is between $26,021-$44,701* the grant may be pro-rated. Again, you cannot receive this after you are 50 years old. No contribution is required to receive the CDSB.

***These amounts are for 2015 and are adjusted each year by the Canada Revenue Agency.**

dabc disability alliance bc

Disability Alliance BC (Formerly BC Coalition of People with Disabilities)
Information in this Help Sheet is based on the legislation that was current at the time of writing. The legislation and policy may be subject to change. Please check the date on this Help Sheet.

Your provincial disability or income assistance benefits

Your provincial disability or income assistance benefits will not be stopped or reduced because of any RDSP savings or withdrawals. This is because the Minister of Social Development and Social Innovation has introduced regulations that exempt RDSP assets and income from being counted as unearned income.

Requirements and Restrictions

To benefit from an RDSP you must:

- Be eligible for the Disability Tax Credit (DTC) and maintain this eligibility. (Please see below for more on this.)
- Have a Social Insurance Number (SIN)
- Be living in Canada when the RDSP is opened
- Be up-to-date with filing your income tax returns
- Be under 50 if you want to claim the CDSG and CDSB (grant and bond)
- Not make any withdrawals for at least 10 years if you want to keep all of the federal grants and/or bonds that you have received. This is because there is a special rule that says, if you withdraw any money from your savings plan, all or part of the grants and bonds paid into it in the preceding 10 years must be repaid to the government. Also, you may have to repay any CDSGs or CDSBs you have received in the preceding 10 years if you no longer qualify for the DTC.

How to establish an RDSP

If you have already qualified for the DTC you should contact a financial institution that offers the RDSP. Each financial institution has its own forms which you will be required to complete to access the RDSP. You can only have one RDSP at any given time. With your permission, other people can also contribute to your RDSP. Some banks will let you open an RDSP, if you have not already qualified for the DTC, but your RDSP will not be official until the DTC is approved.

The Disability Tax Credit (DTC)

To qualify for the DTC you must have a physical or mental impairment that is both **severe** and **prolonged**. Prolonged means that your impairment must be expected to last a continuous period of at least 12 months. Severe means that you are:

- **blind**,

or you are **markedly restricted** in any of the following activities of daily living:
- walking
- speaking
- hearing
- dressing
- feeding
- elimination (bowel or bladder functions)
- mental functions necessary for everyday life

or be **significantly restricted** in two or more activities of daily living (e.g., dressing, speaking, feeding, walking, mental functions necessary for everyday life, etc.)

or you need, and must dedicate a certain amount of time specifically for, **life-sustaining therapy**.

Even if you have qualified for the Persons with Disabilities (PWD) designation or Canada Pension Plan disability benefits, you may not necessarily qualify for the DTC. You must get the DTC Certificate (T2201) from the Canada Revenue Agency (CRA) and ask your doctor or other qualified health care professional to complete the form.

Once the form is filled out and submitted, you may have to wait several weeks before you find out whether or not you qualify. In some cases, you may wait up to several months if CRA seeks additional information on your application.

Keep in mind that even if you qualify for the DTC, Canada Revenue can ask you to re-apply in the future and/or decide you are no longer eligible.

The Endowment 150 Fund

The Endowment 150 Fund is available to British Columbians with disabilities who received income assistance any time since January 1, 2008. If this is you, when you open an RDSP with at least $25, you can apply to receive a one-time $150 grant from the Endowment 150 fund. This grant is administered by the Vancouver Foundation and is in addition to the federal CDSGs and CDSBs (grants and bonds) that you may receive. Application forms can be found on the Vancouver Foundation website at: www.endowment150.ca.

Taking money out of an RDSP

Generally, there are two kinds of payments that can come out of an RDSP.

- **Lifetime Disability Assistance Payments (LDAPs)** are annual payments that, once started, must continue until the RDSP is spent. LDAPs **can** begin before the beneficiary turns 60, but **must** start when the beneficiary is 60. The LDAP has a maximum annual amount which is set by a legislated formula, based on the value of the plan and life expectancy of the beneficiary.
- **Disability Assistance Payments (DAPs)** are one-time payments from the RDSP that can be requested at any time. However, talk to your bank about their policies on DAP payments. Each bank is permitted to have their own rules or restrictions on these payments.

Repayment Rules

If any money is taken out of an RDSP, you have to repay to the federal government all or part of the grants and bonds put into your RDSP in the previous 10 years.

Financial institutions that are offering the RDSP

Most financial institutions are currently offering RDSPs, including the following:

- Bank of Montreal (BMO)
- Canadian Imperial Bank of Commerce (CIBC)
- Central 1 Credit Union
- Community Savings Credit Union
- Desjardins Trust Inc.
- Envision Investment Services Ltd.
- Investors Group Trust Co. Ltd.
- Mackenzie Financial Corporation
- Royal Bank of Canada (RBC)
- Scotia Bank
- TD Canada Trust
- Vancity Credit Union

NOTE: Banks' RDSP policies vary. For example, they may have different restrictions on when you can make withdrawals from an RDSP. Be sure to ask your bank about these policies before you set up an RDSP.

RDSP: Pros and cons

Pros

- The RDSP provides generous grants and bonds from the federal government, and is an excellent savings opportunity for many people with disabilities.
- For people on income assistance, the provincial government has made RDSP assets and withdrawals exempt. This means that people can save and use this money without having their monthly income assistance affected.
- For people who receive lump-sum payments (such as an ICBC settlement), the RDSP is a practical alternative to a trust to exempt the asset.
- The RDSP can provide long-term financial security.

Cons

- The older you are, you have fewer financial incentives available to you. For example, if you are over 49, you cannot qualify for the federal grants and bonds going forward.
- You must meet a relatively strict definition of disability to qualify for the DTC. If you do qualify, but lose your eligibility at a later time, you may have to close your RDSP. However, an RDSP may remain open, if you meet certain criteria. Please see "Key Changes in 2014" below.
- The Repayment Rules mean that you have to pay back all or part of the grants and bonds you have received in the past 10 years when you withdraw any amount of money from the RDSP.

Because the RDSP is a relatively new program, we are still learning how it will work in practice. We recommend that, if you are interested in finding out more about the RDSP, you look into some of the resources listed below.

Changes in 2011

In 2011, the federal government introduced carry forward and rollover provisions to the RDSP.

The carry forward provision allows people who may not be able to contribute regularly to their RDSP to claim unused grant and bond entitlements for a 10-year period (starting from 2008, when the RDSP first became available). The annual maximum for unused grants is $10,500, for unused bonds it is $11,000.

The rollover provision allows the Registered Retirement Savings Plan (RRSP), Registered Retirement Income Fund (RRIF) or Registered Pension Plan (RPP) of a deceased family member to be rolled over into the RDSP of a dependent child or grandchild.

Key Changes in 2014

In 2014, the new Proportional Repayment Rule will replace the current "10-year rule." The 10-year rule requires repayment of all federal grants and bonds received in the previous 10 years, if you make a withdrawal. Under the Proportional Repayment Rule, for every $1 withdrawn from an RDSP, $3 of any grants or bonds received in the past 10 years must be repaid.

If you cease to qualify for the Disability Tax Credit, the period an RDSP can remain open will be extended up to five years, with certification from a medical practitioner that you will likely re-qualify for the DTC in the foreseeable future.

Other Resources

Planned Lifetime Advocacy Network (PLAN) has information and resource links about RDSPs on their website. They also facilitate an RDSP blog where people can ask questions. Phone: 604-439-9566; website: www.plan.ca.

Details about the RDSP can be obtained from the Canada Revenue Agency (CRA). Information about the DTC can also be obtained from the CRA. Phone your local CRA office or go to www.cra.gc.ca for more information.

The financial institutions that offer the RDSP have also produced information materials and have financial advisors that may be able to answer your questions.

This Help Sheet was prepared by Advocacy Access, a program of Disability Alliance BC (formerly BC Coalition of People with Disabilities). Thank you to the Health Sciences Association of British Columbia for funding the BC Disability Benefits Help Sheets.

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The full Help Sheet series and all DABC publications are available free at www.disabilityalliancebc.org/library.

DISABILITY TAX CREDIT CERTIFICATE

This form is separated into two sections: the introduction and the form itself. The introduction includes the following:

- general information about the disability amount;
- definitions;
- how to change your return for previous years;
- what to do if you disagree with our decision about your eligibility;
- a questionnaire to help you determine if you may be eligible for the disability tax credit; and
- where you send this form.

The form itself includes an **application** (**Part A**), and a **certification** (**Part B**). Both parts of the form must be completed.

Who uses this form – and why?

Individuals who have a severe and prolonged (defined on the next page) impairment in physical or mental functions, or their legal representative, use this form **to apply** for the disability tax credit (DTC) by completing Part A of the form.

Qualified practitioners use this form **to certify** the effects of the impairment by completing Part B of the form.

Note

For information to help qualified practitioners complete this form, go to **www.cra.gc.ca/qualifiedpractitioners**.

What is the disability amount?

The disability amount is a non-refundable tax credit used to reduce income tax payable on your income tax and benefit return. This amount includes a supplement for persons under 18 years of age at the end of the year. All or part of this amount may be transferred to your spouse or common-law partner, or another supporting person. For more information, go to **www.cra.gc.ca/disability** or see Guide RC4064, *Medical and Disability-Related Information*.

The disability amount is entered on **line 316** (self), **line 318** (transferred from a dependant), or **line 326** (transferred from your spouse or common-law partner) of your income tax and benefit return when you are eligible for the DTC.

Are you eligible?

You are eligible for the DTC only if we approve this form. A qualified practitioner has to complete and certify that you have a severe and prolonged impairment and its effects. To find out if you **may** be eligible for the DTC, use the self-assessment questionnaire in this introduction.

If you receive Canada Pension Plan or Quebec Pension Plan disability benefits, workers' compensation benefits, or other types of disability or insurance benefits, **it does not necessarily mean you are eligible for the DTC**. These programs have other purposes and different criteria, such as an individual's inability to work.

The Canada Revenue Agency must validate this certificate for you to be eligible for the DTC. If we have already told you that you are eligible, do not send another form unless the previous period of approval has ended or if we tell you that we need one. **You must tell us immediately if your condition improves.**

You can send the form to us at any time during the year. By sending us your form before you file your income tax and benefit return, you may prevent a delay in your assessment. We will review your application before we assess your return. Keep a copy of the completed form for your records. **We do not accept photocopies or facsimile copies of this form when completed and signed.**

Fees – You are responsible for any fees that the qualified practitioner charges to complete this form or to give us more information. However, you may be able to claim these fees as medical expenses on line 330 or line 331 of your income tax and benefit return.

Related programs

If a child under 18 years of age is eligible for the DTC, that child is also eligible for the **child disability benefit**, an amount available under the Canada child tax benefit. For more information, go to **www.cra.gc.ca/benefits** or see Booklet T4114, *Canada Child Benefits*.

If you are eligible for the DTC and you have working income, you may be eligible for the **working income tax benefit disability supplement**. For more information, go to **www.cra.gc.ca/witb** or see line 453 in the *General Income Tax and Benefits Guide*.

If you are eligible for the DTC, you may be eligible to open a **registered disability savings plan**. For more information, go to **www.cra.gc.ca/rdsp** or see Guide RC4460, *Registered Disability Savings Plan*.

Do you use a teletypewriter (TTY)?

TTY users can call **1-800-665-0354** for bilingual assistance during regular business hours.

If you use an operator-assisted relay service, call **1-800-959-8281** during regular business hours. We need your written permission to discuss your information with the relay operator. Send a letter (we will keep it on file until you ask us to change it) to your tax centre giving us your name, address and social insurance number, the name of the telephone company that you are authorizing to discuss your information during relay calls, your signature, and the date you signed the letter.

Agents are available Monday to Friday (except holidays) from 8:15 a.m. to 5:00 p.m. From February 17 to April 30, these hours are extended to 9:00 p.m. on weekdays, and from 9:00 a.m. to 5:00 p.m. on Saturdays (except Easter weekend).

If you have a visual impairment, you can get our publications in braille, large print, etext, or MP3 by going to **www.cra.gc.ca/alternate**. You can also get your personalized correspondence in these formats by calling **1-800-959-8281**.

(Vous pouvez obtenir ce formulaire en français à **www.arc.gc.ca** ou en composant le **1-800-959-7383**.)

Canada

Definitions

Inordinate amount of time – is a clinical judgement made by a qualified practitioner who observes a recognizable difference in the time required for an activity to be performed by a patient. Usually, this equals three times the normal time required to complete the activity.

Life-sustaining therapy – You must meet **both** the following conditions:

- the therapy is required to support a vital function, even if it alleviates the symptoms; and
- the therapy is needed at least **3 times per week**, for an average of at least **14 hours per week**.

You must dedicate the time for the therapy – that is, you have to take time away from normal, everyday activities to receive it. If you receive therapy by a portable device (such as an insulin pump) or an implanted device (such as a pacemaker) the time the device takes to deliver the therapy does **not** count towards the 14-hour per week requirement. However, the time you spend setting up a portable device does count.

Do **not** include activities such as following a dietary restriction or regime, exercising, travelling to receive the therapy, attending medical appointments (other than appointments where the therapy is received), shopping for medication, or recuperating after therapy.

For 2005 and later years, life-sustaining therapy includes a regular dosage of medication that needs to be adjusted on a daily basis. The activities directly related to determining dosage are considered part of the therapy, except activities related to exercise, or following a dietary regime such as carbohydrate calculation.

The time spent by a primary caregiver performing and supervising activities related to the therapy of a child because of his or her age can be counted toward the 14-hour per week requirement.

Examples of life-sustaining therapy:

- Chest physiotherapy to facilitate breathing
- Kidney dialysis to filter blood

Markedly restricted – You are markedly restricted if, **all or substantially all of the time** (at least 90% of the time), you are unable or it takes you an inordinate amount of time (defined above) to perform one or more of the basic activities of daily living (see Question 4 on the next page), even with therapy (other than therapy to support a vital function) and the use of appropriate devices and medication.

Prolonged – An impairment is prolonged if it has lasted, or is expected to last, for a continuous period of at least 12 months.

Qualified practitioner – Qualified practitioners are medical doctors, optometrists, audiologists, occupational therapists, physiotherapists, psychologists, and speech-language pathologists. The table on page 2 of the form lists which sections of the form each can certify.

Significantly restricted – means that although you do not **quite** meet the criteria for markedly restricted, your vision or ability to perform a basic activity of daily living (see Question 4 on next page) is still substantially restricted all or substantially all of the time (at least 90% of the time).

How to change your return

If you need us to adjust a tax year to allow a claim for the disability amount, include Form T1-ADJ, *T1 Adjustment Request*, or a letter containing the details of your request, with your completed Form T2201.

If a representative is acting on your behalf you must provide us with Form T1013, *Authorizing or Cancelling a Representative*, or a signed letter authorizing the representative to make this request.

What if you disagree with our decision?

If we do not approve your form, we will send you a notice of determination to explain why your application was denied. Check your copy of the form against the reason given, since we base our decision on the information provided by the qualified practitioner.

If you have additional information from a qualified practitioner that we did not have in our first review of the form, send that information to the Disability Tax Credit Unit of your tax centre (see the next page) and we will review your file again.

You also have the right to file a formal objection to appeal the decision. The time limit for filing an objection is 90 days after we mail the notice of determination.

Note
Asking us to review your file again does not extend the time limit for filing an objection.

If you choose to file a formal objection, your file will be reviewed by the Appeals Branch. You should send either a completed Form T400A, *Objection – Income Tax Act*, or a signed letter to:

Chief of Appeals
Sudbury Tax Services Office
1050 Notre Dame Avenue
Sudbury ON P3A 5C1

You may also file an objection electronically through our secure Web page at **www.cra.gc.ca/myaccount**.

For more information, visit **www.cra.gc.ca** or see Pamphlet P148, *Resolving Your Dispute: Objection and Appeal Rights Under the Income Tax Act*.

What if you need help?

If you need more information after reading this form, go to **www.cra.gc.ca/disability** or call **1-800-959-8281**.

Forms and publications

To get our forms and publications, go to **www.cra.gc.ca/forms** or call **1-800-959-8281**.

Self-assessment questionnaire

Answer these questions to determine if you **may** be eligible for the disability tax credit (DTC). **This questionnaire does not replace the form itself.**

Note

If your answers indicate you **are not eligible** for the DTC, and you still feel that you should be able to claim it, see page 1 of the form for instructions on how to apply.

1. Has your impairment in physical or mental functions lasted, or is it expected to last, for a continuous period of at least 12 months?

Yes ☐ No ☐

If you answered **yes**, answer Questions 2 to 5 below.

If you answered **no**, you **are not eligible** for the DTC. To claim the disability amount, the impairment has to be **prolonged** (defined on the previous page).

2. Are you blind?

Yes ☐ No ☐

3. Do you receive **life-sustaining therapy** (defined on the previous page)?

Yes ☐ No ☐

4. Do the effects of your impairment cause you to be **markedly restricted** (defined on the previous page) all or substantially all of the time (at least 90% of the time) in one or more of the following basic activities of daily living, even with the appropriate therapy, medication, and devices?

- speaking
- hearing
- walking
- elimination (bowel or bladder functions)
- feeding
- dressing
- mental functions necessary for everyday life

Yes ☐ No ☐

5. Do you meet **all** the following conditions?

- Because of the impairment, you are **significantly restricted** (defined on the previous page) in two or more of the basic activities of daily living listed in Question 4, or you are **significantly restricted** in vision and one or more of the basic activities of daily living listed in Question 4, even with appropriate therapy, medication, and devices.
- These significant restrictions exist together, all or substantially all of the time (at least 90% of the time).
- The cumulative effect of these significant restrictions is equivalent to being **markedly restricted** (defined on the previous page) in a **single** basic activity of daily living.

Yes ☐ No ☐

If you answered **yes** to Question 1 and to any one of Questions 2 to 5, you **may be eligible** for the DTC. To apply for the DTC, complete Part A of the form. Then, take the form to a qualified practitioner who can certify the effects of the impairment for you by completing Part B of the form. If the qualified practitioner certifies the form, send it to us for approval. We will review the form and advise you in writing if you are eligible for the DTC.

If you answered **no** to all of Questions 2 to 5, you **are not eligible** for the DTC. For you to be eligible for the DTC, you have to answer **yes** to at least one of these questions. Even if you cannot claim the disability amount, you may have expenses you can claim on your income tax and benefit return. For more information, see Guide RC4064*, Medical and Disability-Related Information.*

Where do you send this form?

Complete and send the **original** certified form to the Disability Tax Credit Unit of your tax centre. Use the chart below to get the address.

If you are normally served by the tax services office in:	Send your form to the following address:
British Columbia, Regina, or Yukon	Surrey Tax Centre 9755 King George Boulevard Surrey BC V3T 5E6
Alberta, London, Manitoba, Northwest Territories, Saskatoon, Thunder Bay, or Windsor	Winnipeg Tax Centre PO Box 14006, Station Main Winnipeg MB R3C 0E5
Barrie, Sudbury (the area of Sudbury/Nickel Belt only), Toronto Centre, Toronto East, Toronto North, or Toronto West	Sudbury Tax Centre 1050 Notre Dame Avenue Sudbury ON P3A 5C1
Laval, Montréal, Nunavut, Ottawa, Rouyn-Noranda, Sherbrooke, or Sudbury (other than the Sudbury/Nickel Belt area)	Shawinigan-Sud Tax Centre PO Box 4000, Station Main Shawinigan QC G9N 7V9
Chicoutimi, Montérégie-Rive-Sud, Outaouais, Québec, Rimouski, or Trois-Rivières	Jonquière Tax Centre 2251 René-Lévesque Blvd Jonquière QC G7S 5J2
Kingston, New Brunswick, Newfoundland and Labrador, Nova Scotia, Peterborough, or St. Catharines	St. John's Tax Centre PO Box 12071, Station A St. John's NL A1B 3Z1
Belleville, Hamilton, Kitchener/Waterloo, or Prince Edward Island	Summerside Tax Centre 275 Pope Road Summerside PE C1N 6A2
International Tax Services Office (deemed residents, non-residents, and new or returning residents of Canada)	International Tax Services Office PO Box 9769, Station T Ottawa ON K1G 3Y4

DISABILITY TAX CREDIT CERTIFICATE

6729

Protected B
when completed

Part A – To be completed by the person with the disability (or a legal representative)

Step 1: Complete Part A (**please print**). Remember to sign, where applicable, at the bottom of this page.

Step 2: Take this form to a qualified practitioner (use the table on the next page to find out who can certify the sections that apply). The qualified practitioner completes Part B.

Step 3: Complete and send the **original** certified form (Part A and Part B) to your tax centre (see the chart on the previous page). **This form must be submitted in its entirety** (pages 1 to 9).

When reviewing your application, if we need more information, we may contact you or a qualified practitioner (named on this certificate or any attached document) who knows about your impairment.

Information about the person with the disability

First name and initial	Last name	☐ Female ☐ Male
Mailing address (Apt No – Street No Street name, PO Box, RR)		Social insurance number
City	Province or territory / Postal code	Date of birth (Year Month Day)

Information about the person claiming the disability amount (if different from above)

First name and initial	Last name	Social insurance number

The person with the disability is: ☐ my spouse or common-law partner ☐ other (specify) _____

Answer the following questions for **all** of the years that you are claiming the disability amount for the person with the disability.

1. Does the person with the disability live with you? ☐ Yes ☐ No

   If **yes**, for which year(s)? _____

2. If you answered **no** to Question 1, does the person with the disability depend on you for regular and consistent support for one or more of the basic necessities of life such as food, shelter, or clothing? ☐ Yes ☐ No

   If **yes**, for which year(s)? _____

Give details about the regular and consistent support you provide for food, shelter or clothing to the person with the disability (if you need more space, attach a separate sheet of paper). We may ask you to provide receipts or other documents to support your request for the transfer of the disability amount.

As the person claiming the disability amount, I certify that the information given on this form is, to the best of my knowledge, correct and complete.

Signature	Telephone number	Date (Year Month Day)
It is a serious offence to make a false statement.		

Authorization

As the person with the disability or their legal representative, I authorize the qualified practitioner(s) having relevant clinical records to provide or discuss the information contained in those records on or with this certificate to the Canada Revenue Agency for the purpose of determining eligibility for the disability tax credit or other related programs.

Signature	Telephone number	Date (Year Month Day)

Privacy Act, Personal Information Bank number CRA PPU 218

Part B – Must be completed by the qualified practitioner

Protected B
when completed

Before completing this form, read the instructions below.
For more information, go to **www.cra.gc.ca/qualifiedpractitioners**.

Your patient must have an impairment in physical or mental functions which is both severe and prolonged. You must assess the following two criteria of your patient's impairment **separately**:

- **Duration** of the impairment – The impairment must be prolonged (it must have lasted, or be expected to last, for a continuous period of at least 12 months).
- **Effects** of the impairment – The effects of your patient's impairment must be such that, even with therapy and the use of appropriate devices and medication, your patient is restricted all or substantially all of the time (at least 90% of the time).

  The effects of your patient's impairment must fall into one of the following categories:
  - Vision
  - Markedly restricted in a basic activity of daily living
  - Life-sustaining therapy
  - The cumulative effect of **significant restrictions** (for patients who are significantly restricted in two or more of the basic activities of daily living, including vision, but do not quite meet the criteria for **markedly restricted**)

Step 1: Complete **only** the section(s) on pages 3 to 8 that apply to your patient. See the table below to find out which page(s) to complete and to determine which sections you can certify.

Note
Whether completing this form for a child or an adult, assess your patient relative to someone of a similar chronological age who does not have the marked or significant restriction.

	Section:	Go to:	To certify the applicable section, you have to be a:
	Vision	Page 3	Medical doctor or optometrist
Markedly restricted in a basic activity of daily living	• Speaking	Page 3	Medical doctor or speech-language pathologist
	• Hearing	Page 3	Medical doctor or audiologist
	• Walking	Page 4	Medical doctor, occupational therapist, or physiotherapist (physiotherapist can certify only for 2005 and later years)
	• Elimination (bowel or bladder functions)	Page 4	Medical doctor
	• Feeding	Page 5	Medical doctor or occupational therapist
	• Dressing	Page 5	Medical doctor or occupational therapist
	• Performing the mental functions necessary for everyday life	Page 6	Medical doctor or psychologist
	Life-sustaining therapy	Page 7	Medical doctor
	Cumulative effects of significant restrictions in two or more basic activities of daily living, including vision (applies to 2005 and later years)	Page 8	Medical doctor or occupational therapist (occupational therapist can only certify for walking, feeding and dressing)

Step 2: Complete the "**Effects of impairment**," "**Duration**," and "**Certification**" sections on page 9.

Definition

Markedly restricted – means that **all or substantially all of the time** (at least 90% of the time), and even with therapy (other than therapy to support a vital function) and the use of appropriate devices and medication, either:

- your patient is unable to perform one or more of the basic activities of daily living (see above); or
- it takes your patient an **inordinate amount of time** (defined in the introduction of this form) to perform one or more of the basic activities of daily living.

Vision (Complete this section if applicable, and **all sections on page 9**.)

Not applicable ☐

Your patient is considered **blind** if, even with the use of corrective lenses or medication:

- visual acuity in **both** eyes is 20/200 (6/60) or less with the Snellen Chart (or an equivalent); or
- the greatest diameter of the field of vision in **both** eyes is 20 degrees or less.

Is your patient **blind**, as described above? Yes ☐ No ☐

If **yes**, in what year did your patient's blindness begin (this is not necessarily the same as the year in which the diagnosis was made, as with progressive diseases)? Year ____

What is your patient's visual acuity **after correction**? Right eye _____ Left eye _____

What is your patient's visual field **after correction** (in degrees if possible)? Right eye _____ Left eye _____

Speaking (Complete this section if applicable, and **all sections on page 9**.)

Not applicable ☐

Your patient is considered **markedly restricted** in speaking if, all or substantially all of the time (at least 90% of the time), he or she is **unable** or takes an **inordinate amount of time** to speak so as to be understood by another person familiar with the patient, in a quiet setting, even with appropriate therapy, medication, and devices.

Notes
Devices for speaking include tracheoesophageal prostheses, vocal amplification devices, and other such devices.
An **inordinate amount of time** means that speaking so as to be understood takes **three times** the normal time required by an average person who does not have the impairment.

Examples of markedly restricted in speaking:

- Your patient must rely on other means of communication, such as sign language or a symbol board, all or substantially all of the time (at least 90% of the time).
- In your office, you must ask your patient to repeat words and sentences several times, and it takes an inordinate amount of time for your patient to make himself or herself understood.

Is your patient **markedly restricted** in speaking, as described above? Yes ☐ No ☐

Is the marked restriction in speaking present **all or substantially all of the time** (at least 90% of the time)? Yes ☐ No ☐

If **yes**, when did your patient's marked restriction in speaking begin (this is not necessarily the same as the date of the diagnosis, as with progressive diseases)? Year ____

Hearing (Complete this section if applicable, and **all sections on page 9**.)

Not applicable ☐

Your patient is considered **markedly restricted** in hearing if, all or substantially all of the time (at least 90% of the time), he or she is **unable** or takes an **inordinate amount of time** to hear so as to understand another person familiar with the patient, in a quiet setting, even with the use of appropriate devices.

Notes
Devices for hearing include hearing aids, cochlear implants, and other such devices.

An inordinate amount of time means that hearing so as to understand takes **three times** the normal time required by an average person who does not have the impairment.

Examples of markedly restricted in hearing:

- Your patient must rely completely on lip reading or sign language, despite using a hearing aid, to understand a spoken conversation, all or substantially all of the time (at least 90% of the time).
- In your office, you must raise your voice and repeat words and sentences several times, and it takes an inordinate amount of time for your patient to understand you, despite the use of a hearing aid.

Is your patient **markedly restricted** in hearing, as described above? Yes ☐ No ☐

Is the marked restriction in hearing present **all or substantially all of the time** (at least 90% of the time)? Yes ☐ No ☐

If **yes**, when did your patient's marked restriction in hearing begin (this is not necessarily the same as the date of the diagnosis, as with progressive diseases)? Year ____

Walking (Complete this section if applicable, and **all sections on page 9**.)

Not applicable ☐

Your patient is considered **markedly restricted** in walking if, all or substantially all of the time (at least 90% of the time), he or she is **unable** or requires an **inordinate amount of time** to walk even with appropriate therapy, medication, and devices.

Notes

Devices for walking include canes, walkers, and other such devices.

An **inordinate amount of time** means that walking takes **three times** the normal time required by an average person who does not have the impairment.

Examples of markedly restricted in walking:

- Your patient must always rely on a wheelchair outside of the home, even for short distances.
- Your patient can walk 100 metres (or approximately one city block), but only by taking an inordinate amount of time, stopping because of shortness of breath or because of pain, all or substantially all of the time (at least 90% of the time).
- Your patient experiences severe episodes of fatigue, ataxia, lack of coordination, and problems with balance. These episodes cause your patient to be incapacitated for several days at a time, in that he or she becomes unable to walk more than a few steps. Between episodes, your patient continues to experience the above symptoms, but to a lesser degree. However, these symptoms cause him or her to require an inordinate amount of time to walk, all or substantially all of the time (at least 90% of the time).

Is your patient **markedly restricted** in walking, as described above? Yes ☐ No ☐

Is the marked restriction in walking present **all or substantially all of the time** (at least 90% of the time)? Yes ☐ No ☐

If **yes**, when did your patient's marked restriction in walking begin (this is not necessarily the same as the date of the diagnosis, as with progressive diseases)? Year ☐☐☐☐

Elimination – bowel or bladder functions (Complete this section if applicable, and **all sections on page 9**.)

Not applicable ☐

Your patient is considered **markedly restricted** in elimination if, all or substantially all of the time (at least 90% of the time), he or she is **unable** or requires an **inordinate amount of time** to personally manage bowel or bladder functions, even with appropriate therapy, medication, and devices.

Notes

Devices for elimination include catheters, ostomy appliances, and other such devices.

An **inordinate amount of time** means that personally managing elimination takes **three times** the normal time required by an average person who does not have the impairment.

Examples of markedly restricted in elimination:

- Your patient needs the assistance of another person to empty and tend to his or her ostomy appliance on a daily basis.
- Your patient is incontinent of bladder functions, all or substantially all of the time (at least 90% of the time), and requires an inordinate amount of time to manage and tend to his or her incontinence pads on a daily basis.

Is your patient **markedly restricted** in elimination, as described above? Yes ☐ No ☐

Is the marked restriction in elimination present **all or substantially all of the time** (at least 90% of the time)? Yes ☐ No ☐

If **yes**, when did your patient's marked restriction in elimination begin (this is not necessarily the same as the date of the diagnosis, as with progressive diseases)? Year ☐☐☐☐

Feeding (Complete this section if applicable, and **all sections on page 9**.)

Not applicable ☐

Your patient is considered **markedly restricted** in feeding if, all or substantially all of the time (at least 90% of the time), he or she is **unable** or requires an **inordinate amount of time** to feed himself or herself, even with appropriate therapy, medication, and devices.

Notes

Feeding oneself **does not** include identifying, finding, shopping for or otherwise procuring food.

Feeding oneself **does** include preparing food, **except** when the time associated is related to a dietary restriction or regime, even when the restriction or regime is required due to an illness or health condition.

Devices for feeding include modified utensils, and other such devices.

An **inordinate amount of time** means that feeding takes **three times** the normal time required by an average person who does not have the impairment.

Examples of markedly restricted in feeding:

- Your patient requires tube feedings, all or substantially all of the time (at least 90% of the time), for nutritional sustenance.
- Your patient requires an inordinate amount of time to prepare meals or to feed himself or herself, on a daily basis, due to significant pain and decreased strength and dexterity in the upper limbs.

Is your patient **markedly restricted** in feeding, as described above?	Yes ☐ No ☐
Is the marked restriction in feeding present **all or substantially all of the time** (at least 90% of the time)?	Yes ☐ No ☐
If **yes**, when did your patient's marked restriction in feeding begin (this is not necessarily the same as the date of the diagnosis, as with progressive diseases)?	Year

Dressing (Complete this section if applicable, and **all sections on page 9**.)

Not applicable ☐

Your patient is considered **markedly restricted** in dressing if, all or substantially all of the time (at least 90% of the time), he or she is **unable** or requires an **inordinate amount of time** to dress himself or herself, even with appropriate therapy, medication, and devices.

Notes

Dressing oneself **does not** include identifying, finding, shopping for or otherwise procuring clothing.

Devices for dressing include specialized buttonhooks, long-handled shoehorns, grab rails, safety pulls, and other such devices.

An **inordinate amount of time** means that dressing takes **three times** the normal time required by an average person who does not have the impairment.

Examples of markedly restricted in dressing:

- Your patient cannot dress without daily assistance from another person.
- Due to pain, stiffness, and decreased dexterity, your patient requires an inordinate amount of time to dress on a daily basis.

Is your patient **markedly restricted** in dressing, as described above?	Yes ☐ No ☐
Is the marked restriction in dressing present **all or substantially all of the time** (at least 90% of the time)?	Yes ☐ No ☐
If **yes**, when did your patient's marked restriction in dressing begin (this is not necessarily the same as the date of the diagnosis, as with progressive diseases)?	Year

Mental functions necessary for everyday life

Not applicable ☐

(Complete this section if applicable, and **all sections on page 9**.)

Your patient is considered **markedly restricted** in performing the mental functions necessary for everyday life (described below) if, all or substantially all of the time (at least 90% of the time), he or she is **unable** or requires an **inordinate amount of time** to perform them by himself or herself, even with appropriate therapy, medication, and devices (for example, memory aids and adaptive aids).

Note
An **inordinate amount of time** means that your patient takes **three times** the normal time required by an average person who does not have the impairment.

Mental functions necessary for everyday life include:

- adaptive functioning (for example, abilities related to self-care, health and safety, abilities to initiate and respond to social interaction, and common, simple transactions);
- memory (for example, the ability to remember simple instructions, basic personal information such as name and address, or material of importance and interest); and
- problem-solving, goal-setting, and judgement, taken together (for example, the ability to solve problems, set and keep goals, **and** make appropriate decisions and judgements).

Note
A restriction in problem-solving, goal-setting, or judgement that markedly restricts adaptive functioning, all or substantially all of the time (at least 90% of the time), would qualify.

Examples of markedly restricted in the mental functions necessary for everyday life:

- Your patient is unable to leave the house, all or substantially all of the time (at least 90% of the time) due to anxiety, despite medication and therapy.
- Your patient is independent in some aspects of everyday living. However, despite medication and therapy, your patient needs daily support and supervision due to an inability to accurately interpret his or her environment.
- Your patient is incapable of making a common, simple transaction, such as a purchase at the grocery store, without assistance, all or substantially all of the time (at least 90% of the time).
- Your patient experiences psychotic episodes several times a year. Given the unpredictability of the psychotic episodes and the other defining symptoms of his or her impairment (for example, lack of initiative or motivation, disorganized behaviour and speech), your patient continues to require **daily** supervision.
- Your patient is unable to express needs or anticipate consequences of behaviour when interacting with others.

Is your patient **markedly restricted** in performing the mental functions necessary for everyday life, as described above? Yes ☐ No ☐

Is the marked restriction in performing the mental functions necessary for everyday life present **all or substantially all of the time** (at least 90% of the time)? Yes ☐ No ☐

If **yes**, when did your patient's marked restriction in the mental functions necessary for everyday life begin (this is not necessarily the same as the date of the diagnosis, as with progressive diseases)? Year ____

Life-sustaining therapy

Not applicable ☐

(Complete this section if applicable, and **all sections on page 9**.)

Life-sustaining therapy for your patient must meet **both** of the following conditions:

- Your patient needs this therapy to support a vital function, even if this therapy has alleviated the symptoms.
- Your patient needs this therapy at least 3 times per week, for an average of at least 14 hours per week.

Your patient must dedicate the time for the therapy—that is, the patient has to take time away from normal, everyday activities to receive it. If your patient receives therapy by a portable device, such as an insulin pump, or an implanted device, such as a pacemaker, the time the device takes to deliver the therapy **does not** count towards the 14-hour per week requirement. However, the time your patient spends setting up a portable device **does** count.

Do not include activities such as following a dietary restriction or regime, exercising, travelling to receive the therapy, attending medical appointments (other than appointments where the therapy is received), shopping for medication, or recuperating after therapy.

For 2005 and later years

- If your patient's therapy requires a regular dosage of medication that needs to be adjusted daily, the activities directly related to determining and administering the dosage **are** considered part of the therapy (for example, monitoring blood glucose levels, preparing and administering the insulin, calibrating necessary equipment, or maintaining a log book of blood glucose levels).
- Activities that are considered to be part of following a dietary regime, such as carbohydrate calculation, as well as activities related to exercise, **do not count** toward the 14-hour requirement (even when these activities or regimes are a factor in determining the daily dosage of medication).
- If a child is unable to perform the activities related to the therapy because of his or her age, the time spent by the child's primary caregivers performing and supervising these activities **can** be counted toward the 14-hour per week requirement. For example, in the case of a child with Type 1 diabetes, supervision includes having to wake the child at night to test his or her blood glucose level, checking the child to determine the need for additional blood glucose testing (during or after physical activity), or other supervisory activities that can reasonably be considered necessary to adjust the dosage of insulin (excluding carbohydrate calculation).

Examples of life-sustaining therapy:

- Chest physiotherapy to facilitate breathing
- Kidney dialysis to filter blood
- Insulin therapy to treat Type 1 diabetes in a child who cannot independently adjust the insulin dosage (for 2005 and later years)

Does your patient need this therapy **to support a vital function**?	Yes ☐ No ☐
Does your patient need this therapy at least **3 times per week**?	Yes ☐ No ☐
Does this therapy take an average of at least **14 hours per week**?	Yes ☐ No ☐
If **yes**, when did your patient's therapy begin to meet the above conditions (this is not necessarily the same as the date of the diagnosis, as with progressive diseases)?	Year ☐☐☐☐

Provide details of the therapy (for example dialysis, or for persons with diabetes, insulin pump or multiple daily injections):

Cumulative effect of significant restrictions – applies to 2005 and later years

Not applicable ☐

(Complete this section if applicable, and **all sections on page 9**.)

Answer the following questions to determine if your patient may be eligible for the disability tax credit. Also answer the questions at the bottom of this page.

1. Does your patient have an impairment in physical or mental functions that has lasted, or is expected to last, for a continuous period of at least 12 months? Yes ☐ No ☐

2. Even with appropriate therapy, medication, and devices, has the impairment resulted in a **significant restriction**, that is not quite a **marked restriction** (defined below), in **two** or more basic activities of daily living or in **vision** and **one** or more of the basic activities of daily living? Yes ☐ No ☐

3. Do these significant restrictions exist together, **all or substantially all of the time** (at least 90% of the time)? Yes ☐ No ☐

4. Is the cumulative effect of these significant restrictions equivalent to being markedly restricted in a single basic activity of daily living (see examples below)? Yes ☐ No ☐

Note

You **cannot** include the time spent on life-sustaining therapy.

If you answered **yes** to all of the above questions, your patient may be eligible for the disability tax credit.

Definitions

Markedly restricted – means that **all or substantially all of the time** (at least 90% of the time), and even with therapy (other than therapy to support a vital function) and the use of appropriate devices and medication, either:

- your patient is unable to perform one or more of the basic activities of daily living; or
- it takes your patient an inordinate amount of time to perform one or more of the basic activities of daily living.

Significantly restricted – means that although your patient does not **quite** meet the criteria for markedly restricted, his or her vision or ability to perform a basic activity of daily living is still substantially restricted **all or substantially all of the time** (at least 90% of the time).

Examples

Examples of cumulative effects equivalent to being markedly restricted in a basic activity of daily living:

- Your patient can walk for 100 metres, but then must take time to recuperate. He or she can perform the mental functions necessary for everyday life, but can concentrate on any topic for only a short period of time. The cumulative effect of these two significant restrictions is equivalent to being markedly restricted, such as being unable to perform one of the basic activities of daily living.
- Your patient always takes a long time for walking, dressing and feeding. The extra time it takes to perform these activities, when added together, is equivalent to being markedly restricted, such as taking an inordinate amount of time in a single basic activity of daily living.

Answer the following question(s) to certify your patient's condition:

Does your patient meet the four conditions for the cumulative effect of significant restrictions described **above**? Yes ☐ No ☐

If yes, tick at least two of the following, as they apply to your patient.

☐ vision ☐ speaking ☐ hearing ☐ walking ☐ elimination (bowel or bladder functions)

☐ feeding ☐ dressing ☐ mental functions necessary for everyday life

If **yes**, when did the cumulative effect described above begin (this is not necessarily the same as the date of the diagnosis, as with progressive diseases)? Year ____

Complete **all** of the sections on this page.

Effects of impairment

The effects of your patient's impairment must be those which, even with therapy and the use of appropriate devices and medication, cause your patient to be restricted **all or substantially all of the time** (at least 90% of the time).

Note
Basic activities of daily living are limited to walking, speaking, hearing, dressing, feeding, elimination, and mental functions necessary for everyday life. Working, housekeeping, managing a bank account, and social or recreational activities are **not** considered basic activities of daily living.

Examples of effects of impairment:

- For a patient with a walking impairment, you might state the number of hours spent in bed or in a wheelchair each day.
- For a patient with an impairment in mental functions necessary for everyday life, you might describe the degree to which your patient needs support and supervision.

Describe the effects of your patient's impairment(s) on his or her ability to perform **each** of the basic activities of daily living that you indicated are or were markedly or significantly restricted (include the diagnosis, if available). If you need more space, attach a separate sheet of paper.

Effects of impairment:

Diagnosis: _____

Duration

Has your patient's impairment lasted, or is it expected to last, for a continuous period of at least 12 months? For deceased patients, was the impairment expected to last for a continuous period of at least 12 months? Yes ☐ No ☐

If **yes**, has the impairment improved, or is it likely to improve, to such an extent that the patient would no longer be blind, markedly restricted, equivalent to markedly restricted due to the cumulative effect of significant restrictions, or in need of life-sustaining therapy? Yes ☐ No ☐ Unsure ☐

Note
Additional comments related to duration may be added to the "Effects of impairment" section.

If **yes**, enter the year that the improvement occurred or may be expected to occur. Year ☐☐☐☐

Certification

Tick the box that applies to you:

☐ Medical doctor ☐ Optometrist ☐ Occupational therapist ☐ Audiologist
☐ Physiotherapist ☐ Psychologist ☐ Speech-language pathologist

As a **qualified practitioner**, I certify that the information given in Part B of this form is, to the best of my knowledge, correct and complete and I understand that this information will be used by the Canada Revenue Agency (CRA) to determine if my patient is eligible for the disability tax credit or other related programs.

Sign here

_____
It is a serious offence to make a false statement.

Print your name _____

Date _____

Telephone _____

Address

Note
If more information is needed, the CRA may contact you.

Step-by-Step Guide to Establishing a Non-Discretionary Trust through a Tax-Free Savings Account

Prepared by Stephen Portman updated by Thea McDonagh,
Together Against Poverty Society

October 2015

Introduction:

Assisting a client to establish a trust is one way that advocates can help clients improve their financial security. Clients of the Ministry of Social Development and Social Innovation (MSDSI) must maintain strict cash asset limits in order to be eligible for benefits. Without the advantage of an asset exemption vehicle, many people are forced to deplete their financial resources in order to be eligible for assistance. This results in unnecessary hardship and decreased financial security for these individuals.

This guide seeks to provide advocates with the tools necessary to help clients establish non-discretionary trusts through mainstream financial institutions. These institutions offer Tax Free Savings Accounts (TFSA) that are governed by a trust agreement and are a successful method of exempting cash assets. Clients can have up to $200,000 in a non-discretionary trust and still be eligible for support payments. Disbursements or expenditures from the TFSA trust are considered exempt income provided the funds are used for disability-related costs.

Before assisting a client to establish a TFSA trust advocates should familiarize themselves with the applicable legislation and ministry policy that relates to disability trusts (Appendix 1 and 2). MSDSI recognizes a TFSA trust as a non-discretionary trust for the purposes of Section 12 of the *Employment and Assistance for Persons with Disabilities Regulation.*

It is important for advocates to apply sound judgement in assisting clients to establish TFSA trusts. Every client and circumstance is different and may require different strategies or solutions. Advocates should consult legal supervision whenever they are unsure in their course of action on behalf of a client.

Case Study Part 1: Sigurd Larson gets an Inheritance

Sigurd Larsen is designated as a person with disabilities (PWD). As a single PWD recipient he is allowed to have a maximum of $5000.00 in cash assets and continue to receive monthly disability support. On September 10, 2015, he received a check for $40,000 as an inheritance from his dearly departed Aunt Gertrude. Sigurd may lose his monthly disability support unless he can find a way to exempt a portion of this inheritance. He has decided to seek help from an advocate to deal with his problem. He called Super Awesome Advocacy Society (SAAS) and spoke to an advocate named Sally Turnip. Sally set up an appointment for an interview with Sigurd.

Step 1 - The Interview:

This step is often the most involved and time consuming. In the initial interview with a client there are two objectives that will need to be accomplished: 1) Determine if a TFSA trust is the right vehicle for the client to exempt their asset, 2) Advise the client of the process for establishing the TFSA trust and the ministry policy that will impact them.

Objective 1: Determining if a TFSA trust is right for the client

When contacted by a client who is interested in asset exemption, advocates need to determine if a TFSA trust is the right vehicle for their client. The following are key questions that will help determine this.

1. *Is the client designated PWD or intending to apply?*

   In order to exempt assets through a TFSA trust clients must be designated as PWD or be receiving accommodation or care in a private hospital or a special care facility (drug or alcohol treatment centres not included).

   If a client is intending to apply for PWD the ministry will temporarily exempt assets above the PWD asset limit if the assets are in the process of being transferred into a trust or an RDSP (See ministry policy on asset limits for persons applying for PWD designation, Appendix 2).

2. *How much money will the client be receiving?*

   The maximum contribution limit for a TFSA in 2015 is $41,000. If the client has not made prior contributions to a TFSA and they do not need to exempt more than $41,000 then a TFSA trust may be a good option. If they will be receiving funds in excess of the maximum TFSA contribution limit then they may need to speak to a lawyer to establish a trust or consider other asset exemptions.

3. *What does the client intend to use the money for?*

   How the client wants to use the money is an important component of determining whether a TFSA trust is the right option for them. Funds from a TFSA trust can only be used for disability-related costs or items that promote independence. If the client wants to use the money for other purposes then a trust may not be a good option.

4. *Is the client capable of sufficiently managing their own financial affairs?*

   If the client is unable to manage and maintain their own bank account, keep up to date records of expenditures, and/or manage a basic budget, then a TFSA trust may not be the right choice for them. MSDSI conducts annual reviews of trust accounts and clients will need to provide a record of all expenditures. If the client is reasonably able to manage their own financial affairs or has access to support to manage their finances, then a TFSA trust may be appropriate.

5. *Does the client have access to establishing an account at either a Vancity or a Royal Bank of Canada (RBC) Branch?*

   Vancity and RBC are the only financial institutions whose trust agreements (Appendix 6 and 7) TAPS has had reviewed by a trust lawyer. We have confirmed that these agreements meet MSDSI's definition of a trust. If your client does not have access to either of these institutions it is possible that other financial institutions offer a similar product. Advocates should seek a legal opinion if choosing to use a financial institution other than Vancity or RBC.

   Note: It is fundamentally important to ensure that the client makes the decision to use a TFSA trust on their own. Advocates should present the various options that are available to clients for asset exemption and assist the client in pursuing the course of action that the client chooses.

Case Study Part 2: Sigurd decides to use a TFSA Trust Account

Sigurd is 54 years old and has chronic back pain caused by scoliosis. In addition, he suffers from severe dysthymia. He has always independently managed his own bank account and is proud of the fact that he is able to manage his finances and survive on his budget of $906.42 per month. He currently has a bank account in good standing at Scotia Bank. Sigurd's monthly rent is $750.00 per month and he would like to use some of this inheritance so he can offset his shelter costs. There is a Vancity a block from where he lives and he is confident that he would be able to independently manage an account there. Sigurd would like to use the money to help him pay his shelter costs and one day he would like to purchase a car.

Objective 2: The process for establishing the TFSA trust and ministry policy regarding asset exemption

All clients who decide to establish a TFSA trust should be advised of the following information in order to avoid interruption to their benefits and allow them maximum value from their assets.

The process:

1. *Disclosing receipt of income to MSDSI*

   Ministry clients are required to disclose all income to MSDSI by the 5th day of the month following receipt. For clients establishing a TFSA trust this will typically result in a one-month period of ineligibility for PWD support. Clients must ensure that they budget accordingly and manage their financial responsibilities independent of MSDSI during that period.

   In some circumstances an asset can pass directly into a trust or RDSP and the client never has control over it. In this case it is not considered income and there should be no period of ineligibility. This is not the case during the establishment of a TFSA trust as the client has control over the funds in order to open the account.

2. *3 Month Asset Exemption Period and Extensions*

The ministry will temporarily exempt funds intended for a trust for a period of 3 months beginning when the funds are received. The client should inform the ministry as soon as possible of their intention to place the funds into a trust. This will make them eligible for the temporary asset exemption. Advocates can assist by sending a letter to the ministry advising of the client's intent (see Appendix 3).

Advocates should record the date that the client received the money and take steps to ensure that all funds are transferred into the TFSA trust and it is disclosed to MSDSI before the 3 months are up.

MSDSI can extend the exemption period in cases where the client can provide documentation showing that they are making reasonable efforts to establish a trust. A letter from an advocate will usually suffice. The client must provide documentation each month that an extension is requested (See ministry policy on Transferring assets or income into a trust, Appendix 2).

Note: In most cases a TFSA trust can be established within a relatively short period and extensions are rarely required.

3. *Using the TFSA Trust account*

Advocates must advise the client of their responsibilities in maintaining the TFSA trust once it is established. Clients are responsible for making sure that all of the disbursements from the TFSA trust are used for disability related costs (See glossary for definition of disability related costs). Clients are also responsible for maintaining a record of all disbursements from the trust and ensuring that the remainder of their assets do not exceed their allowable asset level.

To help track disbursements from the trust many clients choose to open a chequing account at the financial institution where they establish the TFSA. The client can transfer funds from the TFSA into the chequing account and make purchases with a debit card. Then when asked to show a record of the disbursements they can simply print off a bank statement for that account.

Clients are allowed to spend up to $8000.00 per calendar year on items that go toward promoting their independence. Independence expenses are not defined and are at the discretion of the beneficiary and not ministry staff.

The Disability Alliance of British Columbia has a publication, *Trusts for People Receiving the Persons with Disabilities (PWD) Benefit*, which is very helpful for clients to understand their trust and how they should spend funds from it (Appendix 2). It is a good practice to provide this document to your clients.

4. *Disclosing Income and Intent to MSDSI*

Advocates should advise clients to declare their income prior to the 5th day of the month following the month that they received it. Clients can report this information on their

monthly stub. Advocates should reiterate this info to MSDSI by sending the Intent letter (Appendix 3). Remember to keep a record of the date the client disclosed the income and informed MSDSI of intent to establish non-discretionary trust.

Preparing to go to the Bank:

Once it has been determined by both the client and the advocate that a TFSA Trust is the appropriate vehicle for asset exemption and the client understands their responsibilities and how to use the trust, the next step is to go to the bank. In order to do this there are some basic preliminary steps to go through before the client leaves the initial interview.

The client will need to choose which financial institution they want to use. If the client chooses to use a bank other than Vancity or RBC they should be advised to seek a legal opinion as to whether or not that institution's TFSA will be accepted by MSDSI.

If the client chooses either Vancity or RBC, the advocate should provide the following:

- Letter addressed to the financial institution which outlines the clients intent and identifies the specific TFSA account to be opened (Appendix 4)
- A copy of the appropriate Declaration of Trust (Appendix 6 or 7)
- A signed Release of Information if the client wishes to have the advocate communicate with the institution on their behalf

It is a good idea to offer clients access to online resources that provide information on disability trusts and the RDSP:

- *How to Create a Trust*
  http://www.povnet.org/sites/default/files/sites/povnet.org/files/trust.pdf

- *Trusts for People Receiving the Persons with Disabilities (PWD) Benefit*
  http://www.disabilityalliancebc.org/docs/hs8.pdf?LanguageID=EN-US

- *Disability Assistance and Trusts*
  http://www.eia.gov.bc.ca/publicat/pdf/DisabilitiesTrusts.pdf

Case Study Part 3: Sigurd plans to establish a TFSA and inform the ministry

Sigurd received $40,000 as an inheritance from the estate of his deceased Aunt Gertrude on September 10, 2015. Sally has advised him to declare this income on his income assistance stub and deliver it to MSDSI by October 5, 2015. Sally is going to fax a letter to MSDSI to advise that Sigurd intends to place the money into a non-discretionary trust (Appendix 3). Sally further advised him that he will not receive disability support payments for the month of November, paid out on October 21, 2015. Sigurd will need to ensure that he takes the necessary steps to pay his rent, bills, and other expenses as he will not receive disability support again until November 18, 2015. Sigurd has to write a check to his landlord, BC Hydro and purchase all of his groceries with the money he received from Aunt Gertrude.

Sally advised Sigurd on the process for establishing the TFSA trust and gave him a helpful fact sheet to review so that he will understand how to manage disbursements from his account (Appendix 8). He also has been given a letter to bring with him to Vancity to help in setting up the account (Appendix 4). Sigurd is ready to go to the bank.

STEP 2 – At the Bank

This step is a quick and generally easy process. The client attends the financial institution of their choice and meets with an account manager. The client will provide the account manager with the letter from the advocate (Appendix 3) which explains the client's purpose for being there. In most cases the account manager will assist the client to open the TFSA and provide them with copies of a statement of account, the complete TFSA application, and the declaration of trust.

In some cases, account managers do not understand provincial disability assistance programs and may feel insecure in assisting the client. If this occurs advocates should call and discuss the client's intention and needs. After the financial institution staff is informed that the client is merely going to establish a TFSA they are generally happy to assist.

Establishing Separate Accounts:

In some circumstances clients may choose to establish two separate accounts with their financial institution of choice: a TFSA and a chequing account. This can be helpful for keeping track of the disbursements from the trust. The client can transfer funds from the TFSA trust directly to the chequing account then use a debit card for all purchases. The result is an automatic bank record of all expenditures. When clients have their trust accounts reviewed by MSDSI they can simply request a statement of the chequing account and provide this to the ministry.

Case Study Part 4: Sigurd goes to the Bank

Sigurd called Vancity and made an appointment to meet with an account manager named Jeff Suit. When Sigurd arrived at Vancity, Jeff told him that he was concerned that a TFSA may not qualify as a trust and that Sigurd might be cut off benefits. Sigurd gave Jeff the letter from Sally. Jeff read the letter but had some more questions and so decided to call Sigurd's advocate. After a quick conversation with Sally, Jeff was reassured that Sigurd could open the TFSA and continue to receive benefits. Jeff helped Sigurd to fill out the TFSA application and gave him copies of a statement of account, the complete TFSA Account application, and the declaration of trust (Appendix 6). Sigurd left Vancity and went straight to SAAS to review the documents with Sally.

During the phone call between Sally and Jeff, Sally mentioned that she serves many clients like Sigurd and that she would like to have someone at that Vancity branch that she could communicate with in future when clients were in need of establishing similar accounts. Jeff gave Sally his email address and told her that she could contact him any time.

STEP 3 – Disclosing the TFSA Trust to the Ministry

When the client has established the TFSA and deposited money into the account the trust must be reviewed by the Legislation, Litigation and Appeals Branch (LLAB) of MSDSI to receive approval. This is done by disclosing all the relevant TFSA trust documents to MSDSI.

Documents that must be disclosed:

- Advocate disclosure letter (Appendix 5)
- Trust Account Application
- Statement of Accounts (both the TFSA and chequing account if applicable)
- Declaration of Trust
- Release of Information

Once the ministry receives the disclosure a Trust Query Form is generated and the package is sent to LLAB for approval. This process can take many months for MSDSI to complete.

It is a good idea to send the disclosure directly to the client's local MSDSI office. That way if LLAB takes longer than 3 months to approve the trust then MSDSI has been notified of the pending trust approval. This can avoid confusion about whether the temporary asset exemption period needs to be extended.

Once LLAB has approved the TFSA trust they will mail a letter to the client that explains that the TFSA is considered to be a non-discretionary trust (Appendix 9).

Case Study Part 5: Follow Up at SAAS

Sally reviewed all of the documents with Sigurd. Sally noted that the Statement of Accounts showed that Sigurd had deposited $39,000 into the TFSA governed by the correct Declaration of Trust. Sigurd had kept 1,000 out of the TFSA and placed it in his regular account to pay for his day-to-day expenses over the next month. Sally advised Sigurd again that the funds from the trust are to be spent on disability related costs and that Sigurd should make sure that he has a clear and concise record of all expenditures.

Sally told Sigurd that she would fax the completed Trust documents to the ministry and that Sigurd should contact her when he receives a letter from the ministry with respect to his trust. Sigurd thanked Sally, breathed a sigh of relief, and left the SAAS office.

Case Study Part 6: A job well done

Two months after Sally last saw Sigurd she received a small box of chocolates and an envelope in her mail box at SAAS. When she opened the envelope she saw two things, a card from Sigurd thanking her for all of her efforts and a letter from the ministry that approved Sigurd' s TFSA Account as a non-discretionary trust (Appendix 9).

Trust Glossary:

Assets: the financial resources a person or trust has, including cash, bonds, securities, property and/or items of value (i.e. a car)

Asset Limit: the maximum amount of assets a person receiving PWD benefits can have (Cash assets of $5000.00 for a single recipient or $10, 000 for a family unit of 2).

Beneficiary: the person who benefits from the assets in the trust. The beneficiary is responsible for keeping a record of all disbursements from a non-discretionary trust.

Declaration of Trust: document that sets out the legal structure of the trust (also referred to as a trust agreement).

Disbursements: payments from a trust.

Discretionary Trust: a trust where the beneficiary does not have control over the money in the trust. The trustees make all of the spending decisions. No limit to the amount of money that can be held in a discretionary trust provided the beneficiary has no legal right to end the trust and gain control of the assets.

Disability Related Costs: disability related costs are considered as exempt for the purposes of calculating disability support amounts. All disbursements from a trust must be used for a disability related cost as defined under s. 12 of the *EAPWD Reg* or used to promote the persons independence.*

In the definition of disability-related costs there is no limit to the amount that can be spend each year on following categories:

- devices or medical aids related to improving the person's health or well-being;
- caregiver services or other services related to the person's disability (The online policy says this term is interpreted broadly and includes many services including home-maker service, social network facilitators, employment services or supports, speech therapy, physiotherapy, occupational therapy, behavioural or communication therapy, applied behaviour analysis counselling) ;
- education or training;
- renovations to the person's residence to accommodate the person's disability and
- necessary maintenance for that residence.

**Clients can use up to $8,000 per year for other items or services that promotes their independence (Schedule B s.7 (2.1). MSDSI policy states that, "Any other item or service that promotes the person's independence" is interpreted broadly and is determined by the beneficiary or trustees, not ministry staff (Appendix 2).*

***Intervivos* Trust:** a trust fund that comes into effect during the lifetime of the person who established the trust. It is also known as a living trust.

Non-discretionary trust: a trust in which the beneficiary of the trust has some control over income or capital or can regain control of the assets. MSDSI will exempt assets held in a non-discretionary trust so long as the total assets in the trust are less than $200,000. MSDSI may approve assets above this level if the beneficiary demonstrates that they have life time disability related costs above $200,000.

Settlor: the persons who establishes a trust. The settlor can be the beneficiary.

Tax Free Savings Account (TFSA): A Tax-Free Savings Account (TFSA) is a flexible, registered, general-purpose savings vehicle that allows Canadians to earn tax-free investment income to more easily meet lifetime savings needs.

Testamentary Trust: a trust that is set up, often within a will, which takes effect upon the death of the settlor.

TFSA Trust: technically the same as a TFSA. A form of non-discretionary trust where the financial institution acts as the trustee and the account holder acts as the beneficiary and settlor. Must carry a declaration of trust or trust agreement that establishes the account to meets the legal definition of a trust. As of 2015, carries a maximum cumulative contribution limit of $41, 000 for a person eligible for a TFSA as of 2009.This limit increases annually.

Trust: a legally binding agreement in which a settlor transfers legal ownership of assets to a trustee to manage and administer for the benefit of the beneficiary.

Trustee: The person or company that manages the trust according to written instruction contained in the trust agreement.

APPENDIX:

- APPENDIX 1 – EAPWD Regulations pertaining to disability trusts
- APPENDIX 2 – MSDSI Policy Guide: Trusts
- APPENDIX 3 – Intent to Establish a Trust (Template Letter)
- APPENDIX 4 – Introduction Letter to Financial Institution (Template Letter)
- APPENDIX 5 – MSDSI Trust Disclosure Letter (Template Letter)
- APPENDIX 6 – Vancity TFSA Application and Trust Agreement
- APPENDIX 7 – RBC TFSA Application and Trust Agreement
- APPENDIX 8 – BCCPD Trust Fact Sheet
- APPENDIX 9 – LLAB Trust Approval Letter

Trust Related Legislation: October 2015

BC Employment and Assistance for Persons with Disabilities Regulation

Limits on income

9 (1) For the purposes of the Act and this regulation, **"income"**, in relation to a family unit, includes an amount garnished, attached, seized, deducted or set off from the income of an applicant, a recipient or a dependant.

(2) A family unit is not eligible for disability assistance if the net income of the family unit determined under Schedule B equals or exceeds the amount of disability assistance determined under Schedule A for a family unit matching that family unit.

Asset limits

10 (1) The following assets are exempt for the purposes of subsection (2):

(2) A family unit is not eligible for disability assistance if any of the following apply:

a) a sole applicant or sole recipient has no dependent children and has assets with a total value of more than $5 000;
(B.C. Reg. 197/2012)
(b) an applicant or recipient has one or more dependants and the family unit has assets with a total value of more than $10 000.
(B.C. Reg. 197/2012)

Assets held in trust for person with disabilities

12 (1) In this section, **"disability-related cost"** means the cost of providing to a person with disabilities or a person receiving accommodation or care in a private hospital or a special care facility, other than a drug or alcohol treatment centre,

(a) devices, or medical aids, related to improving the person's health or well- being,
(b) caregiver services or other services related to the person's disability,
(c) education or training,
(d) any other item or service that promotes the person's independence, and (B.C. Reg. 197/2012)
(e) if a person with disabilities does not reside in a special care facility, a private hospital or an extended care unit in a hospital,

(i) renovations to the person's place of residence necessary to accommodate the needs resulting from the person's disability, and
(ii) necessary maintenance for that place of residence.

(2) If a person referred to in subsection (1) complies with subsection (4), up to $200 000, or a higher limit if authorized by the minister under subsection (3), of the aggregate value of the person's beneficial interest in real or personal property held in one or more trusts, calculated as follows: (B.C. Reg. 197/2012)

(a) the sum of the value of the capital of each trust on the later of April 26, 1996 or the date the trust was created, plus
(b) any capital subsequently contributed to a trust referred to in paragraph (a),
is exempt for the purposes of section 10 (2) *[asset limits]*.

(3) If the minister is satisfied that, because of special circumstances, the lifetime disability-related costs of a person referred to in subsection (2) will amount to more than $200 000, the minister may authorize a higher limit for the person for the purposes of subsection (2).
(B.C. Reg. 197/2012)

(4) A person referred to in subsection (2) who has a beneficial interest in one or more trusts must keep records of the following and make the records available for inspection at the request of the minister:

(a) for a trust created before April 26, 1996, the capital of the trust on that date;
(b) for a trust created on or after April 26, 1996, the capital of the trust on the date the trust was created;
(c) the amount of capital contributed in each subsequent year to a trust referred to in paragraph (a) or (b);
(d)all payments made after April 26, 1996 to or on behalf of the person from a trust in which that person has a beneficial interest.

(5) For the purposes of this section, the real or personal property of a "patient", as defined in the *Patients Property Act,* who is a person with disabilities is to be treated as if the real or personal property were held in trust for the patient by the patient's committee.

Schedule B

Exemptions - unearned income

7 (0.1) In this section:
"disability-related cost" means a disability-related cost referred to in paragraph (a), (b), (c) or (e) of the definition of disability–related cost in section 12 (1) *[assets held in trust for person with disabilities]* of this regulation;
(B.C. Reg. 197/2012)

"disability-related cost to promote independence" means a disability-related cost referred to in paragraph (d) of the definition of disability–related cost in section 12 (1) of this regulation; (B.C. Reg. 197/2012)

"intended registered disability savings plan or trust" , in relation to a person referred to in section 12.1 (2) *[temporary exemption of assets for person with disabilities or person receiving special care]* of this regulation, means an asset, received by the person, to which the exemption under that section applies; (B.C. Reg. 197/2012)

(2.1) The maximum amount of the exemption under subsection (1) (d.3) is $8 000 in a calendar year, calculated as the sum of all payments, structured settlement annuity payments and money that, during the calendar year, are applied exclusively to or used exclusively for disability-related costs to promote independence. (B.C. Reg. 197/2012)

(3) Repealed (B.C. Reg. 83/2012) (B.C. Reg. 197/2012)

APPENDIX 2

Trusts Policy

Eligibility and Trusts: July 20, 2011

Among other things, trusts provide a way for some clients and their families to safeguard *assets* for meeting disability-related costs now and in the future while remaining eligible for assistance.

The following client types may transfer certain kinds of *assets (real property or personal property)* into a *discretionary trust* or a *non-discretionary trust*, under certain conditions, without affecting eligibility for assistance:

- Clients who have the *persons with disabilities (PWD) designation*;
- A client who resides in a private hospital or a *special care facility* (other than a drug or alcohol treatment centre);
- Clients or applicants awaiting a PWD adjudication decision or completing a PWD Application form [for more information, see Persons with Disabilities Designation – Designation Application].

Note: Throughout this topic, "client" will refer to both clients and applicants if "client/applicant" is used in the paragraph in which it appears.

Income assistance clients, other than those who reside in a private hospital or a special care facility, could have a discretionary trust that would not be considered an asset in certain narrow circumstances. [For more information, see Policy – Income Assistance Clients and Trusts.]

Types of Trusts: October 1, 2012

A trust is a legal relationship where someone (the trustee) holds the legal interest in (legally owns) money or other *assets* for someone else's benefit (that person is called the beneficiary). The legal relationship is often, but not always, described in a written agreement, or in a will. There can be more than one trustee, and multiple beneficiaries, or there may be only one of each.

There are two basic types of trusts: discretionary and non-discretionary. The distinction is important, because they are treated differently under BC Employment and Assistance legislation.

Discretionary trust: a trust in which the trustee has absolute authority over payment of capital and income from the trust. In other words, the trustee has complete authority to decide whether to provide trust funds to the beneficiary, or to spend trust funds on their behalf.

- The ministry generally does not consider a discretionary trust to be an asset, provided the beneficiary has no legal right to end the trust and take the capital. Because such a trust is not considered an asset, there is no limit to the value of assets that can be held in a discretionary trust.
- If the beneficiary has a legal right to collapse the trust and gain control of the assets, the ministry considers the trust to be an asset. Such a trust is considered to be a *collapsible discretionary trust.*

Non-discretionary trust: A trust in which the trustee does not have absolute authority over payments of capital and income from the trust. The beneficiary may have some control, or the trustee may be required to make certain payments.

1. A non-discretionary trust is considered an exempt asset for eligible clients so long as the value of all capital contributions over time does not exceed **$200,000**.
2. Any return on investment generated by the trust can grow the value of the trust beyond $200,000 [see Policy – Return on Investment in a Trust for more information].
3. Capital contributions in excess of $200,000 are not exempt as an asset unless special approval is given by the minister.
4. The minister can approve capital contributions in excess of $200,000 if the minister is satisfied that the lifetime disability-related costs of the beneficiary will exceed $200,000 [see Procedures – Lifetime Maximum].

Note: Trust capital is the total of all contributions made to a trust. Trust income is any return on investment generated from capital contributions within a trust.

An *RDSP* is a registered matched savings plan specific for people with disabilities. An RDSP is not a trust but is an alternative tool for safeguarding and growing assets now and for the future. [see Related Links – Assets and Exemptions]

Income Assistance Clients and Trusts: July 20, 2011

Income assistance clients, other than those who reside in a private hospital or a *special care facility* (other than a drug or alcohol treatment centre), could have a *discretionary trust* provided they have no way of collapsing the trust and gaining control of the *assets*. This is because a discretionary trust is not considered an asset. However, whether they can have such a trust also depends on how, when, and by whom the trust was set up. For example, these clients may not be eligible for assistance if the trust was set up with capital that was within that client's control, within two years before their date of application for assistance or while in receipt of assistance. Further considerations include the underlying purpose of the contribution to the trust, and the purpose of the trust itself. **A legal opinion must be sought by the ministry through *LLAB* regarding such a contribution to a trust before making an eligibility decision.** [See Procedures]

Examples:

- A third party sets up a discretionary trust using their own resources, naming the client as beneficiary. The client cannot collapse the trust and gain control of the assets. In this case, the existence of the trust alone does not impact the client's eligibility for assistance.
- During the two years prior to applying for *income assistance*, a client receives some property as an inheritance and transfers it to a discretionary trust. The client cannot end this trust and take the capital. Depending on all the circumstances in this case, the client may not be eligible for assistance because of s. 13 of the *EAPWD Act* or s. 14 of the *EA Act*. In some cases it may be determined that the client disposed of *real property* or *personal property* in order to reduce assets by transferring them into a trust.

How a Trust is Set Up: July 20, 2011

A trust is generally set up by transferring *assets* to someone to hold for the benefit of another person. Similarly, a trust can also be set up by a person declaring assets they own are owned for the benefit of another person. The fundamental concept of a trust is that the legal ownership of the asset (essentially, the authority to manage or dispose of the asset) is separated from the beneficial ownership (the right to benefit from the asset).

There are many ways to set up a trust. Two common trust arrangements are:

- The client/applicant or another party chooses someone to be a trustee, or to be a co-trustee with the client, to manage the trust. The client and the trustee sign a trust document showing all the terms under which the assets have been transferred to the trustee, to be held in trust. This type of trust is an inter vivos trust because the creator of the trust is still alive.
- A person creates a trust in their will. The trust becomes effective when that person dies, because the deceased person's assets are automatically transferred to their executor and trustee, so they can carry out the instructions in the will. Thus, a separate trust agreement is not needed to put this trust into effect. This type of trust is a testamentary trust, because it is created through a person's last will and testament.

A trust document itself is not enough to create a trust. The legal title to the asset in trust must be transferred to the trustee to make the trust effective.

Ministry staff must not provide recommendations or advice regarding whether a trust or other personal arrangement is right for a client/applicant. The ministry cannot give legal or investment advice to clients, and can only provide information regarding how an arrangement a client has already made affects their eligibility. If a trust is claimed by a client, a legal opinion must be sought by the ministry through *LLAB* before making an eligibility decision.

Ministry staff use a Trust Query Cover Form (HR2999) and send any other relevant documents to LLAB to determine whether the trust is valid, whether the trust is to be considered an asset, and if it is exempt.

[For more information, see Resources for Clients – Trust Query Submission Guidelines for Clients and Resources for Staff – Trust Query Submission Guidelines for Staff.]

Transferring Income or Assets into a Trust: October 1, 2012

If an eligible client receives *earned income* or *unearned income* (such as CPP disability payments, money from a trust or inheritance, or investment income from *assets* held outside a trust), it is considered income in the month received even if the income is redirected, or received and transferred, into a trust. Certain income exemptions apply [see Related Links – Income and Exemptions]. Unless deemed by the legislation to be unearned income by definition, transfers of capital (including most gifts) are not treated as income [see Related Links – Assets and Exemptions].

Eligible clients may choose to transfer newly received income or assets to a trust or RDSP to avoid being over the asset limit in subsequent months [see Related Links – Assets and Exemptions]. If under $200,000, the asset(s) can be transferred into a trust. If the value of the asset(s) exceeds $200,000, the client should get legal advice, and they MAY be able to use a trust. For example, a possible concern is disposal of *real property* or *personal property* to reduce assets (section 13 of the *EAPWD Act* and section 12 of the *EA Act*). Whether or not this provision applies will depend on the circumstances of each case.

Ministry staff must not provide recommendations or advice regarding whether a trust or other personal arrangement is right for a client/applicant. The ministry cannot give legal or investment advice to clients, and can only provide information regarding how an arrangement a client has already made affects their eligibility. If a trust is claimed by a client, a legal opinion must be sought by the ministry through *LLAB* before making an eligibility decision.

If an asset passes directly into a trust or RDSP and the client/applicant never receives the asset, then the asset is not considered income in the month received. For example, if a relative chooses in their will to disburse assets directly into a trust for the client, those assets will not be considered income in the month received. Note that this is different than when a client has an

entitlement to the asset, but directs the person who has to transfer the asset to the client to instead transfer the asset into trust. An example is where a client is named as a beneficiary in a will, but there is no testamentary trust – the client is simply entitled to receive the inheritance; the client then requests the executor to transfer it into a trust. In such a case, it is the client and not the transferor who has chosen to transfer the asset in the trust. Accordingly, the ministry treats this situation the same as if the client actually received the asset before it was transferred to the trust.

A legal opinion must be sought by the ministry through LLAB when ministry staff require advice regarding how to categorize a transfer of income or assets and, generally, whenever there may be a trust involved, before making an eligibility decision.

If an eligible client transfers an exempt asset into an exempt trust, for example, a residential property that serves as the client's primary residence, or a transfer from a personal RDSP, the asset remains exempt and does not impact eligibility for assistance. Likewise, funds rolled into an exempt trust from a deceased parent's RRSP or Registered Retirement Income Fund are not considered income in the month received.

If an eligible client does not have an exempt trust or RDSP and the client wishes to transfer an asset to a trust or RDSP, the ministry allows the client up to three months to do so (the first month being the month in which the asset is received). During this time, the ministry will exempt assets intended for the trust or RDSP. If, after three months, the client has not set up a trust or RDSP, the client's circumstances will be reassessed. If the client provides documentation (from a financial institution or lawyer) proving they are making reasonable efforts to establish an RDSP or trust, and the delay is beyond their control, the exemption for the asset may be extended on a month-by-month basis. The client must provide documentation each month for which an extension is requested. The exemption ceases to apply if the ministry becomes aware of information that indicates that a client does not intend to contribute the asset or a portion of the asset to a trust or RDSP.

Expenditures from an asset intended for a trust or RDSP will be exempt only so long as they are spent on "disability-related costs" [see Policy – Trust Payments]. However, if the client does not receive assistance for a month because of excess income in the month received, expenditures from the asset intended for a trust or RDSP are not restricted during this month (short of transactions making s. 13 of the *EAPWD Act* or s. 14 of the *EA Act* applicable).

Assets Reported Late or Discovered by Review or Investigation: Clients found to be ineligible for assistance as a result of reporting assets at a later date, or for failing to report assets (either before or after the client began receiving assistance) which were subsequently discovered as a result of a review or investigation, may reapply for assistance when they no longer have the assets, or when they transfer the assets into a trust [see Policy – Eligibility and Trusts]. If they choose to set up a trust, this must be done **before** they will be eligible for assistance (i.e., unlike clients who report assets, non-reporters are not eligible while they are setting up the trust). In such cases, ministry staff will expedite the review of the trust and the client will remain ineligible for assistance until the trust has been reviewed and determined to be valid and an exempt asset.

Exception:

If an asset described above (over the asset limit that is reported at a later date or following a review or investigation that has uncovered the asset which was not reported) is being held within an existing trust, the client remains eligible for assistance and the trust should be immediately reviewed.

Amended Trusts: Clients found to be ineligible following a review of a trust may in some cases amend the terms of the trust. Ministry staff cannot advise whether a client can or should amend a trust. If the client chooses to amend a trust, ministry staff will expedite the review of the amended trust, and the client remains ineligible for assistance unless and until the trust has been reviewed and determined to be valid and an exempt asset.

Trust Payments: July 21, 2014

Payments from both *discretionary* and *non-discretionary* trusts are considered *unearned income* subject to exemptions for certain trust payments. Exemptions apply only to *persons with disabilities* (PWD) clients, PWD applicants and clients who reside in a private hospital or a *special care facility* (other than a drug or alcohol treatment centre); there are no trust payment exemptions for other clients or non-PWD members of a family unit. Trust payments are fully exempt for eligible clients when used for:

- Buying a place of residence for the client,
- A contribution to a Registered Education Savings Plan,
- A contribution to an *RDSP*, or

Disability-related costs:

Disability-Related Cost	**Annual Calendar Year Limit**
Devices, or medical aids, related to improving the person's health or well-being [see notes below]	None
Caregiver services or other services related to the person's disability [see notes below]	None
Any other item or service that promotes the person's independence [see notes below]	$8,000
Education or training	None
Renovations or changes to the person's place of residence necessary to accommodate the needs resulting from the person's disability (clients with PWD designation only)	None

Necessary maintenance on the person's place of residence (clients with PWD designation only)	None

Notes:

Examples of devices, or medical aids, related to improving the person's health or well-being include but are not limited to:

- High performance wheelchairs for recreational/leisure or sports use
- Vehicle modifications (hand controls, van lifts)
- Lift chairs

"Other services related to the person's disability" is interpreted broadly and includes many services. Examples include but are not limited to:

- Home-maker services
- Community Connectors (social network facilitators)
- Employment services or supports
- Speech therapy
- Physiotherapy
- Occupational therapy
- Behavioural or communication therapy
- Applied behavioural analysis
- Counselling

"Any other item or service that promotes the person's independence" is interpreted broadly and is determined by the beneficiary or trustees, not ministry staff.

If part of the cost of an item or service that promotes a person's independence falls under a different disability-related cost (or exempt trust payment), that portion of the expense should not be included within the $8,000 limit. For example, if a client takes an annual trip that requires a caregiver to accompany them, the client's expenses could be paid for out of the $8,000 limit, but the expenses the client pays for the caregiver, (including the caregiver's travel costs if applicable), are not included within the $8,000 limit.

Generally, *disability assistance* clients are not required to use *assets* from a trust to pay for items that may be provided by the ministry. For example, if a PWD client meets all eligibility criteria to be provided a wheelchair, their trust would not be considered an available resource and they would be eligible to receive the wheelchair. Assets from a trust can be used to pay for upgrades to items beyond what may be provided by the ministry.

If an individual who is not a ministry client with a non-discretionary trust applies for a health supplement under life-threatening health need, they are required to use assets from their trust before being considered for a supplement under life-threatening health need.

Trust payments are separate from *RDSP* payments. RDSPs are not subject to trust payments guidelines.

Note on fees: Trust payments for investment commissions, or administration and legal fees required to operate a trust (for example, tax payments or payments to trustees) are not payments to the beneficiary and do not count towards the $8,000 limit.

Preferred Beneficiary Election

A preferred beneficiary election allows a trustee to allocate trust income to the client on the client's tax return, without actually paying the income to the client. The client's income tax return will show that they have received income, but since the client doesn't receive any money, it cannot be included in the client's income for the purpose of calculating the client's eligibility for assistance. This is not the same as income paid on behalf of the client to a third party. Staff are to obtain verification of a preferred beneficiary election from the client or trustee in order to exclude it.

Ministry staff have no authority to direct a client or a trustee regarding how they must use a trust, nor may they provide suggestions or advice as to how to use a trust; staff apply the Act, regulations and ministry policy to determine how the client and trustee have used their trust as it relates to determining eligibility for assistance.

Structured Settlements: October 1, 2012

A structured settlement is an agreement to pay damages to a plaintiff in a lawsuit, but by periodic payments rather than as a lump sum. To be considered a structured settlement under this policy, the settlement agreement:

- must have been in relation to a claim for damages in respect of personal injury or death, and
- must require the defendant to make periodic payments directly to the person for a fixed term or the life of the person through the purchase of a single premium annuity contract that is not assignable, commutable or transferable.

If a settlement does not meet all of these criteria, it is not a structured settlement. These annuities are not assets. Some structured settlements require payments to be made into an actual trust, in which case the trust will determine how the arrangement is treated.

Payments received under structured settlements are treated the same as payments from trusts. The same trust payment income exemptions apply, regardless of whether the payment originated in a trust, or came from a structured settlement annuity.

If a client receives a structured settlement and does not have the *persons with disabilities (PWD) designation* or is not a person receiving accommodation or care in a private hospital or a *special care facility*, the underlying annuity will not be considered their asset. However, there are no exemptions for payments under a structured settlement for these clients, so any payments under a

structured settlement to a client who is neither a PWD nor a resident in a special care facility will be treated as unearned income.

If the structured settlement is set up to make payments into a trust, the payments may or may not be considered income; a legal opinion is required.

A legal opinion must be sought by the ministry through LLAB when structured settlements are reported, before making an eligibility decision.

Structured Settlement Reporting: Clients who are the beneficiary of structured settlement annuity payments are required to keep records of the following and make the records available for inspection at the request of the minister:

- the settlement agreement, including the table of payments to be made to the person
- documentation showing the ownership of the underlying annuity

Each year the ministry needs the following information:

- all payments made to or on behalf of the person under the structured settlement and what the money was used for

In addition, clients are required to report structured settlement annuity payments on their monthly report, as the payments may affect their eligibility.

Committees: January 28, 2015

A committeeship is an arrangement where the *Public Guardian and Trustee* (PGT), a private individual, or a trust company is granted the authority to manage the affairs of an adult who is incapable of managing his or her own affairs. Under BC Employment and Assistance legislation, a *patient's* own *real property* and *personal property*, which is controlled by a *committee*, is treated by the ministry as if held in trust for the adult; accordingly, it is not required to be held in an actual trust to qualify for an exemption equivalent to a *non-discretionary trust* (generally $200,000). A third party can still set up a trust for a patient. A patient would also generally continue to be the beneficiary of a trust that existed prior to their incapacity. Such actual trusts are considered on their terms, and in light of the patient's inability to manage their affairs.

A legal opinion must be sought by the ministry through LLAB in the case of a committeeship, to confirm the status of the committeeship as well as to determine how to apply the trust asset exemptions before making an eligibility decision. In seeking a legal opinion, it is important to include documentation showing who holds title to the assets in question and, if there is an actual trust, documentation showing that the property is held in trust and confirming the terms of any trust arrangement. Documentation should also include a copy of the court order or certificate of incapacity creating the committeeship.

The PGT provides assistance to adults who need support for financial and personal decision making. In that role, the PGT acts as the client's representative, no different from any other client

advocate, committee or trustee. **As such, a legal opinion must be sought by the ministry through LLAB for all arrangements involving the PGT before making an eligibility decision.**

Payments made by the committee from assets held by the client are not considered as income and do not impact eligibility for assistance. If, however, a payment is made by the committee from an actual trust, trust payment policy applies [see Policy – Trust Payments].

For example, if a committee makes a payment from a client's bank account (such as for rent, transportation, a medical device, etc.), it is a payment from a client's own money and not income. The committee is spending the client's money on the client's behalf – therefore, the client's support and shelter assistance is not impacted. If however, any of these payments are made by the committee from an actual trust, the payments are unearned income and trust payment policy applies and each payment may or may not be exempt according to trust policy.

For more information on documentation required, including for committees involving the PGT, see Resources for Clients – Trust Query Submission Guidelines for Clients, and see Resources for Staff – Trust Query Submission Guidelines for Staff.

Trust Reporting Requirements: July 20, 2011

Clients are required to report all trust changes and activity that may affect their eligibility on their monthly report (for example, new contributions, income, payments). Clients are not required to regularly report trust balances.

The ministry has the authority to ask for information regarding a trust at any time, and trustees must keep accounts and be prepared to produce documentation on request regarding activity in the trust. Each year the ministry needs all of the following information about a trust:

- how much money was disbursed from the trust to or on behalf of the client
- what this money was used for
- whether any new money was deposited to the trust

[see Resources for Clients – Disability Assistance and Trusts Booklet for tips on how to report this information]

An updated legal opinion must be sought by the ministry through LLAB when a change in trustee or amendment to the terms of the trust is reported, before making an eligibility decision.

Random Annual Audits: July 20, 2011

Exempt trusts held for clients with the *persons with disabilities designation* or persons in a private hospital or a *special care facility* (other than a drug or alcohol treatment centre) are subject to random annual audits. Audits will match reported trust activities with actual trust documentation to ensure accurate accounting of the trust.

Trustees holding exempt trusts for clients need to keep a record of all activity relating to the trust.

Return on Investment in a Trust: October 1, 2012

Income generated from return on investment within a trust can either be kept in the trust or paid out to the client, depending on how the trust is set up.

If the income is held in the trust, it is **not** considered income to the client but rather remains part of the trust. This is true for both *discretionary trusts* and *non-discretionary trusts*. Only distributions from the trust are attributable to the client as income, and exemptions may apply.

While non-discretionary trusts have a maximum contribution limit, the value of the trust can exceed the contribution limit through return on investment. This means that the trust remains exempt regardless of whether the income generated in it brings the value of the trust over $200,000. Income accrued in a trust is **not** considered to be a capital contribution.

For example, if a client sets up a non-discretionary trust with a $199,000 contribution and income generated on that amount brings the value of the trust to $210,000, the entire value of this trust would still be considered an exempt asset.

If the income is paid out to the client through a trust payment, it does not matter whether the payments are made from capital, income or mixed capital and income. The entire payment is from a trust, and therefore income attributable to the client [see Policy – Trust Payments].

Note on topping a trust back up: If a client contributes $200,000 (or their approved lifetime maximum) to a non-discretionary trust, draws down the value of the trust, and subsequently makes further contributions to it, the additional contribution is not exempt. For example, a client withdraws $10,000 from their trust that they set up with $200,000. After the $10,000 withdrawal, the client contributes $5,000 of fresh capital. In this example, the $5,000 contribution is considered a non-exempt asset since the client has now contributed a total $205,000 to their trust – more than their lifetime maximum.

Note that it is only "new" contributions to the trust that count toward the exemption limit in the calculation; if the trust earns income that is simply kept by the trust and accumulated as trust capital, such capital has not been "contributed" to the trust for the purpose of this calculation.

Note on investment properties: *Real property* may be held within a trust. If the trust owns the property, rental income the property generates is income to the trust, like any other investment income. It is not a capital contribution nor is it the client's income. Assuming the trust is exempt, this income is exempt because it is income earned by the trust, not the client. If the income accumulates, it does not count as a capital contribution by the client.

Client as Trustee: July 20, 2011

While not a common situation, a client/applicant can be a trustee of a trust where another person is the beneficiary. (A client can also be a co-trustee of a trust where the client is the beneficiary.)

If a client is a trustee of a trust where another person is the beneficiary, the assets in the trust and income generated in the trust are not considered to be the client's asset; however, a number of issues can still arise in this situation. **A legal opinion must be sought by the ministry through LLAB in every case where the client claims they are a trustee, or otherwise claims to be holding property for the benefit of another person, before making an eligibility decision.**

APPENDIX 3 – Intent to Establish a Trust (Template Letter)

DATE

Ministry of Social Development and Social Innovation

RE: LARSON, Sigurd (SIN XXX-XXX-XXX) – Intent to Establish Trust

To Whom It May Concern,

Mr. Larson has contacted our organization seeking assistance regarding his ministry benefits. A Release of Information is enclosed.

Mr. Larson has requested I provide the ministry with a brief outline regarding his intentions for the use of recently received income. Mr. Larson received an inheritance of $20,000 on DATE. It is Mr. Larson's intent to establish a non-discretionary trust with this income and to use the funds from this trust for disability-related costs.

I have advised Mr. Larson ministry policy is to exempt assets intended for a non-discretionary trust for a period of **three calendar months** from the date they are received.

Please contact me directly should you require any additional information to ensure Mr. Larson receives the appropriate asset exemption.

Yours sincerely,

_____

Sally Turnip, Legal Advocate
Super Awesome Advocacy Services

APPENDIX 4 – Introduction to Financial Institution (Template Letter)

DATE

Dear RBC/Vancity Representative,

RE: LARSON, Sigurd (SIN XXX-XXX-XXX) - TFSA Application

Mr. Sigurd Larson has contacted our organization seeking assistance to transfer funds into a Tax Free Savings Account (TFSA). A Release of Information is enclosed.

Mr. Larson is currently in receipt of/applying for persons with disability (PWD) benefits from the Ministry of Social Development and Social Innovation.

Mr. Larson would like to place some of the money he recently received into a TFSA that meets the terms as set out in the attached Declaration of Trust/Trust Agreement.

In order to ensure the continuance of his PWD benefits, it is essential that the TFSA Mr. Larson establishes is governed by the attached agreement.

Please provide Mr. Larson with a copy of the completed application and Trust Agreement/Declaration of Trust so that I may submit this information to the ministry on his behalf.

If you have any questions concerning this request please feel free to contact me at (250) 361-3521.

Sincerely,

_____

Sally Turnip, Legal Advocate
Super Awesome Advocacy Services

APPENDIX 5 – MSDSI Trust Disclosure Letter (Template Letter)

DATE

Ministry of Social Development and Social Innovation

RE: LARSON, Sigurd (SIN XXX-XXX-XXX) – Trust Agreement

To Whom It May Concern,

Further to my previous correspondence regarding Mr. Larson's intent to establish a trust, please find the attached documents referring to Tax Free Savings Account (acct # XXXXXX).

Mr. Larson agrees to be bound by the terms and conditions of this account as set out in the application and the accompanying Declaration of Trust/Trust Agreement. The Trustee, namely Vancity Credit Union/RBC, agrees to act as Trustee of the Account in accordance with the terms of the Declaration of Trust/Trust Agreement.

This TFSA qualifies as a trust under Section 12 of the *Employment and Assistance for Persons with Disabilities Regulation*.

We understand that Ministry procedure is to refer the Trust to the Legislation, Litigation and Appeals Branch for review and to continue paying Mr. Larson's disability benefits.

Please advise me directly if you require any additional information. I can be reached by phone at 250-361-3521.

Most Sincerely,

_____

Sally Turnip, Legal Advocate
Super Awesome Advocacy Services

Vancity

Tax-Free Savings Account Application

Holder Information

Office Use

Vancity Account Number | Branch Number | Date | UR Number | TFSA Contract Number

First Name | Last Name | Social Insurance Number | Birth Date (MM/DD/YYYY)

Investment Instructions

$ _____ Deposit Amount

☐ Variable Rate Investment Savings

or

☐ Term Deposit

_____ Effective Date

_____ Product Type

_____ Term Length

Successor Holder and Designated Beneficiaries

Please note that the election of a successor Holder and designation of a beneficiary in respect of the Account is subject to the laws of the applicable jurisdiction (province or territory). If the laws of the applicable jurisdiction do not permit such an election or designation, it may be made only in your will. If the laws of the applicable jurisdiction permit such an election or designation in the Account, the following applies:

Successor Holder Election

I elect that my surviving spouse or common-law partner below become the successor Holder in the event of my death before termination of the Account, and confirm that my spouse or common law partner has the unconditional right to revoke any beneficiary designation made by me.

First Name | Initial | Last Name | Relationship to Holder

Designation of Beneficiary(ies)

I designate the person(s) below as beneficiary(ies) to receive, in the event of my death **and in the absence of a successor Holder**, any property under the Account.

First Name | Initial | Last Name | Relationship to Holder | Proportion of Account

First Name | Initial | Last Name | Relationship to Holder | Proportion of Account

Please note that:

- unless the proportion of the Account property to which each beneficiary is entitled is clearly indicated above, such property will be divided equally among them.
- in the event of the death of a beneficiary, the surviving beneficiary will receive the deceased beneficiary's share.

Undertakings, Acknowledgements, Agreements

- I acknowledge receipt of a copy of the Declaration of Trust governing the said Account, which is printed on the reverse hereof, and agree to be bound by it and the provisions of the *Income Tax Act* (Canada).
- I acknowledge that I must notify the Vancouver City Savings Credit Union should I wish to use my interest or right in the Account as security for a loan or other indebtedness.
- I acknowledge that I may be liable for certain tax consequences should the Account not comply with the requirements of the *Income Tax Act* (Canada).
- I undertake to notify Vancouver City Savings Credit Union should I cease to be a resident of Canada.

Election

I request that Vancouver City Savings Credit Union elect to register this arrangement as a tax free savings account (the "Account") under Section 146 of the *Income Tax Act* (Canada). If the date hereof is prior to 2009, I understand that the TFSA will not be issued, and that I may not make any contributions, until 2009.

X _____ X _____

Holder Signature | Date | Witness/Vancity Staff Signature | Vancity Staff Operator Number

Vancouver City Savings Credit Union, located at 183 Terminal Avenue Vancouver, British Columbia, acknowledges receipt of the contribution(s) noted above and accepts the within application.

Richard Seres

Vancity Signature

The information in this document, including the S. I. N., will be used for record keeping, financial reporting and tax reporting purposes.

Vancouver City Savings Credit Union (the "Trustee") by this Declaration of Trust hereby agrees to act as the trustee of the Vancouver City Savings Credit Union Tax Free Savings Account (the "Account") established by the individual named on the application(the "Application") hereof (the "Holder") on the following terms and conditions:

1. Registration: Subject to the Holder having attained at least 18 years of age, the Trustee will elect, in the form and manner prescribed by the Income Tax Act (Canada) (the "Act"), as amended from time to time, and any applicable provincial income tax legislation (the "Applicable Tax Legislation") relating to tax free savings accounts, to register the arrangement as a tax free savings account under the Social Insurance Number of the Holder. The Holder shall be solely responsible for the acceptability for registration thereof, and the Trustee assumes no responsibility for any revocation of such registration for any reason including, without limitation, the failure of the Holder to comply with any of the conditions necessary for registration of a tax free savings account under the Applicable Tax Legislation. The ultimate responsibility for the administration of the Account however, remains with the Trustee. For greater certainty, unless the Holder has attained at least 18 years of age at the time that this arrangement is entered into, it shall not constitute a qualifying arrangement, as that term is defined in subsection 146.2(1) of the Act, susceptible of being registered as a tax free savings account.
2. Definition of Spouse: Notwithstanding anything to the contrary contained herein or any endorsements forming a part thereof, the term "Spouse", as it is used in this Declaration of Trust or in the Application, means the individual who is considered the Holder's spouse or common law partner but does not include any person who is not recognized as a spouse or common-law partner for the purposes of any provision of the Act respecting a tax free savings account.
3. Definition of Holder: Any reference to "Holder" in this Declaration of Trust or in the Application means the Holder or the Successor Holder.
4. Definition of Successor Holder: Any reference to "Successor Holder" in this Declaration of Trust or in the Application means a survivor, as that term is defined in subsection 146.2(1) of the Act, and who is the Spouse of the Holder immediately before the Holder's death.
5. Purpose of the Account: Contributions to the Account and the income therefrom will be held by the Trustee, subject to the terms hereof, until the arrangement is no longer considered a tax free savings account.
6. Account: The Trustee will establish and maintain the Account for the exclusive benefit of the Holder showing all contributions and transfers to and distributions and transfers from, the Account, the Holder's investments and the income earned from such investments. The Trustee shall provide the Holder with a statement of the Account at least annually as of December 31 each year.
7. Contributions: Only the Holder may make contributions to the Account. Contributions may be made in cash, and in such minimum amounts as may be acceptable to the Trustee as may be directed by the Holder as permitted by the Applicable Tax Legislation. It is the sole responsibility of the Holder to ensure that the contributions do not exceed the amounts permitted under the Applicable Tax Legislation in effect at that time.
8. Investments: Subject to such limitations as the Trustee may impose from time to time, contributions to the Account shall be invested and reinvested as directed by the Holder such investments as the Trustee shall make available from time to time; provided that such investments are qualified investments for trusts governed by tax free savings accounts and not prohibited investments. It is the sole responsibility of the Holder to ensure that such investments are and remain qualified investments and are not and do not become prohibited investments, as those terms are defined in subsection 207.01(1) of the Act. No one other than the Holder and the Trustee shall have rights under the Account relating to the investment and reinvestment of the Account.
9. Tax Receipts: The Trustee will provide the Holder each year with appropriate information slips for income tax purposes and such other information as may be required by Applicable Tax Legislation.
10. Distributions: Subject to such reasonable requirements as the Trustee may impose and to the terms of any investment, the Holder may request in writing that the Trustee pay to the Holder all or a portion of the property of the Account in satisfaction of all or part of the Holder's interest (a "Distribution"), subject to the deduction of all proper charges, fees and expenses, together with such income or other taxes as may be required by applicable laws. Notwithstanding the terms of any investment, or any reasonable limits the Trustee may impose on the frequency of Distributions or any minimum Distribution requirement identified either in the Application or other notice given under the terms of this Declaration of Trust, the Trustee may make Distributions at any time in order to reduce the amount of tax otherwise payable by the Holder as a result of excess contributions made contrary to the Applicable Tax Legislation. No one other than the Holder and the Trustee shall have rights under the Account relating to the amount and timing of Distributions.
11. Transfers Out: The Holder may, upon 90 days written notice to the Trustee, or such shorter period as the Trustee may permit, request that the Trustee transfer all or a portion of the property in the Account to another tax free savings account of the Holder subject to the terms of the any investment. The Holder may, upon 90 days written notice to the Trustee, or such shorter period as the Trustee may permit, request that the Trustee transfer all or a portion of the property in the Account to a tax free savings account of his or her Spouse or former Spouse where the Holder and the Spouse or former Spouse are living separate and apart and the transfer is made under a decree, order or judgment of a competent tribunal, or under a written separation agreement, relating to a division of property between the individuals in settlement of rights arising out of, or on the breakdown of, their marriage or common-law partnership.

    The Trustee shall promptly take all steps necessary to effect such transfer (subject to the deduction of all proper charges, fees and expenses, together with such income and other taxes as may be required by applicable laws) and upon such transfer the Trustee shall have no further liability to the Holder with respect to the property of the Account.
12. Transfers In: The Holder may transfer assets to the Account from another tax free savings account of the Holder or of the Spouse or former Spouse where:

    (a) the Holder and the Spouse or former Spouse are living separate and apart and the transfer is made under a decree, order or judgment of a competent tribunal, or under a written separation agreement, relating to a division of property between the individuals in settlement of rights arising out of, or on the breakdown of, their marriage or common-law partnership; or

    (b) the Holder is the Spouse's survivor and the transfer occurs as a result of an exempt contribution as that term is defined in subsection 207.01(1) of the Act.
13. Death of Holder: In the event of the death of the Holder where the Holder has validly designated the Successor Holder (and the Holder is domiciled in a jurisdiction designated by the Trustee as one in which a holder of a tax free savings account may validly designate a survivor), the Successor Holder shall become the Holder. In the event of the death of the Holder where the Holder has not designated the Successor Holder or where there is no Successor Holder, the Trustee shall, upon receipt of satisfactory proof of the death of the Holder and other such documentation as the Trustee may require and to the deduction of all proper charges, fees and expenses together with such income or other taxes as may be required by applicable laws, pay the proceeds of the Account in a lump sum to the designated beneficiary or the estate of the Holder, as the case may be (where the Holder is domiciled in a jurisdiction designated by the Trustee as one in which a holder of a tax free savings account may validly designate a survivor.)

14. Designation of Beneficiary: If the Holder is domiciled in a jurisdiction designated by the Trustee as one in which a holder of a tax free savings account may validly designate a beneficiary, the Holder may designate one or more beneficiaries to receive the proceeds of the Account in the event of the Holder's death. If any such designated beneficiary is a minor at the time of the death of the Holder then the Trustee is expressly authorized to pay any infant beneficiaries' interest in the Account to his or her legally appointed representative or to the Office of the Public Trustee for the Province of British Columbia (or parallel legislation in any other relevant jurisdiction), at the Trustee's option, on behalf of the infant beneficiary.

    The initial beneficiary will be the Holder's estate or such person or persons named by the Holder as beneficiary or beneficiaries under the Designation of Beneficiary section of the Application. A revocation or alteration of a designation of beneficiary will be effective if it is made by an instrument in writing in a form acceptable to the Trustee and is signed by the Holder or it is contained in a will or other testamentary document. The Holder agrees to deliver to the Trustee all instruments, wills and other testamentary documents which contain any revocation or alteration of a designation of beneficiary, provided however, that:

    (i) the Trustee shall be entitled to make payment at any time after the date of death of the Holder to the beneficiary, having regard only to such instruments that are delivered to the Trustee prior to the Holder's death and wills and other testamentary documents that are delivered to the Trustee prior to the date of such payment, notwithstanding that the Holder fails to deliver such wills and other testamentary documents prior to the Holder's death; and

    (ii) if more than one such instrument, will or other testamentary document has been made and so delivered, the Trustee shall make payment only in accordance with the instrument, will or other testamentary instrument bearing the latest execution.

15. Loans: The Trustee is prohibited from borrowing money or other property for the purposes of the Account.

16. Security: Where the Holder wishes to use his or her interest or right in the Account as security for a loan or other indebtedness, he must first advise the Trustee. Where the Holder uses his or her interest in the Account for such purposes, it is the Holder's responsibility to ensure that the terms and conditions of the indebtedness are terms and conditions that persons dealing at arm's length with each other would have entered into, and it can be reasonably concluded that none of the main purposes for that use is to enable a person, other than the Holder, or a partnership to benefit from the exemption from tax of any amount in respect of this Account.

17. No Advantage to Holder: The Holder or a person with whom the Holder does not deal at arm's length may not receive an advantage, as that term is defined in subsection 207.01 (1) of the Act.

18. Amendments: The Trustee reserves the right to amend this Declaration of Trust at any time, provided that no such amendment shall have the effect of disqualifying the Account as a tax free savings account within the meaning of Applicable Tax Legislation. The Trustee shall give the Holder written notice of any amendment by postage prepaid ordinary mail addressed to the Holder at the address set out in the Trustee's records for the Account and shall be deemed to have been given on the day following the mailing. In the event of changes to Applicable Tax Legislation, the Account will be deemed to have been amended to conform to such changes effective the date such changes come into force.

19. Date of Birth: The Holder's statement of his or her date of birth on the Application shall be deemed to be a certificate by the Holder of that information and an undertaking to provide the Trustee with any further evidence of proof of age that the Trustee may require.

20. Fees: The Trustee shall be entitled to payment out of the property of the Account for its services as a trustee, in accordance with its fee schedule. The Trustee may change its fee schedule from time to time upon giving the Holder notice as stipulated under Section 18.

21. Replacement of Trustee: The Trustee may resign as trustee of the Account on 90 days written notice to the Holder. Upon resignation, the Trustee shall appoint a successor trustee and such appointment shall be in writing and signed by both the resigning Trustee and successor trustee. Subject to the approval of Canada Revenue Agency and any other applicable tax authorities, the successor trustee so appointed shall be vested with the property of the Account and the same powers, rights duties and responsibilities as the resigning Trustee and the resigning Trustee shall execute and deliver to the successor trustee all such conveyances, transfers and assurances as may be necessary for the purposes of assuring the same to the successor trustee.

    Any successor trustee appointed hereunder shall be a corporation resident in Canada that is licensed or otherwise authorized under the laws of Canada or a province therein to carry on in Canada the business of acting as trustee.

22. Governing Law: This Declaration of Trust and the Account shall be governed by the laws of British Columbia and the laws of Canada applicable therein.

RBC Direct Investing Inc.
TAX-FREE SAVINGS ACCOUNT
TRUST AGREEMENT

1. Definitions. Whenever used in this Trust Agreement or the Application, any capitalized terms shall have the meanings given to them below:

"Account" means the tax-free savings account established for the Holder;

"Agent" means RBC Direct Investing Inc and its successors and assigns;

"Applicable Laws" means the Tax Act and such other laws of Canada and of the provinces and territories applicable hereto;

"Application" means the Holder's application to the Agent to establish the Account;

"Contribution" means a contribution of cash, in whatever currency held within the Account or any Qualified Investment;

"Distribution" means a payment out of or under the Account in satisfaction of all or part of the Holder's interest therein in a currency agreed upon between the Trustee and the Holder; failing which agreement, the currency of which shall be Canadian dollars;

"Estate Documents" means proof of the Holder's death and such other documents such as letters probate, letters of administration, certificate of appointment of estate trustee with or without a will, representation grant, or other document of like import issued by any court in Canada as may be required by the Trustee in its sole discretion in connection with the transmission of the Property on the Holder's death;

"Estate Representative" means an executor, an administrator, an administrator with the will annexed, a liquidator, or an estate trustee with a will or without a will, whether one or more than one is so appointed;

"Expenses" means all (i) costs, (ii) charges, (iii) commissions, (iv) investment management fees, brokerage fees, and other fees, (v) legal expenses and (vi) out-of-pocket expenses incurred from time to time in relation to the Account;

"Former Spouse" means the individual who is considered by the Applicable Laws to be the Holder's former Spouse;

"Holder" means the *individual* of a "qualifying arrangement" to be in accordance with subsection 146.2(1) of the Tax Act;

"Proceeds " means the Property, less any applicable Expenses and Taxes;

"Prohibited Investment" means Property (other than prescribed excluded Property as that term is defined in the Tax Act) that is:

(a) a debt of the Holder;

(b) a share of the capital stock of, an interest in or a debt of:

  (i) a corporation, partnership or trust in which the Holder has a significant interest;

  (ii) a person or partnership that does not deal at arm's length with the Holder or with a person or partnership described in subparagraph (i);

(c) an interest in, or right to acquire, a share, interest or debt described in paragraph (a) or (b); or

(d) prescribed property (as that term is defined in the Tax Act);

"Property" means any property, including the income on it, the proceeds from it and any cash, in whatever currency held within the Account, held in the Account from time to time;

"Qualified Investment" means any investment which is a qualified investment for a TFSA according to the Tax Act;

"Spouse" means the individual who is considered by the Tax Act to be the Holder's spouse or common-law partner;

"Survivor" of the Holder means an individual who is immediately before the Holder's death a Spouse of the Holder;

"Tax Act" means the *Income Tax Act* (Canada);

"Taxes" means any and all applicable taxes and assessments, including any penalties and interest, as may be required under Applicable Laws;

"TFSA" means a tax-free savings account, which is a "qualifying arrangement" (as that term is defined in the Tax Act) the issuer of which has elected, in the form and manner prescribed by the Tax Act, to register as a TFSA; and

"Trustee" means The Royal Trust Company in its capacity as trustee and issuer of the arrangement governed by this Trust Agreement, and its successors and assigns.

2. Acceptance of Trust. The Trustee agrees to act as trustee of the Account, which is to be maintained for the exclusive benefit of the Holder, and to administer the Property in accordance with the terms of this Trust Agreement.

3. Appointment of Agent. The Trustee has appointed RBC Direct Investing Inc. (the "Agent") as its agent to perform certain duties relating to the operation of the Account. The Holder authorizes the Trustee and the Agent, together or separately, to appoint and employ agents to whom each may delegate, respectively, any of its powers, duties and responsibilities under the Account. The Trustee acknowledges and confirms that ultimate responsibility for the administration of the Account remains with the Trustee.

4. Registration. Subject to the Holder having attained at least 18 years of age, the Trustee agrees to elect, in the manner and form prescribed by the Tax Act, to register the arrangement governed by this Trust Agreement as a TFSA under the social insurance number of the Holder. For greater certainty, unless the Holder has attained at least 18 years of age at the time that this arrangement is entered into, it shall not constitute a qualifying arrangement, as that term is defined in subsection 146.2(1) of the Tax Act, susceptible of being registered as a tax free savings account.

5. Account. The Agent shall maintain an account for the Holder which will record particulars of all Contributions, investments, Distributions and transactions under the Account in the currency in which such Contributions, investments, Distributions and transactions occurred, including all Expenses paid from the Account and shall provide to the Holder, at least annually, a statement of account, unless there have been no such transactions in the previous year and there is no Property held in the Account at the end of the year. The Holder must promptly examine each statement (and each entry and balance recorded in it) and notify the Agent in writing of any error, omission or objection to a statement (or an entry of balance recorded in it) within 30 days from the statement date. If the Holder does not notify the Agent as required, the Agent is entitled to treat the above statements, entries and balances as complete, correct and binding on the Holder and the Trustee and Agent will be released by the Holder in respect of those statements, entries and balances.

An account number will be assigned to the Account for identification purposes. If the Agent deems it necessary to change the original number assigned to a new number in order to comply with Applicable Laws or other regulatory or administrative purposes, then the statement of account for the period in which the change occurs will show both the old and new account number. The Agent will keep a record of the change and the reason for it. The Account will be deemed to be the same Account and all previously signed Account documents such as the application, any designation of beneficiary (or election of successor annuitant) and other instructions previously given by you will continue to govern the Account trust as if the new account number had been the original account number assigned to the Account.

6. Contributions. Only the Holder may make Contributions to the Account, in such amounts as are permitted under the Tax Act, in such property as may be permitted in the sole discretion of the Trustee. It shall be the sole responsibility of the Holder to ensure that the amounts of Contributions are within the limits permitted under Tax Act.

7. Distributions to Reduce Tax. Notwithstanding any limit on the frequency of Distributions or any minimum Distribution requirement identified in the Application or other notice given under the terms of this Trust Agreement, any Distributions may be made at any time to reduce the amount of Taxes otherwise payable by the Holder as a result of excess Contributions made contrary to the Tax Act.

8. Tax Information. The Trustee shall provide the Holder with appropriate information slips for income tax purposes and such other information as may be required under the Applicable Laws.

9. Delegation by Trustee. The Holder expressly authorizes the Trustee to delegate to the Agent the performance of the following duties of the Trustee:

(a) receiving Contributions;

(b) receiving transfers of Property;

(c) investing and reinvesting the Property as directed by the Holder;

(d) registering and holding the Property in the Trustee's name, the Agent's name, in the name of their respective nominees or in bearer form as determined by the Agent from time to time;

(e) maintaining records, including information concerning the Survivor and the designation of beneficiaries, where applicable;

(f) providing to the Holder statements of account at least annually;

(g) preparing all government filings and forms;

(h) making Distributions pursuant to the provisions hereof; and

(i) such other duties and obligations of the Trustee as the Trustee in its sole discretion may from time to time determine.

The Holder acknowledges that, to the extent the Trustee delegates any such duties, the Trustee shall thereby be discharged from performing such duties, subject to paragraph 3.

10. Investment of the Property. The Property shall be invested and reinvested on the directions of the Holder (or the Holder's agent) without being limited to investments authorized by law for trustees. The Annuitant shall be responsible for ensuring that an investment is and continues to be a Qualified Investment, and determining whether any such investment is not and continues not to be a Prohibited Investment.

The Trustee, in its sole discretion, may require the Holder to provide such documentation in respect of any investment or proposed investment as the Trustee deems necessary in the circumstances. The Trustee reserves the right to decline to make any particular investment if the proposed investment and related documentation do not comply with the Trustee's requirements at that time. Subject to the appointment of an agent as contemplated in paragraph 11, no one other than the Holder and the Trustee shall have rights under the Account relating to the investment and reinvestment of the Property. The Trustee shall exercise the care, diligence and skill of a reasonably prudent person to minimize the possibility that the Plan holds a non Qualified Investment.

However, the Trustee will not have any duty or responsibility regarding voting and giving proxies to vote in respect of Qualified Investments except to mail proxies and other notices received by the Trustee or the Trustee's nominees in respect of Qualified Investments to the Holder. As well, the Trustee will not have any duty or responsibility to investigate or participate in any process or proceedings involving Qualified Investments unless the Holder has given the Trustee written instructions to that effect and the Trustee has the right in its discretion to refuse to act despite such instructions and upon notice to the Holder and the Holder agrees that the Trustee will not be liable to the Holder for such refusal. For greater certainty, the Trustee will not accept dissenting shareholder instructions from the Holder. If the Holder wishes to commence a dissenting shareholder process to be paid fair value for the beneficially owned shares for which the Trustee is the registered owner, the Holder agrees to de-register these shares, by withdrawing them from or substituting them in the Account, prior to commencing such process. Neither the Trustee nor the Agent will be liable for rejecting dissenting shareholder instructions from the Holder or the taxation consequences of withdrawing shares from the Account in order to bring a dissenting shareholder process.

11. Uninvested Cash. Uninvested cash, in whatever currency held within the Account, will be placed on deposit with the Trustee or an affiliate of the Trustee and held in the same currency as received from the Agent, provided that such currency is a currency that has been agreed from time to time by the Trustee and Agent and repaid in the same currency. The interest on such cash balances payable to the Account will be determined by the Agent from time to time in its sole discretion with no obligation to pay a minimum amount or rate. The Trustee will pay interest to the Agent, in the same currency as the uninvested cash was received, as referred to above, for distribution to the Account and the Agent shall credit the Account with appropriate interest. The Trustee shall have no liability for such payment of interest once it is paid to the Agent for distribution.

12. Right of Offset. The Trustee and the Agent shall have no right of offset with respect to the Property in connection with any obligation or debt owed by the Holder to the Trustee or the Agent, other than the Expenses payable by the terms of this Trust Agreement.

13. Pledging. The Holder may not use his or her interest or right in the Account as security for a loan or other indebtedness. Any attempt by the Holder to use his or her interest or right in the Account as security for a loan or indebtedness shall not be recognized by the Trustee and shall be null and void.

14. Trustee Cannot Borrow. The Trustee is prohibited from borrowing money or other property for the purposes of the Account.

15. Cash Deficits in Account If the Account has a cash deficit in one or more currencies held within the Account at any time, the Annuitant agrees that the Agent will charge interest on the cash deficit until such deficit is eliminated. If the Annuitant fails to instruct the Trustee to liquidate Property and eliminate the cash deficit after the cash deficit in the Account arises, then the Annuitant authorizes the Trustee to sell the whole or any part of the Property in such manner and on such terms as the Trustee in its absolute discretion deems advisable to cover the cash deficit and to pay any interest the Annuitant owes the Agent within the Account. The Trustee is prohibited from borrowing money or other property for the purposes of the Account. If the Trustee determines, in its sole discretion, that any investment held within the Account is no longer a Qualified Investment, the Trustee may withdraw such investment from the Account in-kind with the valuation of such investment to be determined by the Trustee in its sole discretion.

16. Interest Charged. Interest charges owing on any cash deficit in one or more currencies held within the Account are calculated and payable monthly, in the same currency or currencies that is or are in deficit, based on an annual interest rate (divided by 365, or 366 in a leap year) and the average daily cash deficit or deficits during the calculation period. Any unpaid interest will be included in the calculation of the daily average cash deficit for the applicable currency. The rate of interest payable on the cash deficit will be determined by the Agent from time to time in its sole discretion. The rate of interest and method of calculation is available upon request to the Agent and will be the rate shown on the Holder's statement in respect of the Account.

17. Distributions. Subject to any limit on the frequency of Distributions or to any minimum Distribution requirement identified in the Application or other notice given under the terms of this Trust Agreement, and to the deduction of all Expenses and Taxes, the Holder may, at any time and upon 60 days' notice or such shorter period as the Agent in its sole discretion permits, request that the Agent liquidate part or all of the Property and pay to the Holder an amount, in a currency agreed upon between the Trustee and the Holder, failing which agreement, the currency of which shall be in Canadian dollars, from the Property not exceeding the value held under the Account immediately before the time of payment. No one other than the Holder and the Trustee shall have rights under the Account relating to the amount and timing of Distributions.

Such payments will only be made to the Holder by a cheque payable to the Holder or deposited to a Royal Bank of Canada bank account of which the Holder is the sole owner or is one of the joint owners. Although the Holder will have once verified to the Trustee or the Agent that he or she is the owner or one of the owners of such bank account, neither the Trustee nor the Agent will have any responsibility to confirm that the Holder is still an owner of such bank account at the time the payment is made.

18. Successor Holder and Beneficiary Designation. Subject to Applicable Laws the Holder (or if permitted by Applicable Laws his or her representative) may designate:

a Spouse as successor holder of the Account; or

one or more beneficiaries to receive the Account Proceeds on the Holder's death and, at any time, change or revoke such designation. A designation may only be made, changed or revoked: (a) in a format acceptable to the Agent, adequately identifying the Account and signed by the Holder; or (b) by the Will and, in either case, delivered to the Agent prior to the Proceeds being paid from the Account. If the designation is made by Will, the Agent only will accept such designation to be recorded in the records of the Account as part of the Estate Documents to be provided after the death of the Holder and not earlier. The Holder acknowledges that it is his or her sole responsibility to ensure that a designation or revocation is valid under the laws of Canada, its provinces or territories.

If under Applicable Laws expressly pertaining to the designation of beneficiaries it is permitted and the Holder wishes to make an irrevocable designation of beneficiary under the Account, acceptance of such designation will be subject to the policies and procedures of the Trustee and Agent and must be filed in accordance with Notice below. If there is any inconsistency between the provisions of this Trust Agreement and any additional terms which may apply as a result of the irrevocable designation, the additional terms shall govern the Account provided that no such additional term shall result in the Account not being acceptable as a tax free savings account under the Tax Act.

19. Death of Holder. Upon receipt of satisfactory evidence of the Holder's death and provided a Survivor is the successor holder of the Account, the Trustee will continue to hold the Property for such successor holder as Holder of the Account. If there is no successor holder,

(a) if the Holder has a designated beneficiary, the Account Proceeds will be paid or transferred to the designated beneficiary, subject to the Applicable Laws. The Trustee and the Agent will be fully discharged by such payment or transfer, even though any beneficiary designation made by the Holder may be invalid as a testamentary instrument or under the laws of the jurisdiction where the Holder is domiciled at death;

(b) if a trustee has been designated as or appointed for a beneficiary for the Account, the Agent and Trustee will be fully discharged by payment to the trustee without any obligation to see to the due execution of any trust imposed upon such trustee; and

(c) if the Holder's designated beneficiary has died before the Holder or if the Holder has not designated a beneficiary or if the Holder has designated his or her "estate", the Trustee will pay the Account Proceeds to the Holder's estate upon receipt of the instructions from the Estate Representative and in accordance with Applicable Laws.

20. Release of Information. The Trustee and the Agent each are authorized to release any information about the Account and the Proceeds, after the Holder's death, to any or all of the Holder's Estate Representative, the Spouse, or a beneficiary designated hereunder as the Trustee deems advisable.

21. Payment into Court. If there is a dispute about:

(a) a payout from the Account or equalization of Property or other dispute arising from a breakdown of the Holder's marriage or common law partnership;

(b) the validity or enforceability of any legal demand or claim against the Property; or

(c) the authority of a person or personal representative to apply for and accept receipt of the Proceeds on death of the Holder,

the Trustee and the Agent are entitled to either apply to the court for directions or pay the Proceeds into court, which payment shall be in Canadian dollars, and, in either case, fully recover any legal costs it incurs in this regard as Expenses from the Account.

22. Limitation of Liability. The Trustee shall not be liable for any loss suffered by the Account, by the Holder or by any Survivor or beneficiary designated for purposes of the Account as a result of the purchase, sale or retention of any investment including any loss resulting from the Trustee acting on the direction of the agent appointed by the Holder to provide investment direction.

23. Indemnity. The Holder agrees to indemnify the Trustee for all compensation, Expenses, and Taxes, other than those Taxes for which the Trustee is liable in accordance with the Tax Act and that cannot be charged against or deducted from the Property in accordance with the Tax Act, incurred or owing in connection with the Account to the extent that such compensation, Expenses and Taxes cannot be paid out of the Property.

24. Self-Dealing. The Trustee's services are not exclusive and, subject to the limitations otherwise provided in this Trust Agreement on the powers of the Trustee, the Trustee may, for any purpose, and is hereby expressly authorized from time to time in its sole discretion to, appoint, employ, invest in, contract or deal with any individual, firm, partnership, association, trust or body corporate, with which it may be directly or indirectly interested or affiliated with, whether on its own account or on the account of another (in a fiduciary capacity or otherwise), and to profit therefrom, without being liable to account therefore and without being in breach of this Trust Agreement.

25. Compensation, Expenses and Taxes. The Trustee and Agent will be entitled to such reasonable fees as each may establish from time to time for services rendered in connection with the Account. All such fees will, unless first paid directly to the Agent, be charged against and deducted from the Property in such manner as the Agent or Trustee determines. All Expenses incurred and Taxes shall be paid from the Account, other than those Taxes for which the Trustee is liable in accordance with the Tax Act and that cannot be charged against or deducted from the Property in accordance with the Tax Act.

For greater certainty, in the event of any executions of third party demands or claims against the Account, both the Trustee and the Agent are entitled to fully recover any Expenses incurred by them in this regard as Expenses and all such payments made under this Paragraph shall be in Canadian dollars, with the conversion to occur on the date of payment.

26. Sale of Property. The Trustee and Agent may sell Property in their respective sole discretion for the purposes of paying compensation, Expenses and Taxes, other than those Taxes for which the Trustee is liable in accordance with the Tax Act and that cannot be charged against or deducted from the Property in accordance with the Tax Act.

27. Transfers to the Account. Any property may be transferred to the Account from another TFSA of the Holder, or of the Spouse or Former Spouse where:

(a) the Holder and the Spouse or Former Spouse are living separate and apart and the transfer is made under a decree, order or judgment of a competent tribunal or under a written separation agreement, relating to the division of property between the Holder and the Spouse or Former Spouse in settlement of rights, arising out of, or on the breakdown of, their marriage or common-law partnership; or

(b) the Holder is the Spouse's survivor and the transfer occurs as a result of an exempt contribution (as that term is defined in the Tax Act).

28. Transfers out of the Account. Upon delivery to the Agent of a written direction from the Holder in a form satisfactory to the Trustee, the Trustee shall transfer all or a portion of the Property as is specified in the written direction:

(a) to another TFSA of the Holder; or

(b) to a TFSA of the Spouse or Former Spouse where the Holder and the Spouse or Former Spouse are living separate and apart and the transfer is made under a decree, order or judgment of a competent tribunal or under a written separation agreement, relating to the division of property between the Holder and the Spouse or Former Spouse in settlement of rights, arising out of, or on the breakdown of, their marriage or common-law partnership.

29. Changes to Trust Agreement. The Trustee may change this Trust Agreement periodically. The Holder will be notified on how to obtain an amended copy of the Trust Agreement reflecting any such change and will be deemed to have accepted such changes. No change to this Trust Agreement (including a change calling for the Trustee's resignation as trustee or the termination of the trust created by this Trust Agreement) will be retroactive or result in the Account not being acceptable as a TFSA under the Applicable Laws.

30. Replacement of Trustee.

(a) The Trustee may resign by giving such written notice to the Agent as may be required from time to time under the terms of an agreement entered into between the Agent and the Trustee. The Holder will be given at least 30 days prior notice of such resignation. On the effective date of such resignation, the Trustee will be discharged from all further duties, responsibilities, and liabilities under this Trust Agreement, except those incurred before the effective date. The Trustee will transfer all Property, together with all information required to continue the administration of the Property as a tax free savings account under the Applicable Laws, to a successor trustee.

(b) The Trustee has agreed to resign upon it being provided with notice in writing by the Agent if the Trustee is satisfied that the successor trustee nominated by the Agent will properly assume and fulfill the Trustee's duties and liabilities hereunder in respect of the administration of the Account.

(c) In either event, the Agent shall forthwith nominate a person to replace the Trustee and the resignation of the Trustee shall not take effect until its replacement has been so nominated by the Agent and appointed as successor by the Trustee and approved by Canada Revenue Agency or its successor. Failing the nomination of a replacement by the Agent within 30 days after receipt by it of a notice of resignation, the Trustee shall be entitled to appoint a person as its own replacement.

(d) Upon any such appointment and resignation of the Trustee, the person so appointed as replacement trustee shall, without further act or formality, be and become the Trustee hereunder. Such replacement trustee shall, without any conveyance or transfer, be vested with the same power, rights, duties and responsibilities as the Trustee and with the assets of the Account as if the replacement trustee had been the original Trustee. The Trustee shall execute and deliver to the replacement trustee all such conveyances, transfers and further assurances as may be necessary or advisable to give effect to the appointment of the replacement trustee.

(e) Any person appointed as a replacement trustee shall be a corporation resident in Canada that is licensed or otherwise authorized under the laws of Canada or a province to carry on in Canada the business of offering to the public its services as trustee. Any trust company resulting from the merger or amalgamation of the Trustee with one or more trust companies and any trust company that succeeds to substantially all of the trust business of the Trustee shall thereupon become the successor to the Trustee without further act or formality. In all such cases, Canada Revenue Agency or its successor shall be notified.

31. Assignment by Agent. The Agent may assign its rights and obligations hereunder to any other corporation resident in Canada authorized to assume and discharge the obligations of the Agent hereunder and under the Applicable Laws.

32. Notice. Any notice given by the Holder to the Agent shall be sufficiently given if delivered electronically to the Agent upon the Holder's receipt of an acknowledgement and response to same or personally or mailed, postage prepaid, to the office of the Agent, RBC Direct Investing Inc. at Royal Bank Plaza, 200 Bay Street, North Tower, P.O. Box 75, Toronto, Ontario M5J 2Z5 or such other address as the Trustee or the Agent may direct. Such notice shall be considered to have been given on the day that the notice is actually delivered to or received by the Agent. Further, the Agent may, in its discretion, honour any notice or other communication purporting to or claiming to be given by the Holder to the Agent under this Trust Agreement by telephone conversation with the Agent's employees, whether they are licensed or not as required by law, by facsimile or in any other manner as the Trustee or the Agent may determine, without the necessity of any verification or enquiry, other than the provision of the RBC Direct Investing Inc. identification number provided to the Holder. The Agent may, in its discretion, record any telephone conversations with the Holder. The Trustee and the Agent will not be liable to the Holder for such reliance. The Trustee or the Agent may, in its discretion, require that any notice must be in writing and given personally or by mail to the Agent as set out above. Any notice, statement, receipt or other communication given by the Trustee or the Agent to the Holder shall be sufficiently given if delivered electronically or personally to the Holder, or if mailed, postage prepaid and addressed to the Holder at the address shown on the Application or at the Holder's last address given to the Trustee or the Agent, and any such notice, statement, receipt or other communication shall be considered to have been given at the time of delivery to the Holder electronically or personally or, if mailed, on the fifth day after mailing to the Holder.

33. Date of Birth and SIN. The Holder's statement of his or her date of birth and Social Insurance Number in the Application shall be deemed to be a certification as to the Holder's age and Social Insurance Number, on which the Trustee and the Agent may rely, and an undertaking to provide any further evidence of proof of age and Social Insurance Number as may be required by the Agent.

34. Contribution While Holder is a Minor. Where the Holder makes a Contribution to the Account prior to the Holder having attained the age of majority in accordance with the Applicable Laws, the Holder will execute a ratification of the Application and all transactions made by the Holder in respect of the Account prior to reaching the age of majority.

35. SIN and Address of Holder. The Trustee shall be entitled to rely upon the Agent's records as to the social insurance number, and to the current address of the Holder as establishing his or her residency and domicile for the operation of the Account and its devolution on the death of the Holder subject to any written notice to the contrary respecting the Holder's domicile on death.

36. Heirs, Representatives and Assigns. The terms of this Trust Agreement shall be binding upon the heirs, Estate Representatives, attorneys, committees, guardians of property, other legal and personal representatives, and assigns of the Holder and upon the respective successors and assigns of the Trustee and the Agent and their directors, officers, employees, and agents, as well as their respective estates, Estate Representatives, heirs, attorneys, committees, guardians of property, other legal and personal representatives, and assigns.

37. Language. The Holder has expressly requested that this Trust Agreement and all related documents, including notices, be in the English language. Le titulaire a expressément demandé que cette Convention de fiducie et tous documents y afférents, y compris tout avis, soient rédigés en langue anglaise. (Quebec only/Québec seulement)

38. Interpretation. Unless the context requires otherwise, any terms or provisions importing the plural shall include the singular and vice versa.

39. Governing Law. This Trust Agreement and the Account shall be governed by and construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein. The Holder expressly agrees that any action arising out of or relating to this Trust Agreement or the Account shall be filed only in a court located in Canada and the Holder irrevocably consents and submits to the personal jurisdiction of such court for the purposes of litigating of any such action.

8 DISABILITY ALLIANCE BC
HELPSHEET
BC DISABILITY BENEFITS
2015

Trusts for People Receiving the Persons with Disabilities (PWD) Benefit

This Help Sheet is funded by the Health Sciences Association of British Columbia.

The Disability Alliance BC has prepared this Help Sheet to help you understand about trusts. If you receive the Persons with Disabilities (PWD) benefit, have disability status, or live in a special care facility, you may be allowed to set money aside in a trust and still receive PWD benefits.

A trust is set up by a legal document that has to follow strict guidelines. You will need to submit the trust document to the Ministry of Social Development and Social Innovation (MSDSI). As soon as it is drawn up, the Ministry's legal advisors will tell you whether the trust fits its guidelines. This process can take a few weeks.

This Help Sheet explains what a trust agreement is and outlines some of the MSDSI rules on trusts. It does not tell you how to set a trust up–you should have a lawyer do that for you. Some community organizations may also be able to help. Please see below for details.

Definition of a trust

A trust is a way to set money aside through a special legal agreement. It is not the same as a regular savings account or term deposit. This agreement allows a person (the trustee) to hold money or other assets for you (the beneficiary). The trustee must follow certain rules about how the money is spent.

dabc disability alliance bc
Disability Alliance BC (formerly BC Coalition of People with Disabilities)
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In 2012, the Ministry introduced a change that now may recognize two new types of trusts: committeeships, where a person's money is managed by the Public Guardian and Trustee, and structured settlements, where a person has received money from a personal injury.

Why you may consider setting up a trust

You should consider setting up a trust if you are going to receive a lump sum of money that is over your asset limit. To be eligible for PWD benefits, you may only have a certain amount of assets. For example, if you are a single person with no children, you cannot have more than $5,000. This is called an asset limit.

PWD recipients who are over their asset limit:

- must go off monthly benefits until they are within their asset limit, or
- may put the money into an exempt asset such as a trust, use it for certain things related to their disability and still receive monthly benefits.

We recommend that you look into setting up a trust before you actually receive the money. The sooner a lump sum is placed in a trust, the less likely it is to affect your monthly benefits. Ministry regulations require you to declare income shortly after you receive it and it may be decided that you are ineligible for a benefit cheque for one month. After the first month, a lump sum may be considered an asset and if the trust is in place by then your monthly entitlement should not be in question. See "Having your trust recognized by MSDSI."

How trusts work

Trusts have beneficiaries and trustees. You are the beneficiary–the person who receives money from the trust.

The trustee is the person who manages or helps to manage the trust. The trustee arranges for money to go from the trust to you, the beneficiary. There may be more than one trustee.

You can choose your trustee. It should be someone who knows you well and understands your needs. You may also be named as a co-trustee for your trust. This means that you manage your trust with another trustee.

Once the trust is established, money can be added to it. Under MSDSI regulations, PWD recipients may have one of the following types of trusts:

- **Discretionary trust** - you do not have control over the money in the trust. The trustee makes all spending decisions. There is no limit to the amount of money that can be placed in a discretionary trust.
- **Non-discretionary trust** - you have control over the money in the trust through the trustee. The trustee makes all expenditures based on your requests. You may also act as a co-trustee. There is a $200,000 life-time limit to the money you can put in a non-discretionary trust. MSDSI may permit you to put in more by special approval only.

Using the trust money

There are restrictions on what you can use your trust money for, without affecting your monthly disability benefits. If there is any doubt about what category a planned expense falls into, you can check with an advocate before you draw money from the trust. To maintain your disability benefits, you may only spend trust money on the following:

- Caregiver services
- Education or training
- Home renovations necessary because of your disability
- Home maintenance repairs
- Medical aids
- Independent living: up to $8,000.00 per year for any other item or cost that will help you live more independently (these items and costs do not need to be approved by the Ministry)

You will be required to provide MSDSI with information at least once a year on how the trust money has been spent. MSDSI can ask for verification of any payment or disbursement of funds so it is crucial that you and your trustee keep accurate up-to-date records of all your expenditures.

Setting the trust up: next steps

As we noted above, you should have a lawyer or professional with legal knowlege set up your trust. This person should not only understand trust law, but also be familiar with the Ministry's regulations and policy regarding trusts. This will cost money, but you should be able to arrange for it to come out of your lump sum payment.

Other people can set up a trust for you. A common way is for family members to create a trust provision in their will. This means that a trust will come into effect when the

family member dies. If your family or friends are planning to establish a trust for you, make sure they understand that MSDSI has rules about how it must be set up.

Two community organizations that may provide information about trusts to you or your family are:

Coast Foundation

- assists people who have mental health disabilities to set up trusts.
  Ph: Trust Coordinator at 604-872-3502

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- provides information about trusts and a referral service to lawyers who know about setting up a trust for people receiving PWD.
  Ph: 604-439-9566

Having your trust recognized by MSDSI

Once your trust document has been drawn up, MSDSI has to approve it. Give your local office a copy and MSDSI will forward it to Victoria for a legal opinion. This process will help MSDSI decide whether or not your trust has been set up properly. A decision can take several weeks.

If you have not already set up a trust, and you receive a lump-sum payment, we recommend that you tell MSDSI you plan to set up a trust when you receive the funds. MSDSI will exempt these assets for 3 months to give you time to set up your trust and get MSDSI approval. If it takes longer than 3 months, you will need to keep in touch with MSDSI and they will review the situation on a month-to-month basis.

Appealing

You have the right to appeal if the Ministry reduces or cuts off your benefits because it does not accept the terms of your trust. However, it is probably better to talk to your lawyer about changing your trust so that it meets MSDSI's rules.

You may also appeal MSDSI denials related to how you spend your trust money. If you want to appeal, you must notify the Ministry within 20 business days of receiving notification that your expenditures have not been approved. Contact MSDSI and ask for a Request for Reconsideration form. If possible, contact an advocate for help with your appeal.

Other Resources

For the Ministry's brochure on trusts, "Disability Assistance and Trusts," contact your local MSDSI office or go to: www.eia.gov.bc.ca/publicat/bcea/trusts.htm.

An Alternative to Trusts

Another way to exempt assets is to put money into a Registered Disability Savings Plan (RDSP). However, keep in mind that your age and eligibility requirements, such as the Disability Tax Credit, may determine whether you can open an RDSP. For more information on the RDSP, see Help Sheet 14, Registered Disability Savings Plan and the Disability Tax Credit.

This Help Sheet was prepared by Advocacy Access, a program of Disability Alliance BC (formerly BC Coalition of People with Disabilities). Thank you to the Health Sciences Association of British Columbia for funding the BC Disability Benefits Help Sheets.

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BRITISH COLUMBIA
The Best Place on Earth

Ministry of
Social Development

Dear

We are writing to advise you of the ministry's decision following review of your trust arrangement.

The ministry has determined that your Tax Free Savings Account (TFSA) is set up by a Declaration of Trust. Under the terms of the trust, you can compel the plan trustee to withdraw funds for you at any time. As a result, the TFSA is considered to be a non-discretionary trust.

This means that the ministry will treat this trust property as your asset. Nevertheless, the trust property will be an exempt asset as long as the aggregate value of all trust property contributed to the trust is no more than $200,000 in value.

All payments made from the trust to or on behalf of you will be your unearned income, except for payments that are exempt because they are for "disability-related costs" as defined in the regulation.

Please also note that you must advise the ministry of any additional money or other assets placed in the trust, and of any changes made to the trust or the trustee.

You may find it helpful to review the general information in the booklet "Disability Assistance and Trusts" available at Employment & Assistance Centres or http://www.mhr.gov.bc.ca/publicat/pdf/DisabilitiesTrusts.pdf.

The ministry cannot provide specific advice about how best to arrange your affairs. If you have any questions in that regard, or if you have questions about the legal implications of the ministry decision, it is your responsibility to seek independent legal advice.

Sincerely,

for Donna Thompson
Manager, Litigation

Ministry of Social Development
MSD-MCFD Legislation, Litigation and Appeals Branch
PO Box 9743 Stn Prov Govt
Victoria BC V8W 9S3
Telephone: 250-356-5642
Facsimile: 250-356-8182

8 DISABILITY ALLIANCE BC
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BC DISABILITY BENEFITS

2015

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HSA

Strategies for Welfare Appeals Workshop

October 8, 2015 9am – 12:15

Index of materials

Workshop Handouts

Annual Report 2013/14

Accountable

Introduction by Chairperson of the Board of Directors

3. How We Did in 2013/14

Meeting the timelines established by the legislation is one way of measuring the Tribunal's performance. The Tribunal must hold a hearing within 15 business days of receiving a Notice of Appeal. The Tribunal encountered two instances where the 15 business day timeline was missed:

- As Canada Post lost the Notice of Hearing letter, the parties were not notified as required by section 85 of the Employment and Assistance Regulation
- The appeal hearing was unable to proceed as a member did not attend.

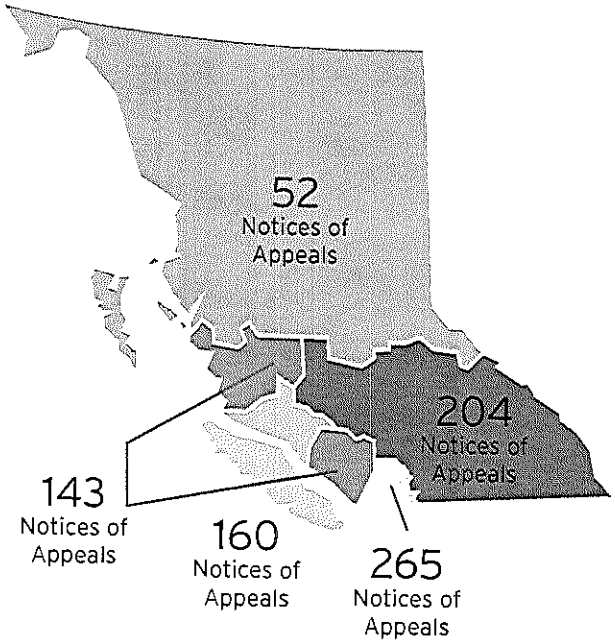
Here is a brief summary of the results of our work for the reporting period of October 1, 2013 to September 30, 2014.

Summary of Statistics - Appeals

Notices of Appeal Received	**824**
Appeals Assessed as not within the Jurisdiction of the Tribunal (do not proceed to hearing)	**62**
Appeals Dismissed (before or during hearing)	**36**
Files Carried Over (Appeals opened between 01/10/2013 and 30/09/2014 and not closed, heard or rejected by 30/09/2014)	**62**

Notices of Appeal - by Region

Region 1 Vancouver Island	20%
Region 2 Vancouver Coastal	17%
Region 3 Fraser	32%
Region 4 Interior	25%
Region 5 Northern	6%



Notices of Appeal - by Type

20 Business Days	11
Crisis Supplement	93
Disabilities - Persons with Disabilities-Designation (PWD)	197
Disabilities - Persons with Persistent Multiple Barriers (PPMB)	38
Eligibility - Deductions on Income/Earnings Exemptions	14
Eligibility - Dependency/Living Arrangements	21
Eligibility - Eligibility Audit	5
Eligibility - Excess Assets	8
Eligibility - Excess Income	24
Eligibility - Excess Income/Assets	14
Eligibility - Failure to Accept/ Pursue Income/Assets	1
Eligibility - Failure to Provide Information/Verification	37
Eligibility - Full Time Student	4
Eligibility - Residency	5
Eligibility - Shelter Allowance	6
Eligibility - Time Limit for IA	1
Eligibility - Undeclared Income/Assets	5
Employment - Dismissed/Quit/Refused Employment	7
Employment - Employment Plan/Failure to Look for Work	75
Employment - Requirement for Two Year Financial Independence	3
Employment - Three Week Reasonable Work Search	3
Health Supplement - Orthoses	7
Health Supplements - Dental Supplement	13
Health Supplements - Diet/Natal Supplements	6
Health Supplements - MSP/Other Health Supplements	8
Health Supplements - Medical Equipment	65
Health Supplements - Medical Supplies	9
Health Supplements - Medical Transportation	15
Health Supplements - Monthly Nutritional Supplement (MNS)	28
Health Supplements - Short-Term Nutritional Supplement Products	4
Health Supplements - Therapies	5
Moving Supplement	30
Special Transportation Subsidy	5
Other - CIHR/under 19	1
Other - Child care	14
Other - Hardship	5
Other - Other	37

Additional appeal types have recently been added to the Tribunal's case management system (CITAR) to enable more detailed reporting.

160 or 23% of 690 appeals heard

Appeal Outcomes

The total number of Notices of Appeal received differs from the number of appeals closed because of files carried over from the previous year or into the following year and various other factors. The number of decisions confirmed and rescinded may not equal the number of appeals heard for the same reason. The following statistics relate to appeal files that were closed in this reporting period.

Ministry of Social Development and Social Innovation

Appeals heard	690
Decisions confirmed	645
Decisions rescinded	45

Ministry of Children and Family Development

Appeals heard	15
Decisions confirmed	15
Decisions rescinded	0

Judicial Review Outcomes

The Tribunal received three judicial review decisions in the past reporting period. In *Watts v. British Columbia (Social Development and Social Innovation)*, 2014 BCSC 1085, there was a challenge to the Tribunal's determination that the ministry was reasonable in concluding the petitioner was not eligible for moving supplement costs as the petitioner only met three of the four criteria for moving supplement under section 55(2)(a) of the Employment and Assistance for Persons with Disabilities Regulation. The application for judicial review was dismissed and the Tribunal's decision was upheld.

In *Underwood v. Employment & Assistance Appeal Tribunal*, 2014 BCSC 598, there was a challenge to the Tribunal's determination that the ministry was reasonable in determining monthly annuity payments were an insurance benefit constituting unearned income for which the Employment and Assistance for Persons with Disabilities Regulation creates no exemption. The Insurance Corporation of British Columbia had entered into a structured settlement agreement with the life insurance company, rather than the petitioner, for the purpose of wage loss. As the annuity covered wage loss and was not in lieu of a damage award for personal injury, the petitioner did not qualify for the exemption. The judicial review application was dismissed and the Tribunal's decision was upheld.

In *Sahyoun v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2014 BCCA 86, two judicial review applications were heard together. At issue was the Tribunal's determination that the Ministry had reasonably denied the petitioner's request to backdate a PWD designation in order to qualify for additional income benefits retroactively from April 2007 until his 65th birthday and for certain medical benefits after age 65. Both judicial review applications were dismissed and the Tribunal decisions were upheld. The petitioner's appeal to the British Columbia Court of Appeal was also dismissed.

Case Name:

Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)

Between
Susan Hudson, Petitioner, and
Employment and Assistance Appeal Tribunal and Ministry of Housing and Social Development, Respondents

[2009] B.C.J. No. 2124

2009 BCSC 1461

2009 CarswellBC 2874

182 A.C.W.S. (3d) 246

Docket: S092170

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

M.M. Koenigsberg J.

Heard: August 17, 2009.
Judgment: October 28, 2009.

(66 paras.)

Administrative law -- Natural justice -- Hearing -- Procedural rights and requirements -- Reasons -- Application by Hudson for judicial review of Employment and Assistance Appeal Tribunal's decision upholding decision that applicant was not eligible for a "Person with Disabilities" designation and not eligible for disability assistance payments allowed -- Applicant suffered from degenerative disc disease, a fractured foot, arthritis, and epilepsy -- Tribunal concluded that applicant did not have severe physical impairment and that evidence failed to establish that impairment significantly restricted applicant's ability to perform daily living activities -- Tribunal's reasons inadequate -- Unclear which evidence Tribunal accepted and rejected and whether Tribunal rejected any evidence or misreading it.

Government law -- Government assistance programs -- Social services and programs -- Entitlement -- Disabled persons -- Appeals and judicial review -- Application by Hudson for judicial review of Employment and Assistance Appeal Tribunal's decision upholding decision that applicant was not eligible for a "Person with Disabilities" designation and not eligible for disability assistance payments allowed -- Applicant suffered from degenerative disc disease, a fractured foot, arthritis, and epilepsy -- Tribunal concluded that applicant did not have severe physical impairment and that evidence failed to establish that impairment significantly restricted applicant's ability to perform daily living activities -- Tribunal's reasons inadequate -- Unclear which evidence Tribunal accepted and rejected and whether Tribunal rejected any evidence or misreading it.

Application by Hudson for judicial review of a decision of the Employment and Assistance Appeal Tribunal upholding a decision of the Ministry of Housing and Social Development that the applicant was not eligible for a "Person with Disabilities" designation and was therefore not eligible for disability assistance payments under the Employment and Assistance for Persons with Disabilities Act. The applicant, 47, suffered from degenerative disc disease, a fractured foot, arthritis, and epilepsy. She was restricted in activities such as meal preparation, basic housework, daily shopping, and mobility outside the home. The applicant was unable to work and unable to drive. She was in constant pain which affected her daily living activities. The Tribunal found that the applicant did not have a severe physical impairment as required by the Act and that there was insufficient evidence to establish that the impairment directly and significantly restricted the applicant's ability to perform daily living activities, either continuously or periodically for extended periods. The applicant argued that the Tribunal failed to provide adequate reasons for its conclusions.

HELD: Application allowed. The Tribunal's reasons for decision were inadequate. It was not clear which evidence the Tribunal accepted and which evidence it rejected, and why. It was also unclear whether the Tribunal rejected any of the evidence at all, as opposed to the possibility of simply misreading it. The Tribunal failed to explain the evidentiary basis for its conclusion that the applicant's physician or assessor had not confirmed that the petitioner had a severe physical impairment that directly and significantly restricted her ability to perform daily living activities. The Tribunal merely summarized the facts and stated this conclusion. There was no indication of which facts the Tribunal accepted or rejected. In its reasons, the Tribunal did not indicate which evidence it relied on to conclude that the applicant did not have a severe physical impairment. Contrary to the Tribunal's decision, the assessor confirmed that the applicant had continuous restrictions in at least two daily living activities and that she required help to perform those activities.

Statutes, Regulations and Rules Cited:

Employment and Assistance Act, SBC 2002, CHAPTER 40, s. 19(1) (b), s. 24, s. 24(3), s. 24(6), s. 24(7)

Employment and Assistance Regulation, B.C. Reg. 263/2002, s. 87(1)

Employment and Assistance for Persons with Disabilities Act, SBC 2002, CHAPTER 41, s. 2, s. 2(2), s. 2(3), s. 2(4)

Employment and Assistance for Persons with Disabilities Regulation, B.C. Reg. 265/2002, s. 2, s. 2(2)

Judicial Review Procedure Act, RSBC 1996, CHAPTER 241,

Judicial Review from: Employment Assistance Appeal Tribunal, January 22, 2009 (2008-00707).

Counsel:

Counsel for Petitioner: K. Milne.

Counsel for Respondent, Employment and Assistance Appeal Tribunal: No appearance.

Counsel for Respondent, Ministry of Housing and Social Development: J. Penner.

Reasons for Judgment

M.M. KOENIGSBERG J.:--

Introduction

1 This is a petition pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, for an order that the Decision (the "Decision") of the Employment and Assistance Appeal Tribunal (the "Tribunal") dated January 22, 2009, in appeal number 2008-00707 be set aside and the matter remitted back to the Tribunal with directions. The Tribunal upheld a decision of the Ministry of Housing and Social Development (the "Ministry") that the petitioner was not eligible for a "Person with Disabilities" ("PWD") designation within the meaning of s. 2 of the *Employment and Assistance for Persons with Disabilities Act*, S.B.C. 2002, c. 41 ("*EAPDA*"), and was therefore not eligible for disability assistance payments under that legislation.

Facts

2 The petitioner Susan Hudson is 47 years old and lives with her 11 year old son. The petitioner suffers from degenerative disc disease, a fractured foot, arthritis, and epilepsy. On October 29, 2008, she applied for disability benefits under the *EAPDA*. To be eligible for disability benefits, one must be designated a PWD, which requires completing a Persons with Disabilities Designation Application ("Application").

3 The Application is to be completed by three persons: the applicant, a physician, and an assessor to be chosen from a list of prescribed professionals, in this case a nurse. The Application was completed as required. On page eight of the Application, in the section titled "Diagnoses", the physician identified the following diagnoses related to the petitioner's impairment using the diagnostic codes on the Application:

* Diseases of the musculoskeletal system and connective tissue

* 13.6 - Degenerative Disc Disease
* 13.0 - Musculoskeletal system - Other
* 13.3 - Arthritis

* Diseases of the nervous system & sense organs - Neurological

* 6.1 - Epilepsy

4 On page nine of the Application, in the section titled "Health History", in relation to the severity of the medical conditions relevant to the petitioners impairment, the physician wrote:

> Ongoing pain + radicular [illegible] related to degen. disc disease C - spine - unable to do any work involving even moderately heavy lifting.
>
> Ongoing pain in feet related to arthritis/fracture. Awaiting further surgery
>
> Prev. history of seizures - recent recurrence. Now on anti-epileptic medication.

5 On page 11 of the Application, in the section titled "Daily Living Activities", the physician specified that the petitioner was restricted in performing the following "Daily Living Activities": meal preparation, basic housework, daily shopping, and mobility outside the home. All of these restrictions were identified as "periodic", and were accompanied by the following notes:

> constant foot/ankle pain - wears a hiking boot 24/7. [Increased] pain and [decreased] mobility without hiking boot.

6 On page 12 of the Application, when providing additional information considered relevant to an understanding of the petitioner's medical condition, the physician wrote:

> She has multiple medical barriers preventing her from working at present.
>
> I feel that she will benefit from custom made orthotics.
>
> Her neck problems are chronic and expected to flare up intermittently. She is not able to do any work involving heavy lifting.
>
> She is unable to drive until she has been seizure free for 1 years.

7 Finally, on page 21 of the Application, the nurse assessor provided additional information relevant to understanding the nature and extent of the petitioner's impairment and its effect on her daily living activities:

1. Client limited to distance walking [due to] pain + weakness. Weakness from degenerative disc disease.

2. Pain in [right] foot from previous surgery and damage. Requires orthotics to assist [and] correct foot placement.
3. Has tingling numbness in hands + feet. This affects her ability to accomplish fine motor movements, lift pots/pans while cooking.
4. This city has limited access to disabled transportation. Nothing available after 3 p.m.

8 The Application also contains space for applicants to describe their disability and the impact it has on their life. While it is not necessary to complete this part, the Application states that if the section is left blank, the Application will be considered "based on information provided in the Physician and Assessor Sections of this Application".

9 The petitioner indicates in the Application that her disabilities have affected her life so much that she can no longer work. She says she is in constant pain which affects her daily living activities. She cannot even walk a block. Her feet have been in such extreme pain that she has sat on the floor at home and slid across the room on her bottom because her feet were too painful to stand on.

10 Concerning her ability to prepare meals, shop for personal needs, and travel outside her home, the petitioner states:

> Because of being only able to stand for 10 minutes it is extremely difficult for me to stand at the kitchen counter to try and prepare and cook our meals. My hands go numb within minutes of chopping, peeling, mixing or stirring food. I can't open cans or jars nor can I open or reseal bags because I have no feeling in my fingers. I also cannot move food from shelves to counters to stove and oven for the same reason. I can't feel with my hands and will drop everything I hold for too long.
>
> ...
>
> My brother or mother or father does my shopping for me. I cannot walk around the store; the cement floors are extremely hard on my feet. I can't reach to take items off the shelves and load them into the basket or cart because of my back and hands. I cannot stand in line to pay for the groceries nor can I carry them.
>
> ...
>
> I always have appointment[s] to go to and my parents or friends always take me because I can no longer drive because of my seizures. My seizures can come at any time.

11 The Ministry denied the petitioner's application on November 26, 2008, and the petitioner submitted a request for reconsideration of this decision on December 4, 2008. The Ministry denied the request for PWD designation in the reconsideration decision on December 10, 2008. On December 23, 2008, the Tribunal received the petitioner's notice of appeal of the reconsideration decision. The Tribunal held a hearing by teleconference on

January 15, 2009. While the Tribunal did not issue its Decision until January 22, 2009, the reasons were signed on January 15, 2009.

12 The petitioner filed for judicial review of the Tribunal's Decision.

Relevant Statutory Provisions

13 Section 2 of the *EAPDA* reads:

> **Persons with disabilities**
>
> **2** (1) In this section:
>
> **"assistive device"** means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;
>
> **"daily living activity"** has the prescribed meaning;
>
> **"prescribed professional"** has the prescribed meaning.
>
> (2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that
>
> (a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and
> (b) in the opinion of a prescribed professional
>
> (i) directly and significantly restricts the person's ability to perform daily living activities either
>
> (A) continuously, or
> (B) periodically for extended periods, and
>
> (ii) as a result of those restrictions, the person requires help to perform those activities.
>
> (3) For the purposes of subsection (2),
>
> (a) a person who has a severe mental impairment includes a person with a mental disorder, and
> (b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires
>
> (i) an assistive device,
> (ii) the significant help or supervision of another person, or
> (iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

14 The terms "daily living activity" and "prescribed professional" are defined in the *Employment and Assistance for Persons with Disabilities Regulation*, B.C. Reg. 265/2002 [*EAPDR*]:

> **2** (1) For the purposes of the Act and this regulation, **"daily living activities"**,
>
> (a) in relation to a person who has a severe physical impairment or a mental impairment, means the following activities:
>
> (i) prepare own meals;
> (ii) manage personal finances;
> (iii) shop for personal needs;
> (iv) use public or personal transportation facilities;
> (v) perform housework to maintain the person's place of in acceptable sanitary condition;
> (vi) move about indoors and outdoors;
> (vii) perform personal hygiene and self care;
> (viii) manage personal medication, and
>
> (b) in relation to a person who has a severe mental impairment, includes the following activities:
>
> (i) make decisions about personal activities, care or finances;
> (ii) relate to, communicate or interact with others effectively.
>
> (2) For the purposes of the Act, **"prescribed professional"** means a person who is authorized under an enactment to practice the profession of
>
> (a) medical practitioner,
> (b) registered psychologist,
> (c) registered nurse or registered psychiatric nurse,
> (d) occupational therapist,
> (e) physical therapist,
> (f) social worker,
> (g) chiropractor, or
> (h) nurse practitioner.

15 The Tribunal's jurisdiction is set out in the *Employment and Assistance Act*, S.B.C. 2002, c. 40 [*EAA*]:

> **19** (1) The Employment and Assistance Appeal Tribunal is established to determine appeals of decisions that are appealable under

...

(b) section 16 (3) [*reconsideration and appeal rights*] of the *Employment and Assistance for Persons with Disabilities Act*, and

...

16 Under s. 24 of the *EAA*, the Tribunal must determine whether the decision being appealed is:

(a) reasonably supported by the evidence, or
(b) a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.

17 Section 24(3) of the *EAA* obliges the Tribunal to provide written reasons for its decision. Section 24 also contains these privative clauses:

(6) The tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal under section 19 and to make any order permitted to be made.
(7) A decision or order of the tribunal under this Act on a matter in respect of which the tribunal has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

18 As stated by Bauman J. (as he then was) in *Harley v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2006 BCSC 1420 at para. 16, 54 Admin. L.R. (4th) 309 [*Harley*], the presence of these privative clauses engages s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*]:

Standard of review if tribunal's enabling Act has privative clause

58 (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

(2) In a judicial review proceeding relating to expert tribunals under subsection (1)

(a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
(b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and

(c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

(3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,
(b) is exercised for an improper purpose,
(c) is based entirely or predominantly on irrelevant factors, or
(d) fails to take statutory requirements into account.

19 The statutory requirements for reasons that apply to the Tribunal are found in the *Employment and Assistance Regulation*, B.C. Reg. 263/2002 [*EAR*]:

Notice of determinations and reasons

87 (1) The written determination of a panel under section 24 of the Act must be in the form specified by the minister and must

(a) specify the decision under appeal,
(b) summarize the issues and relevant facts considered in the appeal,
(c) set out the reasons on which the panel based its determination, and
(d) specify the outcome of the appeal.

Decisions Below

20 The Tribunal's reasons are reproduced for convenience:

The panel must decide whether the ministry's decision to deny PWD status to the appellant was reasonably supported by the evidence.

The EAPWDA, section 2, sets out 5 criteria to be designated as a PWD:

1. The appellant must have reached the age of 18;
2. The minister must be satisfied that the person has a severe mental or physical impairment;
3. In the opinion of a medical practitioner, the impairment will continue for at least 2 years.
4. In the opinion of a prescribed professional, the impairment must directly and significantly restrict the person's ability to perform daily living activities, either continuously or periodically for extended periods; and
5. As a result of the restriction in activities, the person requires help to perform those activities.

There is no dispute that the appellant meets criteria 1 and 3; she is over the age of 18 and her medical practitioner has confirmed that her condition will continue for at least 2 years.

The ministry's position is that the appellant has not met criteria 2, 4, and 5 based on the information that was submitted by her physician and the assessor.

The appellant's position is that she is eligible for PWD status due to her medical conditions and medication.

The panel accepts that the appellant suffers from significant pain and as a result of this pain her lifestyle and activities are affected. However, while the panel appreciates and accepts this information, it has not been confirmed by the appellant's physician or assessor as required by legislation and as such the panel is not able to place significant weight on this evidence.

The evidence of the physician indicates that the appellant suffers from constant pain in her foot and ankle and intermittent pain in her neck as well as epileptic seizures. The appellant's description of her pain was consistent with that of the physician and she further advised that she takes non-prescription medication for her pain and has suffered 2 seizures in the past 7 months. Based on the evidence, the panel finds that the appellant does not have a severe physical impairment as required by the legislation.

While the evidence of the physician indicates that the appellant suffers from physical impairments that affect her mobility and daily living activities, the physician has not provided sufficient evidence to establish that, in her opinion, the impairment directly and significantly restricts the appellant's ability to perform daily living activities, either continuously or periodically for extended periods. The assessor's report identifies few limitations in the appellant's daily living activities. Both the assessor and the physician note that the appellant's restrictions are periodic but they do not address whether these restrictions are for extended periods.

The panel must rely on the reports as provided in reaching a decision as to whether the reconsideration decision was reasonable. On the evidence that has been provided by the assessor and the physician regarding the appellant's limitations, the panel finds that the appellant does not have an impairment that directly and significantly restricts her ability to perform daily living activities, either continuously or periodically for extended periods.

As the physician and assessor have not provided evidence sufficient to establish that the appellant's daily living activities are directly and significantly restricted, the panel cannot find that the appellant requires significant help to perform those activities.

Based on the information provided by the physician, it was reasonable for the minister to conclude that the appellant has not met criteria 2, 4 and 5.

The panel therefore determines that the ministry's decision is reasonably supported by the evidence and that decision is confirmed.

Issues

21 The issues raised in this judicial review are as follows:

1. What are the applicable standards of review?
2. Did the Tribunal violate the statutory duty to provide reasons?
3. Did the Tribunal err in finding that the Ministry's decision was reasonably supported by the evidence?

Analysis

A. Standards of Review

22 As stated earlier, the Tribunal's enabling act contains a privative clause. Accordingly, s. 58 of the *ATA* must be applied. There is no doubt that the Tribunal must be considered an expert tribunal in relation to all matters over which it has exclusive jurisdiction. The Tribunal must be accorded appropriate deference on findings of fact or law or an exercise of discretion in respect of matters over which it has exclusive jurisdiction, unless they are found to be patently unreasonable. Questions about the application of common law rules of natural justice and procedural fairness are to be decided on the basis of whether the Tribunal acted fairly. All other matters are to be reviewed on a standard of correctness.

23 By virtue of s. 87 of the *EAR*, the Tribunal is under a statutory duty to provide reasons. As such, with respect to reasons, it is not necessary to resort to the common law rules of natural justice as described in s. 58(2)(b) of the *ATA*. Thus, the question of the standard of review with respect to reasons turns on whether the statutory duty in s. 87 of the *EAR* can be considered a matter within the Tribunal's exclusive jurisdiction, in which case the standard of patent unreasonableness described in s. 58(2)(a) of the *ATA* would apply; or whether it falls into the category of "all matters other than those identified in [ss. 58(2)(a) & (b)]", in which case the standard of correctness described in s. 58(2)(c) of the *ATA* would apply. It is also worth noting that in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 59, [2008] 1 S.C.R. 190 [*Dunsmuir*], the Supreme Court of Canada makes it clear that the existence of a privative clause does not insulate the administrative decision maker from correctness review on jurisdictional questions.

24 In *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 [*CUPE*], Dickson J. warned against hastily branding questions as ju-

risdictional merely to attract a less deferential standard of review. Doing so "has the capacity to unravel the essence of the decision and undermine the very characteristic of the Agency which entitles it to the highest level of deference from a court - its specialized expertise" (*Council of Canadians with Disabilities v. VIA Rail Canada Inc.,* 2007 SCC 15 at para. 88, [2007] 1 S.C.R. 650). When engaging in judicial review, courts should refrain from overlooking a tribunal's expertise in interpreting its own legislation and defining the scope of its statutory authority. This concern is echoed in *Dunsmuir* at para. 27, where, while reflecting on the nature of judicial review, the Court noted that "[c]ourts, while exercising their constitutional functions of judicial review, must be sensitive ... to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures".

25 Administrative powers, however, have limits. It is the role of the court to ensure that administrative agencies do not overstep their powers, or, as a corollary, that they do not fail to meet them. This latter case refers to those situations where the legislature prescribes specific matters that an administrative decision maker must attend to in the exercise of its powers. Generally, the legal consequence of a failure to comply with statutory directions depends on whether a requirement is mandatory or merely directory (see David Phillip Jones & Anne S. de Villars, *Principles of Administrative Law*, 5th ed. (Toronto: Carswell, 2009) at 162). Failure to comply with an imperative statutory direction will render an administrative action voidable. However, where a failure to comply with a statutory direction is minor or trivial and has no impact on the outcome of the case, a court may decline to set aside an administrative decision: *Uniboard Surfaces Inc. v. Kronotex Fussboden GmbH and Co.*, 2006 FCA 398 at para. 24, 61 Admin L.R. (4th) 47. Crucial to the court's discretion in this area is interpretation of the provision in question: given the scheme and object of the Act, is it reasonable to conclude that the legislature intended to confer jurisdiction on an administrative decision maker that does not comply with statutory requirements?

26 The *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 29 [*Interpretation Act*], provides that "'must' is to be construed as imperative". In this case, the *EAR*, s. 87(1)(c) mandates that a Tribunal's reasons "must ... set out the reasons on which the panel based its determination". The language is imperative. Unless the failure to comply with this direction is trivial, administrative action which does not follow this direction should not be granted a deferential standard of review.

27 A failure to provide reasons is not trivial. As discussed by the Federal Court of Appeal in *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25, 193 D.L.R. (4th) 357 (F.C.A.) [*VIA Rail*]:

> [17] The duty to provide reasons is a salutary one. Reasons serve a number of beneficial purposes including that of focussing the decision maker on the relevant factors and evidence. In the words of the Supreme Court of Canada:
>
> > Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated, and, therefore,

> more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision.
>
> [18] Reasons also provide the parties with the assurance that their representations have been considered. [Footnotes omitted.]

A similar articulation highlighting the importance of reasons has been developed in the common law jurisprudence on procedural fairness: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 38-43.

28 In *Harley*, Bauman J. (as he then was) considered a challenge to a decision of the Tribunal on the grounds that the Tribunal did not provide adequate reasons. After considering the existence of the statutory duty to provide reasons in s. 87(1) of the *EAR* and the content of the statutory duty to give reasons discussed in *VIA Rail*, he stated that a failure to articulate reasons to the standard mandated in *VIA Rail* amounts to non-compliance with a statutory direction and must be reviewed on a standard of correctness, as called for by s. 58(2)(c) of the *ATA*. In this regard, I also adopt with approval the statement in Jones & de Villars, *supra* at 375 that "where the delegate is statutorily required to provide reasons, failure to do so will certainly violate the duty to be fair and, moreover, will amount to a jurisdictional error by the statutory delegate".

29 From this, it can be concluded that the legislature did not intend to confer on the Tribunal the jurisdiction to make the Decision without regard to the statutory direction to set out its reasons. Accordingly, this is not a matter within the exclusive jurisdiction of the Tribunal, and the standard of review with respect to reasons is correctness.

30 Before leaving this issue, it is necessary to briefly return to the *ATA*, where we find additional evidence that the legislature did not intend to confer jurisdiction on a tribunal that does not comply with statutory direction. Section 58(3)(d) states that a discretionary decision made by a Tribunal is patently unreasonable if it fails to take statutory requirements into account. Although the decision to provide reasons is a mandatory and not a discretionary one, the legislature's explicit refusal to confer jurisdiction on a Tribunal that does not comply with statutory requirements in the realm of discretionary decisions assists in the conclusion that the legislature did not intend to confer jurisdiction on a Tribunal that does not comply with imperative statutory requirements.

31 With respect to the third issue of whether the Tribunal erred in finding that the Ministry's decision was reasonably supported by the evidence, both the petitioner and the respondent agree that the appropriate standard of review is patent unreasonableness. Leaving the jurisdictional matter of the adequacy of reasons aside, this is a matter of fact or law within the exclusive jurisdiction of the Tribunal, and pursuant to s. 58(2)(a) of the *ATA* should be reviewed on a standard of patent unreasonableness.

B. Reasons

32 At the outset of its reasons, the Tribunal indicates that it must decide whether the Ministry's decision to deny PWD status to the appellant was reasonably supported by the evidence. This is consistent with s. 24(1)(a) of the *EAA*. The Tribunal has gone further than this. It has made several conclusions in which it appears to be engaged in a direct as-

sessment of the applicant's condition. I assume from this that the Tribunal was exercising its jurisdiction under s. 24(1)(b) of the *EAA* to decide whether the Ministry's decision was a reasonable application of the *EAPDA* in the petitioner's circumstances.

33 *VIA Rail* contains a simple direction for reasons against which courts can test the adequacy of a tribunal's reasons. Both Bauman J. in *Harley* and Chief Justice McMurtry of the Ontario Court of Appeal in *Gray v. Director of the Ontario Disability Support Program* (2002), 59 O.R. (3d) 364 [*Gray*], in reviewing similar reasons for decision where a person was denied PWD status, have cited *VIA* with approval in this context. The relevant parts of *VIA* are as follows:

> [21] The duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case. However, as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed. In the words of my learned colleague Evans J.A., "[a]ny attempt to formulate a standard of adequacy that must be met before a tribunal can be said to have discharged its duty to give reasons must ultimately reflect the purposes served by a duty to give reasons."
>
> [22] The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors [Footnotes omitted].

34 In reviewing an administrative decision of this nature, applicants are entitled to know that the hearing has given them a meaningful opportunity to influence the decision maker. If a decision involves, as it does here, an exercise of discretion, the reasons should demonstrate that the Tribunal recognized it had the power to make a choice regarding the Ministry's decision and the factors that it relied on in making that decision.

35 Furthermore, in reviewing this decision, it is important to keep in mind the *Interpretation Act*, s. 8, which reads "[e]very enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." In dealing with similar legislation to the *EAPDA*, the Ontario Court of Appeal in *Gray* provided valuable instruction for interpreting the type of social welfare legislation at issue:

> [10] It is my view that as social welfare legislation, any ambiguity in the interpretation of the *ODSPA* should be resolved in the claimant's favour. In *Wedekind v. Ontario (Ministry of Community and Social Services)* (1994), 21 O.R. (3d) 289 (C.A.) at 296-297, this court stated:

> [T]he principle of construction ... applicable to social welfare legislation ... is, where there is ambiguity in the meaning of a statute, the ambiguity should be resolved in favour of the applicant seeking benefits under the legislation.

[11] Likewise, in *Abrahams v. Canada (Attorney General)*, [1983] 1 S.C.R. 2 at 10, Wilson J. wrote with respect to the *Unemployment Insurance Act*:

> Since the overall purpose of the Act is to make benefits available to the unemployed, I would favour a liberal interpretation. ... I think any doubt arising from the difficulties of the language should be resolved in favour of the claimant.

[12] The rationale for such an approach was set out by the Federal Court of Appeal in *Villani v. Canada (Attorney General)* 2001 FCA 248, 205 D.L.R. (4th) 58 (F.C.A.) at 70 as follows:

> The liberal approach to remedial legislation flows from the notion that such legislation has a benevolent purpose which courts should be careful to respect.

36 Finally, in reviewing the adequacy of the Tribunal's reasons on the standard of correctness, I am assisted by the Supreme Court of Canada's articulation of the standard in *Dunsmuir* at para. 50:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer.

37 It is keeping this instruction in mind that we turn to an analysis of the Tribunal's reasons.

38 The petitioner submits that the Tribunal failed to meet the standard required in *VIA Rail* by failing to explain the following conclusions:

1. the petitioner's evidence of her significant pain and its effect on her lifestyle and activities was not confirmed by her physician or assessor;
2. the petitioner does not have a severe physical impairment; and
3. the petitioner does not have an impairment that directly and significantly restricts her ability to perform daily living activities, either continuously or for extended periods.

Further, the petitioner submits that the Tribunal's reasons are contradictory on the "key issue" of whether the petitioner's evidence relating to her pain and limitations are confirmed by her physician or assessor.

39 The respondent denies each of these submissions, and, in short, submits that the petitioner failed to meet the statutory criteria for PWD status and that the Ministry's decision is entitled to deference and should not be interfered with because it is reasonable. More specifically, the respondent submits that "[w]hen the Tribunal's Reasons are read as a whole ... it is clear that while the Tribunal accepted that the Petitioner feels that her lifestyle and activities are affected by a severe physical impairment, her opinion was not confirmed by a prescribed professional as required by the legislation" [Emphasis added]. With respect, I disagree. Nowhere in the Tribunal's decision is there a finding that petitioner "felt" her activities were limited by her physical impairment. In its Decision, fully reproduced above, the Tribunal stated that it "accepts that the appellant suffers from significant pain and as a result of this pain her lifestyle and activities are affected." In the Tribunal's opinion, the petitioner's "description of her pain was consistent with that of the physician". Despite this, the Tribunal stated the petitioner's pain and its effect on her lifestyle and activities have not been confirmed by the petitioner's physician or assessor, and as such, it "is not able to place significant weight on this evidence".

40 Concerning the petitioner's first submission on whether the petitioner's significant pain and its effect on her lifestyle and activities was confirmed by her physician or assessor, s. 2(1) of the *EAPDR* defines daily living activities, in relation to a person who has a severe physical impairment, as follows:

> (i) prepare own meals;
> (ii) manage personal finances;
> (iii) shop for personal needs;
> (iv) use public or personal transportation facilities;
> (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
> (vi) move about indoors and outdoors;
> (vii) perform personal hygiene and self care;
> (viii) manage personal medication,
>
> ...

41 These daily living activities are reproduced on page 11 of the Application. In this section, the physician is asked: "Does the impairment directly restrict the person's ability to perform Daily Living Activities?" [Emphasis added]. This question is left unanswered in the petitioner's Application. However, immediately following this question, there is a table listing all of the daily living activities in s. 2 of the *EAPDR* with a subsequent question asking "Is the Activity Restricted?", with a space to answer "Yes", "No", or "Unknown". While the physician did not directly answer the question of whether the impairment directly restricts the petitioner's ability to perform daily living activities, the physician is asked to complete this table if the physician is of the opinion that the impairment directly restricts the applicant's ability to perform daily living activities. In this case, the physician completed this table, indicating "Yes" to a restriction on meal preparation, basic housework, daily shopping, and mobility outside the home.

42 These daily living activities are again reproduced on page 17 of the Application, in the section to be completed by the assessor. The assessor is asked to indicate the assis-

tance required related to impairments that directly restrict the applicant's ability to manage daily living activities. The assessor indicated that the applicant requires significant help most or all of the time in going to and from stores for shopping and in carrying purchases home. The assessor indicated that the applicant requires significant help some of the time to prepare and cook meals.

43 Section 2(2) of the *EAPDA* requires evidence from a "prescribed professional" that a severe physical impairment "directly and significantly restricts the person's ability to perform daily living activities." There is no indication that every one of the daily living activities listed must be affected. The ordinary meaning of the plural "activities" in this section dictates that there must be evidence from a prescribed professional indicating a direct and significant restriction on at least two daily living activities.

44 The definition of "prescribed professional" includes a medical practitioner and a nurse practitioner. There is nothing indicating whether the medical reports need to be read discretely, or even whether more than one opinion is required. Both the physician and the assessor in this case fall within the definition of prescribed professional in the *EAPDR*.

45 There is evidence in the affidavit submitted to this Court that the medical practitioner found a direct restriction on at least four of the petitioner's daily living activities. There is evidence that the nurse assessor found a significant, direct restriction on the petitioner's ability to go to and from stores and on her ability to carry purchases home. At the very least, this speaks both to the petitioner's ability to shop for personal needs and the petitioner's ability to move about outdoors. Additionally, there is evidence from both the medical practitioner and the nurse assessor that the petitioner can only walk for limited distances due to the pain in her right foot and her weakness from the degenerative spine disease.

46 Faced with this evidence, the Tribunal has failed to explain the evidentiary basis for its conclusion that the petitioner's physician or assessor has not confirmed that the petitioner has a severe physical impairment that directly and significantly restricts her ability to perform daily living activities. The Tribunal merely summarizes the facts and states this conclusion. There is no indication of which facts the Tribunal accepted or rejected. Did it consider the either the physician's, the assessor's, or both reports unreliable? The reader is left with no articulation of the Tribunal's reasoning in this respect, and as such, the Tribunal's assessment of this evidence does not meet the standard of adequacy for reasons articulated in *VIA Rail*.

47 Concerning the second submission on whether the petitioner has a severe physical impairment, it is to be noted that the term "severe physical impairment" is not defined in the *EAPDA*. As the respondent rightly points out, the determination of whether or not a person meets that definition is a question of fact or of mixed fact and law, to which the Tribunal is entitled to deference (provided that determination is not patently unreasonable). Where, however, the statutory pre-condition of providing reasons for decision is unfulfilled, as it is in this case, no deference is warranted.

48 In its reasons, the Tribunal does not indicate which evidence it relies on to conclude that the appellant does not have a severe physical impairment. To the contrary, the Tribunal only lists evidence which would appear to support the opposite conclusion. In-

deed, the Tribunal's reasoning here appears to be contradictory. The Tribunal accepts, on one hand, that the petitioner's description of her pain was consistent with that of the physician. The petitioner's description of her pain was that "I am in constant pain which totally affects my daily living activities". Yet, on the other hand, with only this evidence and evidence of the prescribed professionals in the Application, the Tribunal baldly states that, "[b]ased on the evidence", the petitioner does not have a severe physical impairment.

49 Were the Tribunal to explain its reasoning and the finding of facts upon which it is based, the Tribunal would be entitled to deference in its assessment. However, when the Tribunal concludes that the petitioner does not have a severe physical impairment without disclosing which evidence it relies upon in reaching this conclusion, it has not adhered to the statutory requirement to provide reasons and is, therefore, incorrect.

50 Concerning the third submission on whether the petitioner has an impairment that directly and significantly restricts her ability to perform daily living activities, either continuously or for extended periods, we must again turn to the medical reports in the Application. Again, s. 2(2) of the *EAPDA* requires evidence from a "prescribed professional" that a severe physical impairment directly and significantly restricts the person's ability to perform daily living activities either continuously, or periodically for extended periods, and that as a result of the restriction in activities, the person requires help to perform those activities.

51 On page 11 of the Application, where the physician indicated the degree of restriction on the petitioner's daily living activities, the physician responded that the petitioner has periodic restrictions on meal preparation, basic housework, daily shopping, and mobility outside the home. While the physician does not directly indicate whether these periodic restrictions are for extended periods, she does indicate that the petitioner has "ongoing pain" related to degenerative disc disease, making her unable to do any work involving even moderate heavy lifting, and that she has "ongoing pain" in her feet related to arthritis and a fracture. On page 10 of the application, the physician indicates that the impairment is likely to continue for two years or more from the date of assessment.

52 Concerning the petitioner's mobility outside the home, the physician noted on page 12 of the Application that the petitioner is unable to drive until she has been seizure free for one year. On page 9 of the Application the physician noted that the petitioner has had a recent recurrence of seizures due to her epilepsy. This is consistent with the petitioner's evidence that she can no longer drive because of her seizures. This is in addition to the physician's evidence that the petitioner is unable to walk more than 1 block on a flat surface without the assistance of another person, assistive device, or assistance animal. Also of note in this regard is the Assessor's comment on page 21 of the Application that the city has limited access to disabled transportation and that nothing is available after 3 p.m.

53 On page 17 of the Application, the assessor indicated that the petitioner requires "[c]ontinuous assistance from another person" in going to and from stores for shopping and in carrying purchases home. This speaks both to the petitioner's ability to shop for personal needs and her ability to move about outdoors on her own. Additionally, the assessor indicated that the petitioner requires "periodic assistance" in food preparation and in cooking, which speaks to the petitioner's ability to prepare her own meals.

54 The Tribunal wrote that "[b]oth the assessor and the physician note that the appellant's restrictions are periodic but they do not address whether these restrictions are for extended periods." Unless the Tribunal had valid grounds for rejecting the prescribed professionals' evidence, this is incorrect. The physician's evidence on the duration of the periodic limitations aside (leaving aside also the inquiry into whether a broad reading of the Act mandates reading the physician's evidence of periodic limitations together with the physician's evidence that the petitioner's impairment is "ongoing" and likely to last for more than two years), the assessor clearly stated that the petitioner requires continuous assistance from another person to go to and from stores and to carry purchases home. In other words, contrary to the Tribunal's decision, the assessor confirms that the petitioner has continuous restrictions in at least two daily living activities and that she requires help to perform those activities.

55 Given these findings, it is not clear which evidence the Tribunal accepted and which evidence it rejected, and why. Even more disturbing is that it is unclear whether the Tribunal rejected any of the evidence at all, as opposed to the possibility of simply misreading it. Because of this unknown, it is very difficult to effectively scrutinize this decision - one of the hallmarks of inadequate reasons.

C. Did the Tribunal err?

56 The status of the patently unreasonable standard of review in this province under the *ATA* was recently considered in *Manz v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2009 BCCA 92, 91 B.C.L.R. (4th) 219, 82 Admin. L.R. (4th) 185. After satisfying itself of the constitutional validity of s. 58(2)(a) of the *ATA* in a post-*Dunsmuir* environment, the Court stated:

> 39 ... When applied to findings of fact or law the Administrative Tribunals Act does not define [patently unreasonable]. (Section 58(2)(a) refers to a finding of fact or law or an exercise of discretion, but s. 58(3) is said to apply only to discretionary decisions). Accordingly, the well understood meaning of that phrase in relation to factual matters applies, is as described in *Speckling*, [2005] B.C.J. No. 270:
>
> > [37] As the chambers judge noted, [2003] B.C.J. No. 2244, a decision is not patently unreasonable because the evidence is insufficient. It is not for the court on judicial review, or for this Court on appeal, to second guess the conclusions drawn from the evidence considered by the Appeal Division and substitute different findings of fact or inferences drawn from those facts. A court on review or appeal cannot reweigh the evidence. Only if there is no evidence to support the findings, or the decision is "openly, clearly, evidently unreasonable", can it be said to be patently unreasonable.

57 This application is allowed on the basis that the Tribunal's reasons for decision are inadequate. As a result of that inadequacy, this Court is in no position to decide whether the Tribunal's Decision is patently unreasonable. The Tribunal could reconvene and come to a reasoned conclusion that, having weighed the evidence and applied it to the statutory

criteria, the petitioner remains ineligible for a PWD designation. Provided that the problem with the reasons is remedied and there were no other jurisdictional errors, the reconvened Tribunal would only be open to review on a patently unreasonable standard.

58 However, because several of the Tribunal's findings as currently articulated have no clear and reasonable evidentiary basis, they could be characterized as patently unreasonable. I should stress that this is not a matter of this Court reweighing the evidence. Rather, it is a matter of there being clearly articulated evidence to support the Tribunal's findings.

59 When applied to the statutory framework, the following aspects of the Tribunal's decision could be considered patently unreasonable:

* the Tribunal's finding that the petitioner's physician or assessor has not confirmed that the petitioner has a severe physical impairment that directly and significantly restricts her ability to perform daily living activities;
* the contradictions on the face of the reasons with respect to whether the physician or assessor confirmed the petitioner's evidence relating to her pain and limitations, and the possibility that the Tribunal misread the medical reports;
* the Tribunal's finding that it could not give significant weight to the petitioner's evidence since it was not confirmed by the physician or assessor;
* the Tribunal's finding that neither the assessor nor the physician confirmed that the impairment directly and significantly restricts the petitioner's ability to perform daily living activities either continuously or periodically for extended periods; and
* the finding that the petitioner does not have a severe physical impairment.

60 Concerning the last point, it is useful to briefly return to s. 2(2) of the *EAPDA*:

> (2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that
>
> (a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and
> (b) in the opinion of a prescribed professional
>
> (i) directly and significantly restricts the person's ability to perform daily living activities either
>
> (A) continuously, or
> (B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

61 As indicated by the Tribunal and agreed to by the petitioner and the respondent, s. 2(2) of the *EAPDA* sets out 5 criteria that must be met for a person to be designated as a PWD:

1. the applicant must have reached the age of 18 (s. 2(2));
2. the Minister must be satisfied that the person has a severe mental or physical impairment (s. 2(2));
3. in the opinion of a medical practitioner, the severe physical impairment will continue for at least two years (s. 2(2)(a));
4. in the opinion of a prescribed professional, the impairment must directly and significantly restrict the person's ability to perform daily living activities (s. 2(2)(b)(i)), either continuously (s. 2(2)(b)(i)(A)) or periodically for extended periods (s. 2(2)(b)(i)(B)); and
5. in the opinion of a prescribed professional, as a result of the restriction in activities, the person requires help to perform those activities (s. 2(2)(b)(ii)).

62 It is possible that the Tribunal interpreted s. 2(2) in such a manner that if all the criteria were not met, the applicant could not be considered to have a severe physical impairment. If this was so, was the petitioner's failure to meet, in the Tribunal's opinion, criteria 4 and 5 determinative of the petitioner's failure to meet criterion 2? Put another way, even if the Tribunal's current reasoning on criteria 4 and 5 is considered patently unreasonable, then could the Tribunal still correctly come to the conclusion that criterion 2 has not been met? Without proper explanation from the Tribunal, whether or not such a conclusion is supportable is mere speculation. However, such an interpretation would need to be made in light of the broad interpretation applicable to social welfare legislation canvassed in the authorities above at para. [35]. The Tribunal should interpret the *EAPDA* with a benevolent purpose in mind.

63 I pause now to consider another difficulty in the Tribunal's Decision. The Decision indicates that "[t]here is no dispute that the appellant meets criteria 1 and 3". The first criterion is uncontroversial. It is with the conclusion on criterion 3 that I have some difficulty. Read carefully, section 2(2) reads that the Minister may make a PWD designation "if the minister is satisfied that the person has a severe mental or physical impairment that ... in the opinion of a medical practitioner is likely to continue for at least 2 years". Thus, it would appear that meeting criterion 2 is a condition precedent to meeting criterion 3. How can the Ministry be satisfied that the applicant has a severe physical impairment that will continue for at least 2 years if the Ministry is not satisfied that the applicant has a severe physical impairment in the first place? If there is any ambiguity in the interpretation of s. 2(2)(a), which I doubt there is, it must be resolved in favour of the applicant: *Gray* at paras. 9-12.

64 Concerning the weight to be given to the petitioner's evidence, while s. 2(2) of the *EAPDA* makes it clear that certain eligibility criteria for PWD status need to be confirmed by the applicant's physician or assessor, nothing in the *EAPDA* prevents the Ministry or the Tribunal from placing considerable weight on the Petitioner's evidence, provided the statu-

tory eligibility criteria are met. Indeed, it would be illogical for the Application to demand of the petitioner to describe her disabling condition if the situation were otherwise.

65 I should note that to the extent that the Tribunal did not choose to place significant weight on the petitioner's evidence because of a legitimate reason going to credibility, conflict with the medical practitioner's reports, or otherwise, the Tribunal cannot be said to have committed a patently unreasonable error. The Tribunal is entitled to make a decision that, despite the opinion of the medical professionals, the petitioner did not meet the eligibility criteria for PWD designation. The problem is, of course, that the Tribunal has not revealed its rationale.

Conclusion

66 The relief sought by the petitioner is therefore allowed and the Decision is set aside. Because the Tribunal violated its statutory duty to provide reasons, the matter is sent back to a differently constituted Tribunal for consideration of the petitioner's appeal.

M.M. KOENIGSBERG J.

Case Name:

Garbutt v. British Columbia (Minister of Social Development)

Re: Judicial Review Procedure Act
Between
Stanley Garbutt, Petitioner, and
Minister of Social Development, Respondent

[2012] B.C.J. No. 1805

2012 BCSC 1276

Docket: S124183

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

D. Kloegman J.

Heard: August 20, 2012.
Judgment: August 29, 2012.

(27 paras.)

Pensions and benefits law -- Pension commissions, boards and superintendents -- Appeals and judicial review -- Deference to expertise of decision maker -- Standard of review -- Reasonableness -- Patent unreasonableness -- Application by petitioner for judicial review of decision of Employment and Assistance Appeal Tribunal, upholding decision that denied petitioner designation as person with disabilities, on basis reasons were inadequate and findings patently unreasonable dismissed -- Reasons were not inadequate: they allowed understanding why Tribunal made its decision, and determination of whether conclusion was within range of acceptable outcomes -- Deference must be had to Tribunal's opinion -- Evidence supported finding of something less than severe impairment -- Petitioner was able to do majority of daily living activities without assistance -- Decision was not patently unreasonable.

Pensions and benefits law -- Public pension plans -- Canada Pension Plan -- Pensions and supplementary benefits -- Benefits payable -- Disability pension -- Severe and pro-

longed disability -- Application by petitioner for judicial review of decision of Employment and Assistance Appeal Tribunal, upholding decision that denied petitioner designation as person with disabilities, on basis reasons were inadequate and findings patently unreasonable dismissed -- Reasons were not inadequate: they allowed understanding why Tribunal made its decision, and determination of whether conclusion was within range of acceptable outcomes -- Deference must be had to Tribunal's opinion -- Evidence supported finding of something less than severe impairment -- Petitioner was able to do majority of daily living activities without assistance -- Decision was not patently unreasonable.

Application by the petitioner for judicial review of a decision of the Employment and Assistance Appeal Tribunal, upholding the decision of the Minister of Social Development that denied him designation as a person with disabilities, on the basis the reasons were inadequate and the findings patently unreasonable. The petitioner, 54 years old, suffered from a variety of medical problems. The Tribunal concluded that even though the petitioner's condition was chronic and impaired him to some degree, he was able to perform the majority of his daily living activities independently and thus his limitations were more in keeping with a moderate, not severe, degree of impairment. The petitioner argued the Tribunal failed to provide adequate reasons for its decision, in particular, the application of the term "severe", and that the finding of no severe impairment and no significant restriction of daily living activities was patently unreasonable, as it was not supported by the evidence.

HELD: Application dismissed. The Tribunal's reasons were not inadequate. The reasons met the test of allowing the reader to understand why the Tribunal made its decision, and permitting the court to determine whether the conclusion was within the range of acceptable outcomes. The term "severe" was not defined in the Act, and it was not incumbent on the Tribunal to state what they considered severe. The Tribunal was tasked with creating designations of impairments that entitled impaired persons to assistance and deference must be had to the Tribunal's opinion. The petitioner's evidence supported a finding of something less than severe impairment in relation to the Minister's categorization. The Act did not require the opinion of a prescribed professional as to severity of impairment. Evidence was required from a professional that indicated a direct and significant restriction on at least two daily living activities to find a person's ability was significantly restricted. It did appear, prima facie, from the petitioner's evidence that there were two daily living activities that were continuously restricted. However, a close reading of the Tribunal's decision showed that it was considering the major headings as each representing a daily activity, and not the individual tasks itemized under each of these headings. The petitioner was able to do the majority of daily living activities without assistance. As such, it was not patently unreasonable for the Tribunal to find the petitioner did not meet the criteria set out in the Act. The decision of the Minister fell within the range of reasonable outcomes and the Tribunal was not patently unreasonable in confirming the decision.

Statutes, Regulations and Rules Cited:

Administrative Tribunals Act, SBC 2004, CHAPTER 45, s. 58

Employment and Assistance Act, SBC 2002, CHAPTER 40,

Employment and Assistance Regulation, B.C. Reg. 263/2002, s. 87

Employment and Assistance for Persons with Disabilities Act, SBC 2002, CHAPTER 41, s. 2(2), s. 2(2)(a), s. 2(2)(b)

Employment and Assistance for Persons with Disabilities Regulation, B.C. Reg. 265/2002, s. 2(1)(a)

Judicial Review Procedure Act, RSBC 1996, CHAPTER 241,

On judicial review from: Employment and Assistance Appeal Tribunal, April 17, 2012 (appeal number 2012-00227)

Counsel:

Counsel for the Petitioner: K.F. Milne.

Counsel for the Respondent, Employment and Assistance Appeal Tribunal: A.R. Westmacott.

Counsel for the Respondent, Minister of Social Development: G. Morley.

Reasons for Judgment

1 **D. KLOEGMAN J.**:-- The petitioner applies for judicial review of the decision of the Employment and Assistance Appeal Tribunal (the "Tribunal"), upholding the decision of the Minister of Social Development (the "Minister") that denied the petitioner designation as a person with disabilities ("PWD").

2 The 54-year-old petitioner suffers from a variety of medical problems, including:

> Hepatitis C, L5-S1 disc disease with space narrowing and arthropathy, chronic pain in his right shoulder with calcific tendonitis, chronic left knee pain, ...
>
> (Tribunal Decision, pp. 65 and 66)

3 The petitioner receives income assistance under the *Employment and Assistance Act*, S.B.C. 2002, c. 40. In December 2011 he sought designation as a PWD under the *Employment and Assistance for Persons with Disabilities Act*, S.B.C. 2002, c. 41 [*Act*], which would provide him with a higher level of income assistance and a reduced obligation to search for employment.

4 On January 27, 2012, the adjudicator delegated by the Minister to consider the plaintiff's application for PWD status found that the plaintiff did not have a severe physical or mental impairment; his ability to perform daily living activities was not significantly restricted; and the petitioner did not require significant help or supervision of another person to perform daily living activities. All three of these findings were required to be positive before the petitioner could be designated PWD under s. 2(2) of the *Act*.

5 On March 12, 2012, a delegated adjudicator reconsidered the decision of January 27, 2012, but denied the petitioner's application on the same three bases as the January 27, 2012 decision.

6 On March 16, 2012, the petitioner appealed the reconsidered decision to the Tribunal. He was allowed to supplement the existing record with written argument by his advocate and a new letter from a second treating physician. An oral hearing was held on April 10, 2012, and the Tribunal confirmed the reconsideration decision on the basis that it was reasonably supported by the evidence.

1. Adequacy of Reasons of the Tribunal

7 The primary ground of attack by the petitioner on the Tribunal's decision is that it failed to provide adequate reasons for its decision.

8 The parties do not agree on the standard of review of the adequacy of the reasons of the Tribunal. The petitioner submits that s. 87 of the *Employment and Assistance Regulation*, B.C. Reg. 263/2002 (which is incorporated by reference in the *Act*), mandates that the written determination must summarize the issues and relevant facts considered in the appeal and set out the reasons on which the Tribunal bases its determination, all of which the Tribunal has failed to do.

9 The petitioner submits that whether the reasons fulfill the requirements of s. 87 is a question of law, and therefore, the standard of review is one of correctness. The petitioner relies on the decisions of *Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2009 BCSC 1461, and *Harley v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2006 BCSC 1420, as support for this proposition.

10 Counsel for the Minister and counsel for the Tribunal both submit that the decision of the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, is overriding authority for the proposition that the review of the adequacy of reasons must be part of the substantive judicial review with the appropriate degree of curial deference as set out by statute or common law. According to this later decision of a higher court, the appropriate standard of review will be in the varying ranges of reasonableness.

11 In any event, regardless of whether I apply the standard of correctness or the standard of patently unreasonable, in my opinion the reasons cannot be viewed as inadequate. If the test is whether the reasons allow the reader to understand why the Tribunal made its decision, and permit the Court to determine whether the conclusion is within the range of acceptable outcomes, (*Newfoundland and Labrador Nurses' Union*, para. 16), then I find the reasons of the Tribunal do so.

12 The analysis of the Tribunal is neatly summarized in the written submissions of the Minister at para. 65:

> a. [The tribunal] accepted the diagnoses of physical impairments by Dr. Haegert;

b. Not enough information was provided from Dr. Haegert on severity of back pain or the present impact of the Hepatitis C diagnosis on daily functioning and fatigue;
c. A chronic diagnosis is not necessarily "severe" within the meaning of the *Act* and it is reasonable for the Minister to have regard for numeric functional skills indicators;
d. The Minister need not accept Dr. Haegert's assertion that the impairment is "severe" although it must consider it;
e. The assertions of the Hepatitis C specialist regarding Mr. Garbutt's present mobility, physical stamina and ability to care for self and perform daily maintenance activities in the letter provided to the Tribunal were not consistent with the evidence in the reports or Mr. Garbutt's own evidence;
f. The negative prognosis of the specialist is not relevant to whether Mr. Garbutt is eligible for PWD status at the time of application;
g. An analysis of the functional skills indicators supports the Minister's conclusion the physical impairment was not "severe" at the time of application;
h. The mental health diagnoses of Dr. Haegert were accepted regarding chronic depression and impaired recent memory;
i. The conclusion that these limitations are more in keeping with a moderate degree of impairment was reasonable;
j. Mr. Garbutt showed continuous restriction of basic housekeeping as a result of his inability to lift and of one out of five tasks of shopping;
k. It was reasonable of the Minister to conclude that this was not a direct and significant restriction on two or more daily living activities, but rather that Mr. Garbutt performs a majority of his daily living activities independently.

13 The specific complaint of the petitioner with respect to the adequacy of the Tribunal's reasons concerns the Tribunal's application of the term "severe," as it is used in s. 2(2) of the *Act*:

> **2** (2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that
>
> (a) in the opinion of a medical practitioner is likely to continue for at least 2 years, ...

14 The term "severe" is not defined in the *Act*. I do not find it incumbent on the Tribunal in their reasons to state what they consider would constitute severe; it is enough that they have stated what is not severe. They concluded that even though the petitioner's condition was chronic and impaired him to some degree, the fact that he was able to perform the majority of his daily living activities independently meant that his limitations were more in keeping with a moderate, not severe, degree of impairment. I agree with the sub-

missions of counsel for the Minister that under the *Act* the word "severe" creates a standard, and applying that standard to a particular set of facts is a matter of judgment, the exercise of which is within the purview of the Tribunal.

2. Finding of No Severe Physical Impairment

15 A secondary ground of attack by the petitioner is that the findings of no severe impairment and no significant restriction of daily living activities, resulting in a need for significant help, are patently unreasonable.

16 The parties agree that the standard of review for the substance of the decision is one of patent unreasonableness as prescribed by s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45.

17 The petitioner further submits that the finding of the Minister that the petitioner did not have a severe physical impairment under s. 2(2) of the *Act*, which finding was confirmed on reconsideration and by the Tribunal, was patently unreasonable. Apart from the alleged inadequacy of the reasons of the Tribunal, the petitioner states that the evidence, as accepted by and summarized by the Tribunal in its reasons, cannot logically support a finding of no severe impairment.

18 I disagree. It may be that a lay person, a judge, or even a doctor would consider the evidence of the petitioner's impairment to be "severe" in the ordinary meaning of the word. However, it is the Tribunal that is tasked with creating designations of impairments that entitle impaired persons to assistance under the *Act*. Deference must be had to the Tribunal's opinion (*Arbic v. British Columbia (Ministry of Housing and Social Development)*, 2011 BCSC 410 at para. 23).

19 The evidence that the petitioner:

a) had not been prescribed medication that may interfere with his ability to perform daily living activities;
b) did not need aides;
c) could walk short distances unaided;
d) could climb stairs;
e) could lift up to five pounds;
f) could sit for about an hour; and
g) knew his limit and worked around it,

apparently supported a finding of something less than severe impairment in relation to the Minister's categorization of impairment. The adjudicator, the reconsideration officer and the Tribunal all have the authority and expertise to weigh this kind of evidence against the claim of the petitioner and his doctors that he is severely impaired.

20 I note that s. 2(2)(a) of the *Act* calls for an opinion of a medical practitioner, but only in regard to whether the applicant's condition is likely to continue for two years or more. The *Act* does not require the practitioner's opinion as to degree of severity of impairment. Similarly, s. 2(b) does not require the opinion of a prescribed professional as to severity of impairment, only whether a person's impairment directly and significantly restricts the per-

son's ability to perform daily living activities and as a result requires help to perform those activities.

21 In other words, it is the Minister who must be satisfied as to the severity of the impairment, not the medical practitioners or prescribed professionals.

3. Finding of No Significant Restriction of Daily Living Activities

22 The petitioner makes the similar submission that the Minister's finding that the petitioner's daily living activities were not significantly restricted was patently unreasonable and should not have been confirmed by the Tribunal. Daily living activities are defined in s. 2(1)(a) of the *Act's Regulation* (B.C. Reg. 265/2002) as:

> (i) prepare own meals;
> (ii) manage personal finances;
> (iii) shop for personal needs;
> (iv) use public or personal transportation facilities;
> (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
> (vi) move about indoors and outdoors;
> (vii) perform personal hygiene and self care;
> (viii) manage personal medication, and ...

23 The decision of *Hudson* established that there must be evidence from a prescribed professional indicating a direct and significant restriction on at least two of these daily living activities in order to find that a person's ability to perform daily living activities is significantly restricted.

24 In the case at bar, the petitioner's physician checked off boxes confirming that the petitioner had continuing restriction (i.e. needed significant help) in housework and daily shopping. The prescribed professional, Nurse Showler, checked boxes confirming that the petitioner needed continuous assistance (i.e. significant help) with laundry, basic housekeeping and one out of five shopping tasks (carrying purchases home). *Prima facie*, it appears from this evidence that there are two daily living activities of the petitioner that are continuously restricted, yet the Tribunal concluded that the evidence did not demonstrate a direct and significant restriction on two or more daily living activities.

25 However, on a closer reading of the analysis of the Tribunal, it is evident that it was considering the major headings of Personal Care, Basic Housekeeping, Shopping, Meals, Pay Rent and Bills, Medication and Transportation as each representing a daily activity, and not the individual tasks itemized under each of these headings. The petitioner was able to do the majority of these daily living activities without assistance. In that regard, it was not patently unreasonable for the Tribunal to state that because only Basic Housekeeping and one out of five tasks involved in Shopping were problematic for the petitioner, and all other daily living activities were independently managed by him, he did not meet the criteria set out in s. 2(b) of the *Act*.

26 The petitioner concedes, through counsel, that it was necessary for him to satisfy the Minister under the whole of s. 2(2) of the *Act* as the provisions are conjunctive. The

adjudicator, reconsideration officer and the Tribunal all found that the petitioner failed to do so. The decision of the Minister fell within the range of reasonable outcomes and I cannot find that either the reconsideration panel or the Tribunal were patently unreasonable in confirming his decision.

27 Accordingly, the petition is dismissed.

D. KLOEGMAN J.

cp/e/qlrds/qllmr/qlpmg

INTERPRETATION ACT

[RSBC 1996] CHAPTER 238

Section 8

Enactment remedial

8 Every 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.

The Ombudsperson and Complaints about the Ministry of Social Development and Social Innovation ("MSDSI")

**Prepared October 24, 2014 by Alison Ward, lawyer, Community Legal Assistance Society.*

The Office of the Ombudsperson is an independent officer of the BC legislature who can investigate unfair administrative decisions or actions of public agencies, including MSDSI.

The Ombudsperson's jurisdiction to investigate unfair actions and decisions is broad. Section 23 of the *Ombudsperson Act* R.S.B.C. 1996, c. 340 sets out its scope. The Ombudsperson must make recommendations to MSDSI if it finds that an act, decision, omission or recommendation by MSDSI was:

- supported by inadequate reasons;
- subject to unreasonable delay;
- contrary to law;
- based on a mistake of law or fact, or irrelevant considerations;
- related to the application of arbitrary, unfair or unreasonable procedures;
- unjust, oppressive or improperly discriminatory;
- made, done or omitted under a statutory provision or other rule of law or practice that is unjust, oppressive or improperly discriminatory;
- done for an improper purpose,
- was the result of negligence or improper action; or
- otherwise wrong,

For more detail on the types of unfairness the Ombudsperson can investigate, see:

- the "Fairness Checklist" on the Ombudsperson's site at https://www.ombudsman.bc.ca/home/fairness-checklist *(copy attached*); and
- Ombudsperson's Public Report 42 (March 2003) *Code of Administrative Justice* at https://www.ombudsman.bc.ca/images/resources/reports/Public_Reports/Public%20Report%20No%20-%2042.pdf

Section 11 of the *Ombudsperson Act* provides that the Ombudsperson cannot investigate a complaint while a reconsideration or appeal to the EAAT, or application for judicial review, is ongoing. However, the Ombudsperson *can* investigate a complaint against MSDSI if the deadline for reconsideration, appeal or judicial review (as applicable) has passed.

Deadline for complaint:

A complaint to the Ombudsperson must generally be made within one year of the act , omission or decision that being complained about (section 3 of the *Ombudsperson Act*).

How to complain:

Complaints to the Office of the Ombudsperson can be made in writing and mailed in, submitted online, or made by phone. A standard complaint form is on the Ombudsperson's website.

A template complaint form customized for general complaints about MSDSI is also **attached**.

Complaints must be made by the person directly affected by unfairness. However, **the Ombudsperson's office will accept complaints from advocates on behalf of** clients when the advocate is able to send them an **authorization form**, **signed by the client**, whereby the client confirms they want the advocate to represent them in making a complaint to the Office of the Ombudsperson. A sample authorization form is **attached**.

Numbers:

Reports from the Ombudsman show that it receives more complaint about MSDSI than any other ministry. Complaints about MSDI were

- 21.0% of total Ombudsperson files opened in In 2013/14 (1110 files)
- 19.7% of total Ombudsperson files opened in 2012/13 (983 files).
- 18.1 % of total Ombudsperson files opened in 2011/12 (830 files)
- 20.4% of total Ombudsperson files opened in 2010/2011 (915 files)

Issues in Complaints

While many complaints to the Ombudsperson are made about MSDSI each year, I think that this is an under-utilized remedy for many different substantive problems that clients face with MSDSI. While the Ombudsperson can clearly deal with procedural complaints on issues such as delay in processing applications for immediate needs assessments, and communication problems related to ICM, there are many other *substantive welfare topics* that may also be ripe for a complaint to the Ombudsperson.

Each year the Ombudsperson releases summaries of sample cases they have dealt with, in their annual report and occasional newsletters. You can find summaries of their decisions about MSDSI (and other income and community support issues like FMEP) at https://www.ombudsman.bc.ca/investigations/case-summaries/income-a-community-supports

Those case summaries often surprise me, and show that the Ombudsperson investigates a wide variety of substantive issues that are difficult to otherwise resolve with MSDSI (e.g. through reconsideration and appeal), and that their office achieves meaningful results for many people.

To encourage advocates to file complaints to the Ombudsperson in a wider variety of issues. I've summarized several sample cases below:

Issue investigated by Ombudsperson	**Substantive issue with MSDSI**	**Outcome**	**Link to decision**
Were MSDSI's actions contrary to law?	MSDSI made numerous deductions from a man's PWD benefits. The Ombudsperson reviewed MSDSI records and determined that some of the repayments were made after the limitation period to collect had expired.	MSDSI's actions contrary to law. Client reimbursed $255 for deductions made after the limitation period expired, and received written confirmation no further debts were owed to MSDSI.	https://www.ombudsman.bc.ca/investigations/case-summaries/income-a-community-supports/230-settling-debts
Did MSDSI follow a fair process in reaching its decision?	A woman on PPMB had her PPMB status reviewed; MSDSI gave her only 3 weeks to submit a new application before her PPMB status would be lost, even though MSDSI policy required 3 months' notice.	Fair process not followed. Client's PPMB rate reinstated for three months to allow for time for review to be conducted.	https://www.ombudsman.bc.ca/investigations/case-summaries/income-a-community-supports/228-time-matters
Did MSDSI follow a fair process in determining what the client had been eligible to receive in the past?	Client on PWD had not been receiving the full amount of the shelter benefits he was entitled to, due to Ministry error. His ongoing benefits were increased, but no reimbursement issued. Ombudsperson reviewed MSDSI records and determined that client had told MSDSI of his actual shelter costs 4 years earlier. While investigating, MSDSI offered to reimburse client for 12 months of underpayment.	Fair process not followed: no policy or legislative directive limiting reimbursement of underpayments to the past 12 months Client reimbursed $4 620.22 for underpayments over the past 4 years.	https://www.ombudsman.bc.ca/investigations/case-summaries/income-a-community-supports/13029-persistence-leads-to-reimbursement-for-four-years-of-underpayment-13-14
Did MSDSI issue adequate reasons for its decision?	A truck driver had had his driver's license suspended for 3 months because of points. His employer usually had work other than driving available, but currently had a shortage of other work. His employer laid him off	Inadequate reasons for decision that he was not eligible, given he was only laid off. MSDSI quickly found	https://www.ombudsman.bc.ca/investigations/case-summaries/income-a-community-supports/369-assistance-

	and he applied for IA until work became available. MSDSI said he was not eligible as he had lost work due to his own actions, so it was like he'd been fired.	client eligible for IA.	provided-for-laid-off-worker-1011
Was there unreasonable delay in processing application for IA?	Client on methadone had just been released from jail in order to attend drug treatment. He had applied for IA one week ago but no decision had yet been made. His methadone coverage was running out; he contacted the Ombudsperson the day before it was scheduled to end.	Unreasonable delay to provide Pharmacare coverage and IA. MSDSI said it had not known client's methadone coverage was running out. Pharmacare instated immediately and IA issued within 2 days.	https://www.ombudsman.bc.ca/investigations/case-summaries/income-a-community-supports/363-emergency-medical-coverage-1011
Did MSDSI follow a fair process in reaching its decision?	A single parent on PWD and MNS ($165/month) received a large lump sum of child support. She was off benefits and on MSO for over a year due to excess assets. MSDSI told her once the child support was spent, she would be reinstated to all her benefits. In fact, once she was back on PWD, MSDSI said she had to reapply for MNS. She did not receive MNS for about two years after her PWD restarted. She asked MSDSI to issue MNS retroactively for the 2 year period; MSDSI refused. She applied for reconsideration and appeal of that decision, and lost.	Ombudsperson found fair process not followed. Client received retroactive payment of 21 months of MNS ($3 456).	https://www.ombudsman.bc.ca/investigations/case-summaries/income-a-community-supports/361-persistence-results-in-supplement-payments-1011
Did MSDSI follow a fair process in reaching its decision?	Client on IA received her first CPP payment in June. She budgeted for it to be deducted from her IA cheque for August (2 month lag). Datamatch with CPP showed client had received the CPP payment in May, so MSDSI deducted it from her July check instead. Ombudsperson reviewed MSDSI records and confirmed there was	Unfair process: datamatch error confirmed and client issued full IA check for July.	

	a datamatch error; client had not in fact received CPP in May, so entitled to full IA check for July.		
Did MSDSI follow a fair process?	A man on IA had been put on third party administration about 10 years ago. He went off assistance for several years. When he reapplied, third party administration was automatically continued. He complained to the Ombudsperson that this was unfair.	Fair process not followed. MSDSI best practices and policy require review of client contact prohibitions annually, but this was not followed. MSDSI agreed to a major revision of its policy regarding 3rd party administration in December 2013, including written reasons for 3rd party administration, and annual review.	https://www.ombudsman.bc.ca/investigations/case-summaries/income-a-community-supports/13033-preventative-ombudsmanship-results-in-new-policy-new-procedure-for-income-13-14
Did MSDSI follow a fair process?	A single mother on IA had her cheque withheld as she had not given MSDSI a birth certificate for her newborn child. The mother had registered the child's birth but, for personal reasons, did not want to get a birth certificate for him. She gave MSDSI other evidence of her son's identity, including a statement from the doctor who delivered him. The client applied for reconsideration of the decision that she had to provide a birth certificate for her son to get IA. She lost. She appealed to the EAAT and lost. She re-applied for IA and complained to the Ombudsperson that it was unfair that MSDI would only accept a birth certificate as identification for her son.	Fair process not followed. The EA Regulation required ID be provided, but did not specify what *kind* of ID was required. MSDSI maintained section 10 of the Act (information and verification) allowed them to direct provision of a birth certificate. MSDSI agreed to revise its policy and procedures on ID requirements and how section 10 is applied. Client's IA restarted, apology issued.	https://www.ombudsman.bc.ca/investigations/case-summaries/income-a-community-supports/13036-unfair-demands-ministry-revises-policy-13-14

Past Systemic Complaints

While systemic complaints are beyond the scope of this handout, it is important to note that the Ombudsperson has released two major reports regarding systemic problems at MSDSI in the past 6 years. They are essential reading for welfare advocates.

They are as follows:

a) *Time Matters: An Investigation into the BC Employment and Assistance Reconsideration Process,* January 2014, Special Report 35, at https://www.ombudsman.bc.ca/images/resources/reports/Public_Reports/Time_Matters_Report_35_web.pdf

This report identified that MSDSI was not meeting the legislated deadlines for issuing reconsideration decisions. As a result of the ministry's delays, over 900 recipients lost benefits they were entitled to receive. As a result of this investigation, the government amended the welfare regulations to require that when reconsideration decisions are not made within specified time limits, approved benefits must be paid retroactively so that MSDSI's delay does not cause a recipient financial loss. The Ministry also agreed to review its application process for PWD, presumably so that more accurate initial decisions are made and fewer reconsiderations needed *(this is in process*).

b) *Last Resort: Improving Fairness and Accountability in BC's Income Assistance Program*, March 2009, Public Report 45 at https://www.ombudsman.bc.ca/images/resources/reports/Public_Reports/Public_Report_No_45.pdf

This systemic report resulted from complaints filed by a number of advocacy organizations, coordinated by BCPIAC. The investigation focused on:

- issues relating to income assistance applications: these included the application process, 3 week work search, immediate needs assessments, and 2 year financial independence requirement;
- eligibility criteria and assessment process for PPMB, as well as the number of PPMB clients
- requirements to submit and resubmit medical and other documentation
- the implementation of previous commitments which included commitments to implement the decisions of appeal boards, monitor program effectiveness and staff compliance with policy, and provide reasons for ministry decisions

The Ombudsperson issued 25 recommendations to MSDSI, with various timelines for implementation, MSDSI agreed to 24 of the recommendations. The Ombudsperson has been monitoring implementation of those recommendations since 2009.

1. See August 1, 2009 Update on Implementation of Recommendations, at https://www.ombudsman.bc.ca/images/resources/reports/Report%20Updates/2009.08.01%20Income%20Assistance%20Report%20Update.pdf

2. See November 1, 2010 Update on Implementation of Recommendations, at

https://www.ombudsman.bc.ca/resources-and-publications/121-last-resort-update-2010-11-01

As of 2014, six recommendations from Last Resort have still not been implemented. The Ombudsperson updated this situation in her 2013/14 annual report (at page 67) as follows:

> *In previous years, I reported that the ministry had not implemented the six recommendations related to the PPMB program that it accepted and committed to implement over five years ago (Recommendations 12, 13, 14, 15, 16(A) and (B)). This situation unfortunately remains the same this year. The ministry accepted and committed to implementing these recommendations but in five years has made no changes – not even as recommended in Recommendation 13 to change a form to improve the clarity of information provided. This situation highlights the importance of continued monitoring of recommendations that have been accepted but not yet implemented. Ministries have the opportunity to accept or reject recommendations at the time a report is made. Once accepted, however, the ministry has made a commitment to carry through on these changes.*
>
> *The ministry has recently completed a province-wide consultation process on disability that may lead to policy and program changes. The ministry has told us it will endeavour to implement the recommendations related to PPMB in Last Resort as part of the changes from this consultation process.*

Employment and Assistance Appeal Tribunal of the Province of British Columbia

Code of Conduct

Marilyn McNamara, Tribunal Chair

6/14/2013

Employment and Assistance Appeal Tribunal of the Province of British Columbia

Code of Conduct

1.0 Mission of the Employment and Assistance Appeal Tribunal

The mission of the Employment and Assistance Appeal Tribunal (the Tribunal) is to provide an independent and impartial appeal process that is community based and delivers timely and fair decisions reviewing specified determinations of the Ministry of Housing and Social Development and Social Innovation regarding income and disability assistance and, for the child care subsidy program, with specified decisions of the Ministry of Children and Family Development.

In carrying out its mission, the Tribunal is guided by the following principles:

- Fairness
- Impartiality
- Timeliness
- Accessibility
- Accountability
- Transparency
- Objectivity
- Discretion

Through adherence to these principles, the Tribunal achieves its goals of independence in decision making, excellence in service, and efficiency in administration.

1.1 Purpose of the Code of Conduct

The purpose of this Code of Conduct ("Code") is to:

- establish rules of conduct that govern the professional and ethical responsibilities of Tribunal members,
- identify the criteria against which members' performance will be assessed for purposes of identifying training needs and making recommendations respecting re-appointment, and

■ promote public confidence in the integrity and competency of the Tribunal, and the independence and credibility of the Tribunal and its members.

The Code is based on the fundamental principle of a fair hearing and recognizes the requirement of independence in adjudicative decision making.

1.2 Scope

The Code covers the role and responsibilities of Tribunal members to the Tribunal, to the public trust, and to the

parties when hearing appeals. Specifically, the Code deals with:

■ the role and authority of Tribunal members,

■ the responsibilities of members to the Tribunal,

■ preparation and timeliness,

■ conduct during hearings,

■ decision making,

■ decision writing, and

■ duties of panel chairs.

The Code may be amended to reflect the continuing development of the Tribunal.

2.0 Roles and Authority of Tribunal Membership

The Chair of the Tribunal, appointed by the Lieutenant Governor in Council, acts as the chief executive officer of the Tribunal and is responsible for its over all management and the appointment of panels to hear appeals. The Chair reports to the Minister annually on the performance of the Tribunal and consults with the Minister respecting appointments to the Tribunal. One or more Vice Chairs may be appointed.

Members of the Tribunal are appointed by the Minister for a set term. Members exercise the authorities of membership only while serving as members of a panel in the course of an appeal. Tribunal members are expected to act honestly and in good faith and to comply with this Code and with the practices and procedures of the Tribunal.

Tribunal members must never speak publicly about any matter related to the Tribunal or its work in a public setting or to the media.

3.0 Responsibilities to the Tribunal

The Tribunal is composed of members from throughout the province. To ensure consistency of service and treatment of parties it is important that any member who observes any conduct of a colleague that he or she reasonably believes is in breach of this Code, or which may threaten the integrity of the Tribunal, bring it to the attention of the Tribunal Chair.

The Tribunal operates through its members, and the Tribunal Chair needs the assistance of all members to ensure the public trust is upheld. Employment and Assistance Appeal Tribunal

Members have a continuing responsibility in relation to the following:

Confidentiality – Members must not divulge confidential information obtained as a result of their appointment unless legally required to do so.

Duty to Disclose – Members are to disclose to the Tribunal Chair any matter that could have or be perceived to have a negative or harmful effect on the public perception of the Tribunal. This includes an actual or potential conflict of interest with respect to the performance of his or her duties and obligations as a member of the Tribunal. This also includes any issue that may be perceived to affect his or her integrity or public accountability, such as being involved in any issue or controversy that has gone or is likely to go to litigation or public review.

Knowledge – Members are expected to acquaint themselves with the orientation and training materials provided prior to being appointed to a panel to hear an appeal and to maintain current knowledge of the Tribunal's jurisdiction and mandate, its governing legislation, and its policies and procedures. Members are to update their copy of the legislation to ensure it is current.

Judgement – Members are expected to exercise good judgment regarding appropriate conduct at all times, including on matters or in situations not specifically mentioned in this Code.

Participation – Members are expected to attend and participate in orientation and training opportunities and in periodic meetings arranged by the Tribunal.

Performance – Members agree to participate in learning and development programs aimed at improving individual competence in relation to the duties performed for the Tribunal.

4.0 Preparation for and attendance at hearings

Preparation – Members must be fully prepared for hearings. Members must review and become familiar with the material and evidence provided in the appeal package prior to the hearing. This is an unconditional requirement. If a member is unable to properly prepare for a hearing for any reason, s/he should notify the Tribunal Chair and withdraw from the panel well in advance of the hearing.

Timeliness and attendance – Members must be present and ready to proceed prior to the scheduled time of the hearing, remain in attendance throughout the proceeding and be available during the decision making and decision writing processes. Ideally, members will arrive 10 – 15 minutes before the scheduled hearing start time.

4.1 Conduct during the Hearing

It is essential that the work of the Tribunal and each of its appeal hearings be conducted in a manner which ensures that the appeal process is fair to the parties and conforms with the legal requirements set out in the applicable legislation.

The following matters are of general applicability and are intended to promote the reality and appearance of impartiality and fairness. This is essential to retain the trust and respect of the parties and the public.

The right to be heard – This is the foundation right governing the work of the Tribunal. All parties must be given a full and fair opportunity to present their case, ask questions of witnesses and present relevant evidence to an impartial panel which will decide the appeal on the basis of the legislation and the evidence.

Maintain appropriate professional distance – Members must maintain an appropriate professional distance from parties, advocates or representatives, and witnesses by avoiding casual, social or private conversations or spending time with parties before, during or after the hearing and by avoiding any other behaviour that may give an impression that a personal or social relationship exists that could give rise to a reasonable apprehension of bias.

Communications – Members must not communicate directly or indirectly with any party, advocate or representative, or witness in respect of a proceeding, except in the presence of all parties and their advocates or representatives.

Impartiality – The appeal process must be fair and reasonable and must accord with the rules of natural justice. Members must be impartial and exercise independence of thought. Members must not be influenced by improper considerations. Evidence of bias, or even a reasonable apprehension of bias, by a panel member will void the hearing and the resulting decision.

Keeping an open mind – Members must not prejudge the appeal until all the evidence has been presented and arguments by the parties have been made. Only then can members properly deliberate on the merits of the appeal.

Respect – Members demeanour, behaviour, and language should reflect respect and courtesy to all parties at hearings. Members must listen patiently and carefully to the views, evidence and submissions of the parties, advocates or representatives, and witnesses. Sensitivity to their culture and heritage is essential, as is understanding and encouragement for appellants representing themselves.

Attentive listening – Members must carefully listen to or read the information presented and the arguments made by the parties as they explain their respective positions on the appeal. The parties should be given the opportunity to present their positions without interruption. If what the party is saying is not clear, the panel may ask questions to clarify the party's position.

Questioning – It is important that aggressive or intimidating questioning be avoided. Members must ensure their questions are asked in a reasonable manner and are focused on understanding the position of the party. Such questioning may disclose that the party's position is inconsistent, conflicts with other information or is not credible.

After a party has finished presenting their position or asking a witness questions, the other party may ask questions directly to the party or the witness. Members may then ask questions. The panel chair must be vigilant to exert control over this questioning to prevent repetitive or non-relevant questions or coercive behaviour while at the same time permitting questions which are probing and challenging.

Procedures – Members are to conduct the hearing in accordance with the *Employment and Assistance Act* and Employment and Assistance Regulation and the Practices and Procedures established by the Tribunal. The panel chair must recess the hearing if a short break is required by any member or participant.

4.2 Evidence

The panel may only accept and consider information and records that were before the minister when the decision was made or oral or written evidence in support of the original records and information (*Employment and Assistance Act*, s. 22). Written submissions and documents tendered as evidence at the hearing are to be recorded on forms entitled Submission at Hearing – Appellant or Submission at Hearing – Ministry. Indicate whether the evidence tendered was admitted and the reasons for that decision on the relevant form as well as in the Tribunal Decision.

4.3 Deliberations and Decision Making

In the course of deliberating and decision making, members must:

(a) Be guided by the requirements of the law;

(b) Avoid arriving at any final judgment, conclusion or decision on an issue until all panel members have had an opportunity to provide input;

(c) Deliberate as a panel and each member of the panel must participate fully in the discussions, including the determination of:

- the facts of the case,
- the applicable legislation, and
- how the legislation applies to those facts;

(d) Demonstrate the same respect and courtesy to fellow members during deliberations as shown to the parties during the hearing, listening patiently and carefully to their views and arguments;

(e) Take personal responsibility for making a decision. A member may not delegate this obligation or allow their decision to be dictated by another. Provision is made for majority decisions because consensus is not always possible.

4.4 Decision Writing

All members of a panel must participate in the drafting of the written decision (which may include a dissenting opinion) to the extent of agreeing in point form on the findings of fact, the applicable law, and the reasoning supporting the decision. The final draft of the decision may be typed or written by the panel chair without the other members present.

(a) Members must have the opportunity to review and comment on the final draft decision prior to the panel chair forwarding it to the Tribunal. This can be done in person, by telephone, or by fax or email.

(b) Where email is used, only Part E – Summary of Facts and Part F – Reasons for Panel Decision will be exchanged and care must be taken that they contain no identifying information.

(c) Members must sign the decision form at the hearing or at a later time. In all cases the members must review and agree to the draft decision before it is sent to the Tribunal;

(d) The written decision must follow the format set out in s. 87 of the Employment and Assistance Regulation;

(e) All appeal records and documents, both hardcopy and electronic, must be kept in a confidential and secure manner. All hardcopy material (including the appeal record, draft decisions, members' notes and any material provided by the parties at the hearing) must be returned to the Tribunal with the appeal records and all electronic material must be deleted;

(f) Appeal records and other documents must be returned to the Tribunal within 5 business days of the panel making its determination.

4.5 Obligations of Panel Chairs

The panel chair is to ensure s/he and other members of a panel adhere to the Code of Conduct and take any necessary steps to ensure compliance, including:

(a) Following the "Conduct of Hearing" guidelines set out in the Panel Member Reference Manual, section 3.2.5, "Introduction by Panel Chair;"

(b) Recessing the hearing to consult with the members on procedural or legal issues as required. All discussion of procedural or substantive issues must take place in private without the parties present;

(c) Ensuring that the requirements above, **4.1** to **4.4**, are met;

(d) Identifying or clarifying any procedural issues, including acceptance of evidence, consideration of former Tribunal decisions or court decisions, adjournment requests, and objections raised by a party;

(e) Dealing with aggressive or rude behaviour and safety concerns;

(f) Ensuring the proper procedure is followed if a conflict of interest or a matter of bias is identified that may disqualify a member from participating in a hearing;

(g) Deciding any question of practice or procedure that arises during a hearing and is not provided for in the regulations or in the Practices and Procedures of the Tribunal (*Employment and Assistance Act,* s. 22(6);

(h) Ensuring all members comport themselves with dignity and in keeping with the provisions of this Code and bringing breaches by a member to the attention of that member and the Tribunal Chair;

(i) Maintaining order at a hearing and attempting to complete hearings within the time allocated;

(j) Facilitating the discussion between panel members regarding the disposition of the case.

(k) Maintaining liaison with the Appeal Coordinator regarding adjournments, or other issues arising during a hearing.

(l) Ensuring that decisions are completed and submitted in a timely and complete manner.

EMPLOYMENT AND ASSISTANCE APPEAL TRIBUNAL OF THE PROVINCE OF BRITISH COLUMBIA

CODE OF CONDUCT

I, _____ have been appointed

as a member of the Employment and Assistance Appeal Tribunal, pursuant

to Ministerial Order #_____.

I have been provided with, read and understand the Employment and Assistance Appeal Tribunal Code of Conduct.

I undertake to comply fully and to the best of my ability with the provisions of this Code of Conduct, and any subsequent amendments, understanding that I am required to maintain independence in decision making.

Dated at: _____

Signature:_____

Day Month Year

Complaints to the BC Ombudsperson

The mandate of the Office of the BC Ombudsperson is to determine whether provincial public authorities have acted fairly and reasonably, and whether their actions and decisions were consistent with relevant legislation, policies and procedures.

You may make a complaint about unfair treatment by a government body (e.g. the Ministry) in any of the following ways:

Phone: Toll-free at 1-800-567-3247 from anywhere in BC, or 250-387-5855 (Victoria)

Fax: 250-387-0198

Online: https://www.bcombudsperson.ca/complaints/make-online-complaint

Mail: BC Ombudsperson
PO Box 9039 STN PROV GOVT
Victoria BC V8W 9A5

Complaints to the Chair of the Employment and Assistance Appeal Tribunal (EAAT)

If you have a concern about the conduct of hearing at EAAT, you may make a complaint by writing to the Tribunal Chair. You must include your name, address and the particulars of your complaint, as well as the Tribunal appeal number and the date of the appeal.

A complaint about the conduct of an appeal must be made in writing and addressed to the Tribunal Chair.

Fax: Toll-free at 1-877-356-9687 from anywhere in BC, or 250-356-9687 (Victoria)

Email: eaat@gov.bc.ca

Mail: Tribunal Chair
Employment and Assistance Appeal Tribunal
PO Box 9994 Stn Prov Govt
Victoria, BC, V8W 9R7

Prepared October 1, 2015 by Erin Pritchard of BCPIAC

CPP Disability

From Application to Tribunal and
all the steps in between

Payment Rates

The CPP-D amount that a person would receive is based on a portion of their estimated retirement benefit and a flat rate amount. In 2015 that flat rate is $465.84.

This monthly flat rate amount is linked to inflation so the rates that CPP Disability pays changes annually.

Payment Rates

In 2015 the maximum monthly benefit CPP Disability paid was $1,264.59

The average amount received in 2014 was $902.02

CPP Disability benefits for the child of a disabled contributor

In addition to the monthly CPP Disability amount the plan also provides a benefit for each child under the age of 18.

In 2015 the amount was $284.32 per month paid to the custodial parent.

If the child of a CPP Disability recipient is between the ages of 19-26 and attending school full time the child benefit will be paid directly to them until they either finish full time school or reach the age of 26.

Qualifying for CPP Disability

To qualify for CPP Disability you **must**:

- Be under 65 years of age
- Have made the required amounts of contributions.
- Have a disability that is both “severe and prolonged” as defined by the CPP Legislation.

The Burden of Proof

The applicant has to prove that they meet the definition of disability.

Minimum Qualifying Period (MQP)

The MQP is the minimum period of time that a person must have worked and contributed to CPP in the years immediately before they become disabled according to the CPP legislation.

You must be able to prove you became disabled by the end of your MQP.

For anyone who became disabled between January 1, 1987 and December 31, 1998

You must have worked and paid into the plan in either:

- two of the last three years before you became disabled, or
- Five of the last ten years before you became disabled

For anyone who became disabled on or after January 1st, 1998

It is necessary for a person to have worked and made valid contributions for four out of the last six years before they became disabled.

For applications submitted after February 29, 2008

If HRSDC determines that you became disabled on or after December 1, 2006 and if you have made contributions to CPP for 25 years or more, then you can qualify if you worked and contributed in just three out of the last six years before you became disabled.

Statement of Contributions

You can request a Statement of Contributions from Service Canada

Ph: 1-800-277-9914 (English)

Ph: 1-800-277-9915 (French)

Or online with a My Service Canada account.

Issues Related to Contributions

What if there have not been enough contributions?

Unfortunately there are no humanitarian grounds for awarding CPP Disability. With out sufficient contributions an application and all further appeals will be denied.

What if I worked and have paid into another pension plan?

Contributions to the Québec pension plan can be combined with CPP contributions.

If you have worked in another country that has a social security agreement with Canada your contributions to the social security program in that country may be used to help you meet the CPP contribution requirement.

Definition of CPP

So what exactly do they mean by **severe** and **prolonged**?

Severe

The CPP legislation defines “severe” as any condition(s) that would make “a person incapable of regularly pursuing any substantially gainful occupation”

Severe is all about not being able to work at any job. Full time. Part time. Seasonal. Retraining.

Prolonged

Prolonged is defined as “such severe disability is likely to be long continued and of indefinite duration or is likely to result in death….”

What if I am still working?

- In most cases you cannot collect CPP Disability benefits if you are still able to work.

What are the exceptions?

- Sheltered Employment
- Work for a “Benevolent Employer
- Work that is not substantially gainful.

Definition of Sheltered Employment

Sheltered Employment

Sheltered employment is not considered an "occupation for the purposes of CPP-D. Sheltered employment involves simple tasks performed in a closely supervised environment where performance goals are defined by the employee's capabilities. The work is therapeutic and often is offered in coordination with other public, psychiatric and mental health programs.

Who is a Benevolent Employer?

A benevolent employer is someone who varies the working conditions and modifies the job expectations to accommodate a person with disabilities limitations. For example the performance expected in terms of productivity or output is considerably less than that expected of other employees.

What is substantially gainful?

CPP Regulations were recently amended to include the following definition:

68.1 (1) For the purpose of subparagraph 42(2)(a)(i) of the Act, “substantially gainful”, in respect of an occupation, describes an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension.

For 2015 this works out to be $15,175 ($ 1,264.59 x 12)

How Does CPP Apply this Rule?

Applicants and Recipients of CPPD are treated differently.

Generally speaking, if an applicant reports that they are earning any income their application will be denied and they will have to request a reconsideration.

For CPPD recipients, there is an annual earning exemption (YBE). For 2015 the amount is $5,400. CPP will allow recipients to earn this amount without it affecting their benefit.

Recipients must advise CPP if they start earning more that the YBE.

Earnings in excess of the YBE

For those earning more that the YBE, CPP will conduct a review.

It often allows recipients to earn more than the YBE.

Although there are exceptions, CPP will stop paying benefits if the recipient is earning more than the Substantially Gainful amount.

For CPPD recipients there is a grey earnings amount between $5,400 and $15,175.

On top of all this, CPP allows adjudicators to consider situations where the recipient earns:

1. Between the substantially gainful amount and twice that amount;
2. Above twice the substantially gainful amount.

The Application

You can get a CPP-Disability application form in person from a local Service Canada office or by phoning 1-800-277-9914.

Forms can also be downloaded and printed from the Service Canada's website at: www.servicecanada.gc.ca.

A CPP Disability Application has several parts

- The Application for CPP-D asks for basic information about the applicant such as address, names of any children.
- Questionnaire for Disability Benefits asks for information about their recent work history, medical history and their experiences of their disability.
- Authorization to Disclose Information / Consent for Medical Evaluation allowing HRSDC to obtain medical, employment and educational information about you.
- Medical Report to be completed by the doctor who is most familiar with your disability.
- Child-rearing Dropout Provision.

CPP Questionnaire 17-21

15. Have you received regular Employment Insurance benefits in the last two years?		
◯ Yes **If yes**, give the dates:	From YYYY-MM-DD	To YYYY-MM-DD
◯ No	From YYYY-MM-DD	To YYYY-MM-DD

MEDICAL INFORMATION

16. **When could you no longer work because of your medical condition?**	YYYY-MM-DD

17. Height	Weight	◯ Right-handed ◯ Left-handed

18. State the illnesses or impairments that prevent you from working. If you do not know the medical names, describe in your own words.

19. Describe how these illnesses or impairments prevent you from working.

20. If you have other health-related conditions or impairments, please describe them.

21. If you had to stop other activities (such as hobbies, sports or volunteer work), please explain and give dates activities ceased.

Question 22

Sitting/Standing (How long?) Sitting Standing .	**Seeing/Hearing** Seeing Hearing
Walking (How Long and how far?)	**Speaking**
Lifting/Carrying (How much and how far?)	**Remembering**
Reaching	**Concentrating**
Bending (How much?)	Sleeping
Personal needs (Eating, washing hair, dressing, etc.)	Breathing
Bowel and bladder habits	Diving a car (how long?)
Household maintenance (Cooking, cleaning, shopping and similar activities)	Using public transportation

Who should fill out the Medical Report?

- The General Practitioner (GP) / Family Doctor

In most cases a family doctor will be the one who knows the applicant best. Also, when people have more than one medical condition the family doctor may have the best understanding of how the disabilities interact to prevent the applicant from doing all forms of work.

The Specialist

The advantage of a specialist is that they usually have a more in-depth knowledge of a specific condition.

Specialist's opinions may be given more weight by HRSDC than that of a GP.

The specialists though will usually only provide information on the condition they are treating. They may not know or comment on how your disabilities interact.

Submitting Supporting Documentation

You will want to review all supporting documentation carefully before submitting it with your application. It will not help the application if the medical reports are out of date or a doctor indicates that you should be able to return to work in the near future.

Other health professionals can provide support letters. Information that describes how the disability affects daily life and ability to work can be very useful.

Submitting the application

- If you are mailing the application ensure the Social Insurance Number is on all the pages.
- Sign and date all forms.
- If the applicant’s children do not have a social insurance number, enclose proof of birth (certified copies are acceptable)
- If you are mailing the application consider sending it by sending it registered mail. Be sure to keep a copy for your own records.

Submitting the application

- You can also submit the application in person to your local Service Canada office.

Processing the application

It typically will take four to six months for Service Canada to process an application for disability benefits.

It may be in the applicant's best interest to give the medical adjudicator time to gather additional information.

If the application is approved

Congratulations! The CPP Disability payment usually is received in four to six weeks after the application is approved.

The first payment may include a retroactive lump sum payment and a monthly benefit cheque.

CPP and Retroactive benefits

The lump sum retroactive amount begins accumulating four months after the HRSDC has determined the applicant was disabled under the CPP rules.

For late applications regardless of the date disability began this will be four months from the date of application.

CPP Disability and the Incapacity Provision

- If the applicant was physically or mentally incapable of forming or expressing the intent to make an application for CPP disability benefits, and they were also incapable of asking someone else to apply on their behalf, they should request the **incapacity provision**. They must apply **within a year** after they regained their capacity.

- Most late applications do not qualify for this provision.
- The applicant will need to be able to provide the objective medical documentation that they were so disabled they were unable to make decisions or ask other people to help with decisions.

Child Rearing Drop-Out Provision

- The years where a parent had little or no earnings while caring for a child under the age of seven can be excluded from the four out of six year rule calculation. While a person will still need four years of valid contributions it may be possible to extend the time during which they can be made.

Credit Splitting

- If HRSDC is aware that the person applying for CPP Disability benefits is divorced or separated they will mail off an application for a credit split.
- Credit splitting allows the lower income earner to claim part of their ex-partner’s CPP contributions from the time that they were living together.
- Credit splitting may help someone qualify for CPP Disability even if they have never worked.

If the application is not approved

Don’t automatically give up. More than half of the applications submitted to Service Canada are denied at application.

Remember if they give up and later reapply the retroactive benefits will be calculated based on the date Service Canada received the most current application.

Appeal Stage 1

The Reconsideration Process

Starting the reconsideration

If HRSDC turns down the CPP application people have 90 days to write to Service Canada and let them know that they would like them to reconsider their decision.

The person who reviews the reconsideration will not be the same person as the one who denied the application

Reconsideration procress

With a reconsideration you can provide new information if it will help the case.

This can include letters from doctors and other health professions that address the reasons why the application was denied.

HRSDC may also seek additional medical information or may ask the applicant to see another doctor.

The reconsideration can take several months before they will make a decision.

Reasons an application for CPP-D might be denied

- “You do not have sufficient contributions.”

Remember that CPP cannot grant CPP Disability on humanitarian grounds.

If someone does not have sufficient contributions to qualify for CPP no matter how far they appeal the denial they will continue to be denied.

Receipt of CPP Early Retirement

CPP Disability cannot pay benefits to someone who has been collecting Early Retirement for more than 15 months.

CPP Disability benefits cannot consider any health conditions or disabilities that started **after** CPP Early Retirement benefits began.

You do not have a disability that is both **severe** and **prolonged** under the CPP legislation

- Remember CPP is all about employment often in a denial you will see:

While you may not be able to do your previous job as _____, we concluded that you should still be able to do some type of work. We understand that you have limitations. However, we concluded that the information in the file does not show that your limitations prevent you from doing some form of work.

- Remember an applicant must show not only are they unable to do their old job but that their disability is so severe it would prevent them from doing any sort of work.
- If, for example, the doctors reports say that they are no longer able to do physical work and cannot bend or lift, HRSDC may assume they could do some form of lighter work.

- Sometimes CPP-D applications will be denied because HRSDC has decided that the health condition will not be **prolonged**.
- This can happen if there are up coming treatments or surgeries in the medical information.
- This will also happen if there is medical evidence indicating that a full recovery is expected

Late applicants

- HRSDC will apply the Late Applicant Provision if someone does not meet the four out of six year test immediately before they apply for CPP Disability.
- Late applicants have to prove that their health has stopped them from working ever since their MQP which may be a considerable time in the past.

- The more time that passes between acquiring a disability and submitting an application the more difficult it may become to collect medical evidence in support of the application or appeal

Step 1: Writing to HRSDC

- You must right to HRSDC requesting a reconsideration within 90 days of receiving your denial letter.

To Whom it May Concern,

I would am requesting a reconsideration of the decision to deny me CPP Disability dated _____ as I do not agree with the medical adjudicator's decision.

Sincerely,

Name:_____ SIN:_____

Step 2: Requesting the file

- To get a copy of the file you must send in an *Info Source: Personal Information Request* form.

- You can get this form by calling HRSDC toll free at 1-800-277-9914, or online at http://www.tbs-sct.gc.ca/tbsf-fsct/350-57-eng.pdf.

The file will include

- The completed CPP application
- The doctor’s medical report
- The disability summary sheet which will tell give HRSDC’s reasoning for why they denied your claim.
- Any other documentation that HRSDC may have collected such as clinic notes and specialist reports that you may not have seen.

- Use the disability summary sheet to help guide the review of the file.
    - Did the medical adjudicator miss something important?
    - Have they overlooked any of the information?
    - Is there information missing that would address the medical adjudicator’s reasons for denying your application?

- To have the best chances of success you need to address the reasons why CPP have denied the application. People should start by answering these three questions:
    - Does your disability prevent you from working regularly?
    - Is your condition unlikely to improve in the foreseeable future?
    - Does the medical information in the file acknowledge the limitations that your disability cause you in terms of employability?

Supporting medical documentation

- People may need to ask their doctors and allied health care providers to provide information in support of the appeal.
- This information needs to address the reasons why they were denied the disability benefit and the ways that they fit the definitions of severe and prolonged.

Who pays for the medical information?

- HRSDC will only pay for medical letters that they request. People should ask doctors about any costs involved before requesting their letters.
- HRSDC will sometimes reject the opinion of a GP if there is contradictory information from a Specialist. You must be prepared to address this issue.

Writing a personal letter

- Biography
  - Age, education level etc.
- Personal experience of disability.
  - Symptoms
  - Treatments tried and their impacts
  - What a typical day looks like with examples of limitations
  - How disability has affected your ability to work or when you were working impacted your performance.

- The time it takes for a reconsideration request is variable. If HRSDC is waiting for additional information from doctors it may take longer to get your answer.
- Do not rush them. If the new medical adjudicator is rushed they will make a decision based on the information in the file and often that will be to deny the disability.

What if HRSDC asks me to do something like see a doctor or a specialist?

It is very important to comply with these requests. If a person ignores the medical adjudicator's request that they see a doctor or a specialist they will be putting the appeal at risk.

HRSDC will be able to use that as evidence in later appeals.

If the Reconsideration is Successful

- You can expect to receive a retroactive payment that is backdated to the time CPP recognized your disability. Remember if you submitted your application late they will not be able to go back to the date your disability started.

If your Reconsideration Request is not Successful.

- Don’t give up! If there are sufficient contributions to CPP and if the disability prevents them from working you can appeal to the Social Security Tribunal.

Appeals Stage 2

Appeals to the General Division of the Social Security Tribunal

Appeals to the General Division

- An appeal must be filed within 90 days of having received the denial letter.
- To start an appeal a Notice of Appeal must be completed.
- The Notice of Appeal is available online, over the phone or attached to this package.

The first two pages of the Notice of Appeal to the General Division includes instructions for submitting an appeal.

The Appeal will not be considered until all mandatory information has been submitted.

Tribunal sécurité sociale

NOTICE OF APPEAL to the SOCIAL SECURITY TRIBUNAL (SST) - GENERAL DIVISION

for individuals seeking to appeal the reconsideration decision made by Human Resources and Skills Development Canada (HRSDC) regarding their **Canada Pension Plan (CPP)** Pension/Benefit

INSTRUCTIONS FOR SUBMITTING AN APPEAL

Disponible également en français

BEFORE YOU SUBMIT AN APPEAL

You must complete ALL mandatory (required) fields.

- The appeal will not be considered filed until all mandatory information has been provided.
- Appellants are encouraged to use the interactive (electronic) versions of the Notice of Appeal forms. The interactive version of the Notice of Appeal form automatically highlights the mandatory fields.

Note: HRSDC may also be referred to as Service Canada.

1 - APPELLANT INFORMATION (PAGE 3)

Section 1 is to be completed using the Appellant's personal and contact information.

The following fields, in Section 1, are mandatory:

- ☐ First Name
- ☐ Last Name
- ☐ Social Insurance Number (SIN)*
- ☐ Address
- ☐ City
- ☐ Province/Territory/State
- ☐ Postal/ZIP Code
- ☐ Telephone Number
- ☐ Fax Number (if applicable)
- ☐ Email Address (if applicable)

* If the appeal concerns a Survivor, Orphan, Death, or Disabled Contributor's Child Benefit, include the Contributor's SIN.

2 - DECISION UNDER APPEAL (PAGE 4)

Section 2 is to be completed using information about the reconsideration decision and the reason(s) for the appeal.

If you need more space, continue on a separate sheet. Clearly indicate the question number on the separate sheet.

The following fields, in Section 2, are mandatory:

- ☐ 2(A) Date you received the reconsideration decision from HRSDC
- ☐ 2(C) Reason(s) for the Appeal - Tell us why you are appealing the reconsideration decision

Your appeal must be received by the SST within 90 days of the date that you received the reconsideration decision (including mail time).

If the appeal is being made late (more than 90 days after receipt of the reconsideration decision), you must complete Section 2(B), Reason(s) for Late Appeal, and address the following criteria:

- ☐ Reasonable explanation for the delay
- ☐ Continuing intent to appeal
- ☐ Existence of an arguable case
- ☐ Prejudice to HRSDC or (other party if applicable)
- ☐ Any other reason

Space has been provided in 2(D) to record any additional documentation submitted in support of the appeal.

3 - REPRESENTATIVE INFORMATION (PAGE 5)

Section 3 is to be completed based on whether the Appellant is represented.

The following fields, in Section 3, are mandatory:

- ☐ Fill the appropriate circle based on whether the Appellant has a Representative. Only fill one circle.

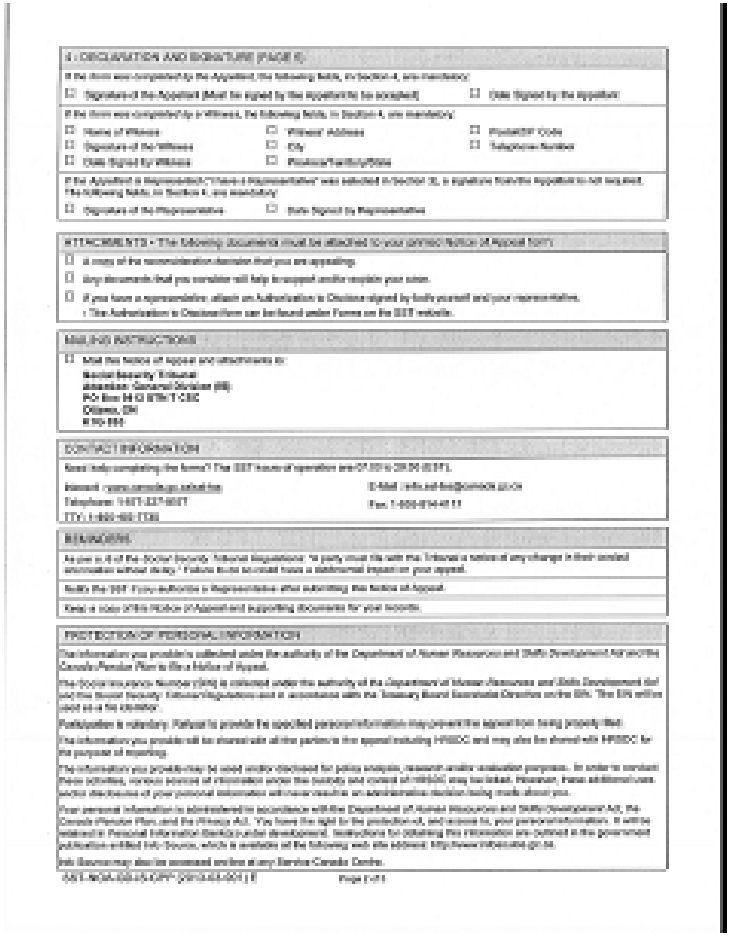
If the Appellant has a Representative (i.e. "I have a Representative" was filled), an Authorization to Disclose form must be submitted with this Notice of Appeal and the following fields are mandatory:

- ☐ Representative's First Name
- ☐ Representative's Last Name
- ☐ Representative's Address
- ☐ City
- ☐ Province/Territory/State
- ☐ Postal/ZIP Code
- ☐ Telephone Number
- ☐ Fax Number (if applicable)
- ☐ Email Address (if applicable)

The second page also gives the contact information for the SST.

Mailing address:
Social Security Tribunal
Attention: General Division
PO Box 9812 STN CSC
Ottawa, ON
K1G 6S3

Internet: www.canada.gc.ca/sst-tss
Phone: 1-877-227-8577
TTY: 1-800-465-7735
Fax: 1-855-814-4117
Email: info.sst-tss@canada.gc.ca



NOTICE OF APPEAL - GENERAL DIVISION
INCOME SECURITY SECTION - CANADA PENSION PLAN

FOR OFFICE USE ONLY Date Stamp

1 - APPELLANT INFORMATION

CONTACT FOR THE PURPOSE OF THIS APPEAL ◯ Mr. ◯ Mrs. ◯ Miss ◯ Ms. ◯ Other		Correspondence Language ◯ English ◯ French
First Name	Last Name	
Appellant's Social Insurance Number	Contributor's Social Insurance Number (if applicable) See: Page 1 Instructions	

CURRENT HOME ADDRESS		
Address (No., Street, Apt., R.R.)		City
Province / Territory / State	Country	Postal / Zip Code

MAILING ADDRESS if different from home address		
Address (No., Street, Apt., R.R.)		City
Province / Territory / State	Country	Postal / Zip Code

ADDITIONAL CONTACT INFORMATION	
Telephone Number	Other Telephone Number

Do you (the Appellant) have a fax number? If yes, you must provide it.
◯ No ◯ Yes (specify) Fax Number:

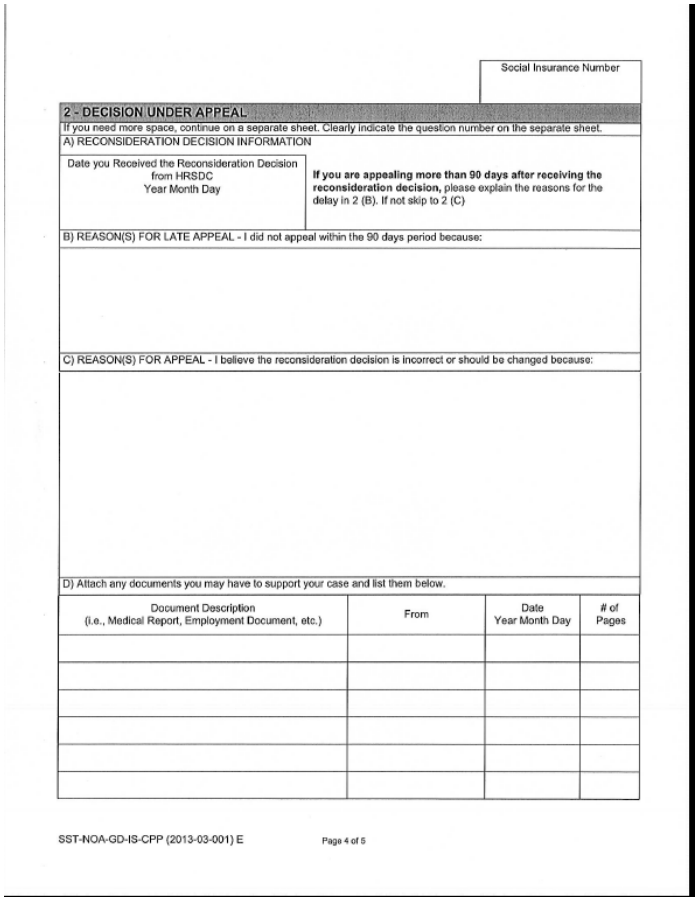
Do you (the Appellant) have an email address? If yes, you must provide it.
◯ No ◯ Yes (specify) Email Address

Best Time to Communicate (SST Regular Hours of Operation: 07:00 - 20:00EST) From: To:	Time Zone

An appeal to the General Division must be filed within 90 days of having received the Reconsideration's denial letter.

You only need to fill in Section B if you are submitted an appeal after the 90 day deadline.

Any documents that are being submitted with the Notice of Appeal should be listed in Section D. The only document that you **must** attach is the CPP Reconsideration denial letter.



Social Insurance Number

2 - DECISION UNDER APPEAL

If you need more space, continue on a separate sheet. Clearly indicate the question number on the separate sheet.

A) RECONSIDERATION DECISION INFORMATION

Date you Received the Reconsideration Decision from HRSDC Year Month Day	**If you are appealing more than 90 days after receiving the reconsideration decision,** please explain the reasons for the delay in 2 (B). If not skip to 2 (C)

B) REASON(S) FOR LATE APPEAL - I did not appeal within the 90 days period because:

C) REASON(S) FOR APPEAL - I believe the reconsideration decision is incorrect or should be changed because:

D) Attach any documents you may have to support your case and list them below.

Document Description (i.e., Medical Report, Employment Document, etc.)	From	Date Year Month Day	# of Pages

SST-NOA-GD-IS-CPP (2013-03-001) E

Page 4 of 5

Social Insurance Number

3 - REPRESENTATIVE INFORMATION

◯ I will represent myself ◯ I have a representative

If you answered "I have a representative", complete the fields below and the Authorization to Disclose form.

Representative's First Name	Representative's Last Name	Name of Company, Association, or Organization

Representative's Address (No., Street, Apt., R.R)	Suite / Unit Number

City	Province / Territory / State	Country

Postal / Zip Code	Telephone Number	Other Telephone Number

Does your Representative have a fax number? If yes, you must provide it.

◯ No ◯ Yes (specify) Fax Number:

Does your Representative have an email address? If yes, you must provide it.

◯ No ◯ Yes (specify) Email Address

4- DECLARATION AND SIGNATURE

PART 1 -TO BE COMPLETED if you do not have a Representative

I hereby appeal the denial of my Canada Pension Plan pension/benefit and declare that to the best of my knowledge and belief, all of the information in this Notice of Appeal is true and complete.

Signature of the Appellant	Year Month Day

PART 2 -TO BE COMPLETED BY A WITNESS IF THE APPELLANT COULD NOT COMPLETE THE FORM

I have completed and have read the contents of this Notice of Appeal form to the Appellant, who made his/her mark, under *Signature of the Appellant* in Part 1, in my presence.

Name of the Witness (print)	**Signature of the Witness**	Year Month Day

Witness' Address (No., Street, Apt., R.R)	City

Province / Territory / State	Country	Postal / Zip Code	Telephone Number

PART 3 -TO BE COMPLETED BY A REPRESENTATIVE OF THE APPELLANT if applicable

I hereby appeal the denial of a Canada Pension Plan pension/benefit on behalf of the Appellant and declare that to best of my knowledge and belief, all of the information in this Notice of Appeal is true and complete.

Note: If you are representing an Appellant, complete and submit a signed Authorization to Disclose with this notice of appeal form. The Appellant must sign the Authorization to Disclose.

Signature of the Representative	Year Month Day

Disponible également en français

Late Appeals

- The tribunal does have the power to accept appeals after the 90 day deadline.
- While the SST had the power to accept these appeals they retain the right to refuse a late appeal. It is best to get the appeal in on time or provide a reasonable and compelling explanation for why the appeal was delayed.

Summary Dismissal

- It the Tribunal believes that there will be no chance of success with an appeal or that it has no legal authority to allow an appeal it will be summarily dismissed.
- For example if someone does not have sufficient contributions to CPP.
- The tribunal member will mail a letter with the reasons why it wishes to summarily dismiss the appeal.
- Should you disagree with the tribunals reasoning there is the automatic right to appeal this but remember you cannot appeal based on compassionate or humanitarian grounds

Forms of Hearings

Factors considered when the SST Member is deciding what style of hearing:

- Credibility
- Complexity of the Appeal
- Information gaps in the file that requires clarification

Decision on the written record

- The member bases the decision totally on existing information in the file and any submissions or evidence submitted to the Tribunal.
- This may seem similar to a summary dismissal but a decision based on the written record does not come with an automatic right to appeal to the Appeals Division.

Decisions based on the written record are considered appropriate to SST when:

- There is no contradictory evidence.
- Credibility is not an issue.
- There is no other information needed to make a decisions.
- Should you feel credibility is an issue or that oral testimony would be needed for your client's case to be presented fully and fairly ensure that a part of the written record addresses that.

Hearing in writing

- Done through the Tribunal Member obtaining written answers to questions and then makes a determination based on the information in the file, the information that had been submitted and the answers to the questions.
- The Tribunal Member will give deadlines for submitting the answers. The Tribunal Member may follow up with additional questions if necessary.
- Seems similar to a summarily dismissal. There is not an automatic right to appeal with a written hearing.

A hearing based on written questions and answers is considered appropriate to SST when:

- The tribunal member does not antipcate having to assess credibility but information in the file needs to be clarified.
- The issue is simple, clear and plain.

Oral hearing by teleconference

- The hearing will happen over telephone. The parties are responsible for having access to a telephone on the date and time of the hearing.
- If using a cell phone you must ensure that the phone will remain charged and in use for the course of the hearing.
- If the client has no access to a telephone the Tribunal Member should be contacted as soon as possible within the time frame given in the Notice of Hearing letter.
- The hearings will now be recorded.

An oral hearing by teleconference is considered appropriate to the SST when:

- Credibility is not expected to be an issue but there are gaps of information on the file that a Tribunal Member needs to clarify before it can make a decision.

Oral hearing in person or by videoconference

- Both in person and videoconference hearings will be scheduled at a hearing location nearest the appellant’s address.
- The hearings are now recorded.
- ID requirements.

An oral hearing by videoconference is considered appropriate to the SST when:

- It is available where the participants live.
- Seeing the parties is important for the appeal.
- Multiple parties will be involved with the hearing.
- Multiple or complex issues.
- The tribunal member feels they must assess credibility.
- There are gaps in the written record that needs clarification.

An in person hearing is considered appropriate to the SST when:

- Seeing the parties is important for the appeal.
- Multiple parties will be involved with the hearing.
- Multiple or complex issues.
- The tribunal member feels they must assess credibility.
- There are gaps in the written record that needs clarification

After the Hearing

The SST have been advising people that they should expect a written decision in four to six weeks following a hearing.

If the appeal is allowed

Congratulations! But don’t relax just yet. HRSDC has 90 days from the date they receive the decision letter to apply to the SST for leave to appeal to the appeals division.

Appeals Stage 3

Appeals to the Appeals Division of the Social Security Tribunal

If the appeal was dismissed

- Regardless of the appeal format if the appeal is dismissed there are 90 days to file a Notice of Appeal with the Appeals Division of the Social Security Tribunal.
- Leave to appeal must be granted in most cases (the only exception is if you are appeal the General Division's decision to summarily dismiss an appeal)
- Appeals from the General Division to the Appeals Division are no longer de novo. The Minister is arguing that the Appeals division cannot consider any new information. It relies on past decisions that were made in the EI context. Because CPP disability claims are much different, there is room to argue that a new set of rules should be developed for these appeals.

The only time to Appeals Division will hear new information

Any appeals that have been transferred to the Social Security Tribunal and the Appeals Division from the Pension Appeals Board can still submit new information. Their appeals were filed with the expectation of a de novo appeal and the SST have stated they will honor that expectation.

Appeals to the Appeals Division MUST be based on the following grounds:

- Failure to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction
- Erred in law
- Based its decision on an erroneous finding of fact that is made in a perverse or capricious manner with out regard to the material before it.

One of the reasons why we are encouraging people to object on record if they are not provided with an in person hearing (if requested) is to lay the groundwork to make a Appeals case based on what would be considered *Procedural Fairness.*

As the Tribunal Hearings are now recorded if you are going before the Appeals Division you should obtain a copy of the recorded General Division hearing.

The Appeals Division has the power to:

- Dismiss an appeal
- Allow an appeal
  - Give the decision that should have been given
  - Send the appeal back to the General Division
  - Rescind or vary decisions

When the Appeals division refers the appeal back to the General Division

- There are no regulations compelling the General Division to hear or ignore new information provided on cases referred to them from the Appeals Division. It is up to each individual Tribunal Member to decide on a case by case basis if they will allow the parties to submit any additional documentation and what time frames would be allowed to do so.
- In some cases the Appeals Division may give specific directions for a certain decision to be made in which case additional submissions would not be appropriate or necessary.

Appeals where it may be appropriate to provide an opportunity to provide additional submissions:

- Appeals referred back with instructions to take into account evidence or submission that were not properly considered by the original member;
- Appeals referred back with instructions to make a determination of an issue which was not decided by the original Member and / or on which parties did not make submissions;
- Appeals referred back to a new member who did not hear the matter in the first instance.

Appeals where it may not be necessary to provide an opportunity to submit additional information:

Appeals referred back because of an error in the application of a legal test, on which both parties have made submissions.

Appeals referred back because of insufficiency of reasons.

What is the next level of Appeal?

Once the Appeals Division has given their decision if either party is unhappy the next level of appeal would be Judicial Review before the Federal Court of Appeals.

What if?

What if I return to work while collecting CPP Disability Benefits?

- In 2015 if your earnings are over $5,300 (gross) Service Canada will expect you to inform them.
- Benefits are not automatically stopped at that amount but Service Canada will likely ask you and your doctor some questions.

What if I go back to work and my condition worsens?

- If you left CPP Disability because you were returning to employment if your disability reoccurs and you have had to stop working it may be possible to have your benefits automatically reinstated.
- Your disability would have to reoccur within two years of you leaving CPP.
- You would have to inform Service Canada within one year after you stopped working.

What if I am working and I haven’t told Service Canada?

- Sometimes people will return to work and not tell Service Canada. This can cause problems because it can take years sometimes for Service Canada to catch on and that may mean owing them years worth of benefits.

What other benefits can I get with CPP?

- Unfortunately Service Canada do not provide any health benefits with CPP Disability.

What happens when I turn 65?

- When you turn 65 your CPP Disability benefits will change over to CPP Retirement benefits.

- It is not possible to collect both pensions at the same time.

I am over 65 why was the child portion was discontinued?

- Once you are over 65 you can no longer collect CPP Disability benefits.
- The monthly benefit paid for each child under 18 or to children between the ages of 19-26 will be discontinued once the parent collecting CPP Disability benefits is discontinued as soon as that parent turns 65.

Resources for clients

Disability Alliance BC

While we are based in Vancouver we are able to provide information and support over the phone for clients.

Toll free: 1-800-663-1278

CPP Disability Series	Disability Alliance BC	2015

CPP-D Application Guide

Series funded by the Notary Foundation of BC, the Law Foundation of British Columbia and Legal Services Society

Contents

Disability Alliance BC (DABC) has prepared this guide to help you understand how to apply for the Canada Pension Plan disability benefit (CPP-D). The guide reviews the eligibility rules for CPP-D and provides a step-by-step explanation of how to complete the application form.

About CPP

The Canada Pension Plan (CPP) is administered by the federal government. The department responsible for CPP is Employment and Social Development Canada (ESDC) – Service Canada.

The CPP program operates in every province, except Quebec, which has a similar program called the Quebec Pension Plan. The CPP benefits program includes:

- Disability benefits
- Benefits for children of people receiving CPP disability benefits
- Retirement pensions
- Death benefits
- Survivor benefits
- Benefits for children of deceased contributors

Payment Rates

Most people who work in Canada contribute to the CPP and so are eligible for a CPP retirement pension. The amount of CPP retirement benefits a person receives is based on the contributions on annual earnings they make above a minimum amount.

The CPP-D amount a person receives is based on a portion of his or her estimated retirement benefit and a flat rate amount. In 2015, for example, the monthly flat rate amount was $465.84. CPP-D is linked to inflation so the rates change slightly each year. In 2015, the maximum monthly benefit amount was $1,264.59. The average monthly benefit in 2015 was $902.22.

For people who are receiving CPP disability benefits, the plan also provides a benefit for each child under the age of 18. In 2015, the amount was $234.87. This benefit is for the child and is paid to the custodial parent. When a child turns 19 and continues to attend school on a full-time basis, the benefit will then be paid directly to him/her until he/she reaches the age of 26.

If you find that your monthly CPP-D rate is less than the provincial disability assistance rate (for example, the maximum amount for a single person with the Persons with Disabilities designation is $906 a month), you may be eligible for a top-up from the provincial government. Contact your local Ministry of Social Development and Social Innovation (MSDSI) office for more information about this.

Qualifying for CPP-D

To qualify for CPP-D, you must:

- Be under 65 years of age
- Have made the required amount of contributions
- Have a "severe and prolonged" disability as defined in the CPP legislation

Contributions

To qualify for CPP-D, you must have worked and contributed to CPP for a certain amount of time.

The Minimum Qualifying Period (MQP)

The MQP is the minimum period of time that you must have worked and contributed to CPP in the years immediately before you became disabled (as defined in the CPP legislation) in order to be eligible for CPP-D benefits.

The MQP is calculated by looking at the number of recent calendar years in which you have made contributions to CPP. In order to qualify for CPP-D, you must prove that you became disabled by the end of your MQP. The end of a person's MQP is usually December 31st of his or her last qualifying year.

If you have worked only four years, then you must have made valid contributions to CPP in **each** of these four years in order to be eligible for CPP-D.

If you have worked more than four years, then in most cases it is necessary for you to have made valid contributions to CPP in at least **four out of the last six years** before you became disabled. This is known as the "four out of six year rule." It applies to anyone who became disabled **on or after January 1st, 1998**.

But if ESDC determines that you became disabled earlier, between **January 1, 1987 and December 31, 1998**, the rules are different. You must have worked and contributed to CPP in either:

- **two of the last three years** before you became disabled, or
- **five of the last ten years** before you became disabled.

Finally, if you are applying for CPP-D after February 29, 2008, and ESDC determines that you became disabled **on or after December 1, 2006**, and if you have made contributions to CPP for 25 years or more, then you do not need to have contributions in four out of the last six years. You can qualify if you worked and contributed to CPP in just **three of the last six years** before you became disabled.

Note | ESDC is currently limiting its application of this rule to people who became disabled on or after December 1, 2006, but there is a good argument the rule should apply to anyone who applies after February 29, 2008, regardless of when they became disabled.

Special Provisions

In some situations, or "special provisions", you may be eligible for CPP-D even if your contributions do not meet the requirements outlined above. Please see Appendix A in this guide for details about these special provisions.

Other Issues Related to Contributions

- If you worked in Quebec, your Quebec Pension Plan contributions can be combined with your CPP contributions.
- If you have worked in another country that has a social security agreement with Canada, contributions to the social security program in that country may be used to help you meet the CPP contribution requirement.
- If you are separated or divorced (including a common-law relationship), you may claim part of your ex-partner's CPP contributions, while you were living together. This is called "credit splitting" and these contributions or credits may help you qualify for CPP-D, even if you have not worked.

Definition of CPP-D

If you have made the required contributions, the next step is to show that you meet the definition of disability contained in the CPP legislation. To do this you must show that your disability is both **severe and prolonged**.

The CPP legislation defines "severe" as a condition that makes "a person incapable of regularly pursuing any substantially gainful occupation". "Prolonged" is defined "as such severe disability is likely to be long continued and of indefinite duration or is likely to result in death…"

Please see Appendix B in this guide for the exact wording of the definition.

The Application

Step 1 • Obtain and Review Your Application

You can get a CPP-D application form by contacting your local Service Canada office or by phoning the general information number: 1-800-277-9914. Application forms can also be downloaded and printed from the Service Canada website at www.servicecanada.gc.ca.

The application includes a General Information Guide to help you fill out the form. We recommend you read the Guide before you begin.

- The **Application for CPP-D** asks for basic information about the applicant and any dependent children.
- **Questionnaire for Disability Benefits**. We will focus on this form in Step 2 of this guide.
- The **Authorization to Disclose Information/Consent for Medical Evaluation** allows ESDC to obtain medical, employment and educational information about you.
- A **Medical Report** to be completed by the doctor who is most familiar with your disability.
- The **Child-rearing Dropout Provision** form should be completed by applicants who made low or zero contributions to CPP because they were caring for children under the age of seven. Please see Appendix A in this guide for more information on this.

Step 2 • Filling Out the Questionnaire for CPP-D

Some questions in the Questionnaire for CPP-D are particularly important and may influence the outcome of your application. Most of the questions we review in this section give you the opportunity to describe the nature and extent of your disability.

The more thorough the information you provide, the better. We recommend that, when you fill in the application, you describe a day when the limitations associated with your disability are the most severe. In this way, ESDC will have the best opportunity to see how your disability affects your day-to-day life and your ability to work.

The following questions on the questionnaire need to be carefully and thoroughly answered.

Question 5

The date you stopped work is entered here. This is important because benefits are payable from the fourth month after the applicant is considered to have become disabled. In this section, you must also explain why you stopped working. If a disability was a factor in ending your employment, it is important to explain that.

Questions 11 and 12

If you show that you plan to return to work, or that your doctor thinks you should, your application will probably be turned down. In order to qualify for CPP-D, you must show that you will not be able to work for the foreseeable future.

Question 16

This question asks when you felt you could no longer work because of your disability. The answer given here will often match with Question 5 which asks for your last day of work. If the two dates are different, it is important to explain why.

Question 18

This question asks you to describe your “illness or impairments”. Clearly state the nature of your disability or disabilities here.

Question 19

Before answering this question about why you can't work, it is helpful to complete Question 22 first. Once you have a good picture about your limitations, it is easier to explain why you can't work at any job and why an employer, if made aware of your limitations, would not hire you.

Question 20

If you have other "health-related conditions or impairments" which have not been described in Question 18, they should be explained thoroughly here. Even if your "primary" disability is not severe enough, according to the CPP definition, the combination of other limitations or impairments may make you unable to work.

Question 21

Another way to explain the extent of your disability is to describe how it has affected non-work related activities, like hobbies, sports or volunteer work, and other social activities. You should describe any limitations that your disability has created in these activities.

Question 22

This section gives you the opportunity to describe how many day-to-day activities are affected by your disability. There are a series of boxes with headings such as sitting, standing, sleeping, driving, etc., and you are asked to describe limitations in these areas.

Again, this section should be filled in describing a "bad" day to give the most realistic picture of your disability. For each activity, try to be as detailed as possible about what you **cannot** do, rather than what you can do.

Please see Appendix C in this guide for step-by-step assistance on how to answer this question.

Questions 23-25

These questions focus on the medical practitioners you have seen over the past two years. Include all your medical practitioners and any hospital stays you have had.

Questions 26-29

List all medications and treatments you have had. Treatment includes physiotherapy, chiropractic visits and counselling. Also list any assistive devices that you use.

Question 30

We recommend that you indicate that you would consider vocational rehabilitation, if your condition improves.

TIP | Remember to sign the questionnaire and put your Social Insurance Number (SIN) on every page.

Step 3 • Medical Report

As far as ESDC is concerned, the Medical Report is the most important part of the application. Your doctor must provide details about your medical condition(s), history, prognosis and treatment.

You should ask the doctor who knows the most about your disability to complete the Medical Report. We recommend that you speak to this doctor, before giving them the forms, to see if they support your application. It is a good idea to tell the doctor how your condition affects your daily life.

Remember, if you have a new doctor who does not know you very well, they may not be able to provide enough detail to ESDC. It may be a good idea to schedule a couple of visits before you ask the doctor to complete the Medical Report.

ESDC suggests that your doctor submit any reports from specialists you have seen. Speak to your doctor about letters and reports in your file.

TIP | Remember, in order to qualify for CPP-D, your condition must be both severe and prolonged.

Some Tips for Talking With Your Doctor

- Make an appointment to talk about your CPP-D application. When you visit your doctor, it's a good idea to show your doctor the sample letter provided in Appendix D in this guide or use the letter as a model for writing your own.

- Ask your doctor whether or not they feel that your disability creates a severe barrier to employment, not only now, but in the future.
- Ask your doctor how long your disability is going to last. Your doctor does not have to indicate that you will be disabled for the rest of your life but he/she should indicate that your disability will not improve for the foreseeable future.

If your doctor is not supportive, consult an advocate.

Who Should Fill Out the Medical Report?

The General Practitioner (GP)

The advantage of using information from a GP is that they are probably the doctor who knows you the best. Also, if you have more than one disabling condition, the GP may have the best understanding of how all your disabilities affect you and your ability to work.

The Specialist

The advantage of getting information from a specialist (e.g. psychiatrist, neurologist or surgeon) is that they usually have more in-depth knowledge of a specific condition. Also, the opinion of a specialist may be given more weight by ESDC than the opinion of a GP.

On the other hand, specialists will usually only provide information on the condition that they are treating and may not know how all your disabilities interact and impact your life. Also, because they may only have seen you once or twice, the specialist might not know you as well as your GP.

Your medical practitioners have the choice of returning the completed Medical Report to you or submitting it directly to ESDC. We suggest that you ask your doctor to return the Medical Report to you so that you can send it to ESDC with your application. This will help avoid confusion and possible delays in processing your application.

Step 4 • Other Supporting Documentation

You can include additional documentation with your application.

However, review this documentation carefully. It will not help your application if the medical reports are out of date or if a doctor indicates that you should be able to return to work in the near future.

Other health professionals can be asked to provide support letters (e.g. a chiropractor, physiotherapist or psychologist). Information that describes how your disability affects your daily life and your ability to work can be very useful.

Family and friends can also be asked to provide letters, although this kind of information is often considered of secondary importance by ESDC.

Step 5 • Putting Your Application Together

A complete application will include:

- The Application for Disability Benefits
- The Questionnaire for Disability Benefits
- The Authorization to Disclose Information/Consent for Medical Evaluation
- The Medical Report
- The Child-rearing Dropout Provision form (if relevant)
- Any other supporting documentation you have obtained

Step 6 • Submitting Your Application to ESDC

The General Information Guide included with your application outlines the steps you need to take to ensure that ESDC receives all the necessary information.

A brief overview

If you are mailing your application:
Indicate your Social Insurance Number on all the pages.
Sign and date all forms.
Enclose the Medical Report from your physician.
If your children do not have a social insurance number, enclose proof of birth (certified copies are acceptable).

TIP | If you are mailing your application, be sure to keep a photocopy for your records.

If you are submitting your application in person:

- Go to your local Service Canada office.
- If you have children and they do not have a social insurance number, bring proof of their birth to the appointment with you.
- Ask the staff person how long it will take to receive a response.

Review page 4 of the General Information Guide to ensure that you have the right documents.

An adjudicator will usually phone you to confirm that your application has been received and to answer any questions you may have. Your adjudicator may also phone you if they need more information.

If your application is approved

Congratulations! You will receive your first payment about 4 to 6 weeks after your application is approved. Your first payment will consist of a retroactive lump sum and a monthly benefit payment cheque. Your lump-sum amount starts accumulating four months after ESDC has determined you were disabled under the CPP rules. Remember CPP is taxable income. Phone 1-800-277-9914 for more information.

If your application is not approved

If your application is denied, you can appeal the decision within 90 days. Please see our CPP-D publication, *Appeal Guide: Part One–The Reconsideration Request*.

Appendix A | Special Provisions (CPP Contributions)

If your contributions into CPP do not meet the requirements outlined in the "Qualifying for CPP-D" section of this guide, you may still be eligible if one of the special provisions below describes your situation.

Late Applicant Provision

This may be used by people who did not apply for CPP-D as soon as they became disabled. When people wait too long to apply, the contribution rules may mean they are ineligible for benefits.

When someone applying for CPP-D has not paid enough into CPP under the current contribution requirements, ESDC automatically looks at his or her contributions to see when they last paid enough into CPP to qualify for benefits. For example, if someone has enough contributions between 1987 and 1997 (but not after that date) the rules that would apply to them would be the ones that were in place between 1987 and 1997.

Under the Late Applicant Provision, an applicant must prove they were disabled by the MQP date and prove that the disability has been continuous from that date until the present.

Child Rearing Drop-Out Provision

Parents, who have taken time out of work to raise children under the age of seven and were in receipt of the family allowance or child tax credit, may apply for this provision. If the parent had little or no earnings during these years, they can be excluded from the rule that is used to calculate their contributions. Although the parent would still need valid contributions, this provision could extend his or her MQP.

Incapacity Provision

When a person is unable to apply for CPP-D benefits because of the severity of their physical or mental condition, this provision enables them to apply at a later date. You still need to meet the MQP requirements, but this provision could help you to receive more retroactive benefits.

Automatic Reinstatement Provision

When a person who was receiving CPP-D has returned to work and then finds that she cannot continue because of the same or related disability, she can apply to have her CPP-D restarted. This is only possible if you stop working within two years of when you came off CPP-D. You must tell ESDC within one year from the date you stopped working that you need to have your benefits reinstated.

Automatic Reinstatement means you do not have to go through the same process that you did when you first applied for CPP-D. However, you have to fill out an application for reinstatement and you need a letter from your doctor saying that the same condition prevents you from working. Once ESDC accepts an application for reinstatement, CPP-D benefits begin the month after the person is unable to work. This rule is for people who were on CPP-D, returned to work and then stopped receiving benefits as of January 31st, 2005 or later.

Fast-track Reapplication Provision

This provision is only available for people who return to work after receiving CPP-D, but stop again within five years because of the same or related disability. In this case, you must have made valid contributions in each year since you started working. After five years, the standard application process and four out of six year rule apply.

Other Issues Related to Contributions

If you worked in Quebec, your Quebec Pension Plan contributions can be combined with your CPP contributions.
If you have worked in another country that has a social security agreement with Canada, contributions to the social security program in that country may be used to help you meet the CPP contribution requirement.

If you are separated or divorced (including a common law relationship), you may claim part of your ex-partner's CPP contributions during the time that you were living together. This is called "credit splitting" and these contributions or credits may help you qualify for CPP-D, even if you have not worked.

Appendix B | CPP Legislation Definition of Disability

Section 42(2) of the Canada Pension Plan defines disability. It says that:

(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a **severe** and **prolonged** mental or physical disability, and for the purposes of this paragraph,

  i) a disability is **severe** only if by reason thereof the person in respect of whom the determination is made is **incapable regularly of pursuing any substantially gainful occupation**, and

  ii) a disability is **prolonged** only if it is determined in prescribed manner that the disability is likely to be **long continued** and of **indefinite duration** or is likely to result in death; and

(b) a person shall be deemed to have become or to have ceased to be disabled at such time as is determined in prescribed manner to be the time when he became or ceased to be, as the case may be, disabled, but in no case shall a person be deemed to have become disabled earlier than fifteen months before the time of making any application in respect of which the determination is made.

(R.S.C. 1985, c.30 (2nd Supp.), s. 2(2)

Appendix C | Question 22

Question 22 is a functional assessment to evaluate your physical and cognitive abilities. It is very important to answer each part of this question in as much detail as possible. Most of us want to be seen in our best light. However, please remember to provide a realistic picture of your disability by describing a "bad day".

As you complete the various sections of Question 22, it may help you to use the questions below as a guide.

Sitting/standing

- How long can you sit comfortably? What happens to you when you stay in one position too long? Does it cause pain? Where? Do you need to use any type of special back support or foot rest? Do you need to sit in a specific type of chair? What do you have to do once discomfort sets in?
- How long can you stand in one place? Do you need support to stand? Does standing cause you pain? Where? What happens if you stand for too long?

Walking

- How far can you walk and how long does it take you? Do you need to stop and rest? What happens if you walk too far? Can you walk up and down hills or stairs, or are you limited to flat ground? Do you lose your balance? Does walking cause pain? Where?

Lifting/carrying

- How much weight can you pick up? How far can you carry it? What happens to you when you carry something? Does it cause pain? Where?

Reaching

- Can you reach up for things? Can you reach across for things (e.g. to the back of a cabinet)? What happens when you try? Does it cause pain? Where? Does reaching affect your balance?

Bending

- Can you bend over to pick an object off the floor? Does it cause pain or cause you to lose your balance? Do you get dizzy? Can you only bend from a seated position? Does it cause pain? Where? Do you need to hold onto a firm surface when you bend over?

Personal needs

- Do you need help to feed yourself? Do you have trouble swallowing? Do you have any other problems with eating? Do you need assistance to get in and out of the shower or bath? Do you need special devices (bath seats, grab bars, etc.)? Can you reach up to wash your own hair? Do you need help getting dressed?

Bowel and bladder habits

- Do you need to get up at night to use the washroom? Are your outings away from home restricted by the need to be near a washroom? Do you have any other problems in this regard?

Household maintenance

- Are you able to do your own cooking? Do you have any restrictions, such as simple meals only, because you aren't able to stand very long? Do you need help shopping–reaching items from store shelves, carrying bags, putting groceries away, etc.? Can you do your own cleaning–making the bed, laundry, using strong smelling cleansers, washing floors, vacuuming, etc.? What happens when you do? Does it take much longer than it would a person without your medical conditions?

Seeing/hearing

- Do you have any problems with vision or hearing–blurred vision, poor night vision, ringing in your ears, etc.?

Speaking

- Do you have any problems with your voice? Do you sometimes have to struggle to find the words you want? Do the wrong words come out?

Remembering

- Do you forget things easily? What kinds of things (appointments, today's date, your own phone number or other important items)? Do you start something, leave the room and completely forget what you were doing? Do you forget routine things, like taking medications?

Concentrating

- Do you lose your place in a conversation or when reading a book? Can you follow the plot of a TV show or movie? Do you remember what you have read or watched?

Sleeping

- How well do you sleep at night? Do you lie awake for a long time or fall right to sleep and waken several times a night? Do you need medication to help you sleep? Do you have a hard time finding a comfortable position because of pain? Do you feel rested and refreshed when you get up in the morning?

Breathing

- Do you have any breathing problems such as shortness of breath? Does extreme heat or cold affect your breathing? Do you stay inside when the air quality index is high? Do you lose your breath when walking along the street or climbing stairs?

Driving a car

- Are you able to drive for only short distances? Does driving cause you pain anywhere? Have you had to stop driving because of your condition? (Your answer to this question should be consistent with your response to the sitting/standing section of Question 22).

Using public transit

- Are you able to use the buses and/or transit system? What happens if you do? Do crowds of people or the starting or stopping motions bother you? Do you need to have a seat in order to use transit?

Appendix D | Sample Letter for Your Doctor

Date
Name
Return address

Dear Doctor _____:

I am writing to ask you to complete a Medical Report for my application for Canada Pension Plan disability benefits. I am enclosing the Medical Report form.

In order to qualify for CPP disability benefits, I must provide medical evidence to show that:

- ever since I last worked (date _____), my disabilities have prevented me from regularly maintaining "substantially gainful" employment in any job (not just my previous job); and that
- my condition is not likely to improve for the foreseeable future.

If you are able to complete the Medical Report for me, please include:

- A list of all my medical conditions and symptoms (Questions 3-4)
- All relevant medical reports, letters and test results (Question 6A).
- A description of all the functional limitations arising from my impairment (Question 6B).
- A list of all the medications and treatments I have tried, and an indication of whether they have helped or not (Questions 8-9).
- A realistic (rather than an optimistic) prognosis (Question 10).
- Comments on how my impairment regularly prevents me from pursuing and maintaining gainful employment (Question 11).
- Comments on whether I could realistically be retrained for other types of work (Question 11).

I would be happy to discuss my application with you. If possible, please show me the form when you have completed it, so that we can go over it together before it is submitted. Thank you for your help with my application.

Sincerely,
[Name & Signature]

Appendix E | Contacts and Resources

Employment and Social Development Canada (ESDC) – Service Canada

> For applications and Reconsideration Requests

The mailing address for Service Canada depends on which province or territory you live. Contact Service Canada by phone to find out which mailing address you should use. For BC residents, the contact information is:

PO Box 1177 Victoria, BC V8W 2V2
Ph: 1-800-277-9914 (English)
Ph: 1-800-277-9915 (French)
TTY: 1-800-255-4786
Website: http://www.servicecanada.gc.ca/

Social Security Tribunal

PO Box 9812
Station T CSC
Ottawa, ON
K1G 6S3
Website: http://www.canada.gc.ca/sst-tss/cu-cn-eng.html
Email: info.sst-tss@canada.gc.ca
Telephone: 1-877-227-8577 (toll-free in Canada and the US)
613-952-8805 (from outside Canada and the US, call collect)
TTY: 1-800-465-7735
Fax: 1-855-814-4117 (toll-free in Canada)

The CPP Series is available at: www.disabilityalliancebc.org/money.htm

Prepared by Disability Alliance BC's CPP Disability Benefits Advocacy Program

204 - 456 W. Broadway, Vancouver, BC V5Y 1R3 | tel 604.872.1278

Fax 604.875.9227 | Toll Free 1.800.663.1278

Information in this guide is based on the legislation that was current at the time of writing. Legislation and policy may be subject to change. Please check the date on this guide

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CPP-D Appeal Guide

The Reconsideration Request

Series funded by the Notary Foundation of BC, the Law Foundation of British Columbia and Legal Services Society

Contents

If your application for Canada Pension Plan disability benefits (CPP-D) has been denied, you have the right to appeal. Disability Alliance BC (DABC) has prepared this self-help guide to help you with the first stage of the CPP-D appeal process: the reconsideration request. If you have had your reconsideration request denied, please see our CPP Disability Information and Assistance publication *Appeal Guide: Part Two–The Review Tribunal.*

About CPP

The Canada Pension Plan (CPP) is administered by the federal government. The department responsible for CPP is Employment and Social Development Canada (ESDC)

The CPP operates in every province, except Quebec which has a similar program called the Quebec Pension Plan. The CPP legislation provides a number of different benefits including:

- disability benefits (CPP-D)
- benefits for children of people receiving CPP disability benefits
- retirement pensions
- death benefits
- survivor's benefits
- benefits for children of deceased contributors

This guide deals with CPP-D benefits only.

Qualifying for CPP-D

To qualify for CPP-D, you need to meet three basic criteria. You must:

- be under 65 years of age
- have made the required amount of contributions to CPP in the years before you became disabled. For example, if ESDC determines that you became disabled on or after January 1st 1998, then you must have worked and contributed to CPP in four of the six years before you became disabled (please see Appendix A on page 14 of this guide for more information on contributions)
- have a **"severe and prolonged"** disability as defined in the CPP legislation. The CPP legislation defines a "severe" disability as one that makes "a person incapable of regularly pursuing any substantially gainful occupation." A "prolonged" disability is one that is "likely to be long continued and of indefinite duration or is likely to result in death…" (please see Appendix B of this guide for the exact wording of the CPPD's definition of disability).

The CPP-D Appeal Process

Stage 1	Stage 2	Stage 3
The reconsideration To appeal: write to ESDC within 90 days of receiving your denial letter from ESDC.	**Appeal to the Social Security Tribunal – General Division** Submit a Notice of Appeal form to the SST General Division within 90 days of receiving your denial letter from ESDC.	**Appeal to the Social Security Tribunal – Appeals Division** Submit an Application Requesting Leave (Permission) to Appeal form to the SST Appeals Division within 90 days of receiving the decision from the General Division.

The Reconsideration Request: An Overview

As you can see from the diagram above, if ESDC turns down your CPP-D application, you have 90 days to write to ESDC to let them know you want them to reconsider their decision. The 90 days starts from the day you receive the letter telling you that your CPP-D application has been denied.

The person who reviews your case on reconsideration will not be the same person who turned down your application.

On reconsideration, you can provide new information that you think will help your case. This can include letters from your doctor and other health professionals that address the reasons why your application was turned down. You can also include letters from family or friends who are familiar with your medical condition, although these will not carry the same weight as those from medical professionals. ESDC may also seek additional medical information or ask you to see another doctor. The review of the reconsideration can take several months.

ESDC can take several months to make a decision on a reconsideration request. If you are successful on reconsideration, and your denial is overturned, you should receive a lump-sum payment, as well as monthly CPP-D benefits.

The Denial Letter: Reasons People are Denied CPP-D

Before preparing your request for reconsideration, it is very important that you have a clear understanding of why ESDC has denied your application. Read ESDC's denial letter carefully, as many times as you need to. And, if you think it will help you, make some notes on what the letter says.

As mentioned in previous sections, to qualify for CPP-D you must be under age 65, have made the required amount of contributions and have a disability that is severe and prolonged, as defined by CPP. The letter from ESDC telling you that your application has been denied will tell you the specific reasons why the department has decided that you do not qualify.

The denial letter will usually refer to the medical reports, doctors' opinions and other documents that ESDC has reviewed. In the letter, ESDC will usually state what information it has used to arrive at its decision. Also included with your denial letter will be an information sheet entitled*:* How to Ask Canada Pension Plan (CPP) Disability to Reconsider Its Decision.

Disability is Not Severe and Prolonged

The most common reason people are denied CPP-D is that ESDC does not accept that the applicant's disability is sufficiently severe and prolonged. The standard CPP-D denial letter telling an applicant this will say:

> *You do not have a disability that is both **severe** and **prolonged** as defined under the CPP legislation.*

Severe

In Appendix B of this guide, you will see that the CPP-D definition says a person's disability is severe when the person is "incapable regularly of pursuing any substantially gainful employment". In other words, you must show that your medical condition(s) is so severe that you cannot work at any job regularly enough to earn a living.

A denial letter telling someone that his or her disability is not sufficiently severe to stop them from working may say something like this:

While you may not be able to do your job as a welder, we concluded that you should still be able to do some type of work. We understand that you have limitations. However, we concluded that the information does not show that your limitations prevent you from doing some type of work.

This means that, after reviewing the evidence, ESDC has decided that although the person cannot do his or her former job, they should still be able to do some type of work. In other words, their disability may be prolonged, but it is not sufficiently severe to qualify for CPP-D.

Keep in mind that ESDC places a lot of importance on what your doctor(s) says about your medical conditions and limitations, and on any medical reports that are submitted. It is important that your doctors' reports explain your condition and why it prevents you from working. When there is little medical evidence that clearly shows your impairment, ESDC may assume you can do some sort of work.

If, for example, your doctor says you are no longer able to perform physical activities such as bending and lifting, ESDC may decide you can do office work. Or, if your doctor says you are responding well to treatment, ESDC may assume your condition is not serious enough to stop you from working.

Prolonged

Sometimes CPP-D applications are denied because ESDC has decided that the applicant's medical condition is not prolonged. This can happen if, for example, someone applies for CPP-D, but is scheduled to have surgery for her condition. ESDC will also likely decide that an applicant's condition is neither long term nor of unknown duration (prolonged) if there is medical evidence suggesting that a full recovery is expected by a certain date.

Not Enough Contributions

The Minimum Qualifying Period (MQP) is the minimum period of time that you must have worked and contributed to CPP in the years immediately before you became disabled (as defined in the CPP legislation) in order to be eligible for CPP-D benefits. See Appendix A of this guide for an explanation of MQP.

Occasionally, an application will be denied because ESDC determines that the applicant has not contributed enough. If you believe a mistake has been made in calculating your contribution period, or you think a provision could be applied for that affects your contribution period and MQP date, you should contact ESDC right away.

NOTE | If you do not have sufficient contributions there is no basis for reconsideration. There are no provisions in the legislation that allow the Ministry to reconsider a decision on compassionate grounds.

Late Applicants

You may also be denied if you do not apply for CPP-D soon enough after you become disabled. For example, if you take too long to apply, you may not meet the four out of six year test. This is the rule that says you must have contributed to CPP for four out of the six years immediately before you apply for CPP-D.

In these situations, it is sometimes possible to use the Late Applicant Provision (for more on this Provision, see Appendix A). This allows an applicant to have an MQP closer to the onset of her or his disability. Late applicants have to prove that their health has stopped them from working ever since their MQP which, because they applied for CPP-D late, may be a considerable time in the past.

Getting Started on Your Request for Reconsideration

Step 1: Writing to ESDC

The first step in the reconsideration request process is to write to ESDC within **90 days** of receiving your denial letter to say you want them to reconsider their decision. The 90 days start from the day you receive your letter.

In your letter, you only need to say that you are requesting a reconsideration of your denial. At this stage, it is not necessary to have your case ready. You can say in your letter that you will be sending additional information later. We have provided the contact information for ESDC in Appendix C on page 17 of this guide.

Step 2: Requesting Your File

Once you have informed ESDC that you would like a reconsideration, you need to ask for your file. To do that, you need to send in an *Info Source: Personal Information Request* form. You can get this form by calling ESDC toll free at 1-800-277-9914, or you can get it online at http://www.tbs-sct.gc.ca/tbsf-fsct/350-57-eng.pdf.

Fill out the *Info Source* form and mail it to ESDC. They require an original signature and will not accept a fax or a photocopy. There are two ways that you can do this:

1. you can return it to your nearest Service Canada office or
2. you can send it to: Privacy Coordinator, Service Canada, PO Box 1177, Victoria, BC V8W 2V2.

The *Info Source* form allows you to get a copy of your complete file. It will take about 5-6 weeks to receive the file. When your file arrives, it will include:

- your application form
- your doctor's medical report
- the disability summary sheet which will tell you why ESDC denied your claim
- other documentation sent to ESDC that you may not have seen, such as letters from your doctor.

Step 3: Reviewing Your File

The disability summary sheet will tell you why your application was turned down. Read the section called "Rationale." This section contains the adjudicator's reasons for the denial of your claim.

The summary helps you to review your file. Ask yourself: have they overlooked anything important? Are there any errors or omissions in their information? This will give you an idea of the kind of material that would be important to include in your appeal. When you have finished reviewing the summary sheet, it is time to look at the rest of your file.

Review Questions 18 to 22 on the questionnaire you filled out. These questions look at your disability and your ability to work. Have you described in detail how your disability prevented you from performing the duties of your last job? Have you detailed all your limitations? This information can be used in your appeal.

Read the Medical Report that was completed by your doctor. Is it accurate? Does your doctor appear to be supportive? How has your disability been summarized? What has been said about your prognosis? Has anything been said about your ability to work? If you have more than one health condition, has your doctor included information about all of them?

Also, check to see if other medical information is included. Is there anything there that you were not aware of? Is the medical information consistent or contradictory? **Has any doctor said or implied that you are able to work or that your condition will improve?**

By answering these questions, you will focus on the most important issues. These notes will be useful as you work through the appeal process.

Step 4: Putting Your Case Together

Having written to ESDC within 90 days to tell them you are requesting a reconsideration (see Step 1 above), your reconsideration will be in process already, but you will need to do more to have the best chance of winning.

After reading your denial letter and reviewing your file, you should have a good idea why ESDC turned down your CPP-D application. This section will help you to get a clear understanding of what information you can use to satisfy CPP-D that you are eligible.

Start by asking yourself these three questions:

1. Does your disability prevent you from working regularly?
2. Is your condition unlikely to significantly improve in the foreseeable future?
3. Does your doctor(s) acknowledge the limitations that your disability causes in your daily life and your ability to work?

The answer to all these questions needs to be "yes" for you to have a chance of success with your appeal. If the answer to #3 is "no", you should speak to your doctor because, without supporting medical documentation, it will be extremely difficult to win your reconsideration request. Here are some things to consider:

- Does your doctor think you have a severe and prolonged disability? Is your doctor willing to write a letter of support and help you obtain additional information? If your doctor is willing to work with you, it will make your job a lot easier (medical letters will be covered in more detail in later sections of this guide).
- How well has your doctor described your disability? Are there existing medical reports or letters that were not submitted with your CPP-D application that can be submitted now? If you have more than one medical condition, information about how all these conditions impair your daily functioning is important. If you can help your doctor to understand in detail how your condition affects your ability to function, your doctor will be able to do a better job of supporting your case.
- Were medical reports submitted with your CPP-D application that are out-of-date, inaccurate or took an overly-optimistic view of your degree of restriction or prognosis? For example, sometimes a doctor will assume that a recommended treatment will be effective, but it was not. We suggest that you talk with your doctor about these kinds of issues because they will need to be addressed in your appeal.

- What new medical information can be obtained? This point is particularly important if your condition is getting worse over time. It may be a good idea for your doctor to refer you to specialists or other health professionals to get new assessments. However, find out how long it will take to receive this new information. If it is going to take a long time, we suggest you contact ESDC and speak to them about any deadline concerns you may have.
- Cultural, educational and social barriers to employment may be considered as factors that affect your ability to work. How realistic is it for you to be retrained for other kinds of occupations? For example, if you have limited language skills and did not complete grade 7, it may be unrealistic to expect you to work in a job that requires strong language skills.
- What has happened since you left your last job? If you have tried lighter work-related activities or a retraining program and failed, it is important to point this out. Even if you have skills, your disability may prevent you from keeping a job. Third parties, such as instructors or employers that can confirm your health-related job restrictions, can be asked for a letter of support.
- People who have medical conditions with an unclear prognosis may run into difficulty. The term “long continued” implies that a condition must be more than temporary. To qualify for CPP-D, your medical prognosis should, at the very least, establish that you are unable to return to the workforce within a foreseeable and reasonable period of time.
- Have you qualified for any other disability benefits programs since you left work? Although qualifying for one disability program does not mean you will automatically qualify for another, sometimes the medical reports associated with the other programs can be of use.
- Disabilities tend to affect people in different ways, even when diagnoses are similar. It is important to detail the particular facts of your case. For example, submitting articles about your disability from medical journals rarely makes a difference. It is much more helpful to provide a medical letter talking about the specific things you cannot do because of your disability.

Step 5: Getting Medical Letters

We have stressed in this guide the importance of obtaining good medical evidence to support your reconsideration request. We are also aware that doctors do not have a lot of time to write letters, and will often charge a fee to do so. ESDC will only pay for medical letters that they request, and not for letters you request.

Therefore, if your doctor agrees to provide a letter, it is extremely important that the letter contain the right kind of information. Specifically, **it is crucial that your doctor address the deficiencies in your application, as identified in ESDC's denial letter.**

You should talk with, or write to, your doctor clearly explaining that you need him or her to write a letter addressing the specific points on which ESDC based its denial. If possible, you should show your doctor the denial letter.

Please see Appendix D on page 19 of this guide for a sample request letter that you can use if you want to write to your doctor.

Which doctor(s) should you ask for a support letter?

The General Practitioner or Family Doctor (GP)

The advantage of information from your family doctor is that he/she probably knows you better than a specialist. Also, if you have more than one condition, your GP may have the best understanding of how your combination of disabilities affects your daily life and your ability to work. The disadvantage is that ESDC will sometimes reject the opinion of a GP if there has been a different opinion expressed by a specialist.

The Specialist

It is important to have up-to-date information from a specialist (e.g., neurologist, psychiatrist, rheumatologist) who is involved in your case. The opinion of a specialist is often given greater weight than your family doctor's opinion because they are considered to have more in-depth knowledge. The problem is that a specialist may not know you very well if you have only had a couple of visits. The specialist may also only be able to comment on one of many conditions. For example, a psychiatrist is unlikely to have information regarding a physical condition.

One option is to request support letters from all your doctors. Another option is to ask your GP to write a letter explaining how your multiple conditions combine to prevent you from pursuing gainful employment on a regular basis. If you ask your GP for a letter, it is helpful if the GP can review any reports from your specialists, and mention in the letter that he or she has done so.

We recommend that you talk to your doctor(s) before they write a letter. Find out whether they can provide the information outlined above and whether they support your application for CPP-D. Find out how much it will cost and how long it will take them to write a letter for you.

If none of your doctors are supportive, there is no point asking for a medical letter and you may wish to seek the advice of an advocate.

NOTE | CPP will only pay for letters that they request. Ask your doctor about any costs involved before requesting support letters. You can ask CPP to contact a doctor, if you believe there is new information that he or she can provide.

Step 6: Other Supporting Documentation and Your Own Letter

In addition to letters from your doctors, you may also provide ESDC with letters from other health professionals who have been involved in your treatment and care. For example, you can request letters from physiotherapists, mental health workers, nurses, podiatrists and psychologists, to name a few. Many of these people can provide relevant information that could help your appeal.

You may also provide ESDC with letters from past employers and vocational rehabilitation personnel, who may be in a position to comment on how your disability affects your ability to pursue and maintain employment.

It may also be helpful to submit documentation related to any other disability benefits programs you have applied for. Be sure to review it for relevance or for any information that could be used to discredit your appeal. Do not use documentation that contains unhelpful or confusing information.

Finally, you can also ask family and friends to provide letters, if they are in a position to comment specifically on how your disability affects your ability to pursue and maintain gainful employment.

Once you have gathered letters from your doctor and other support people, it is a good idea to write your own covering letter too. In your letter you can give:

- your personal experience of your disability, including your symptoms and the treatments you have tried;
- a profile of a typical day and examples of the limitations you live with; and
- examples of how your disability has affected your ability to perform work-related activities.

Step 7: Compiling Your Information for Reconsideration

The information you send in to support your reconsideration request should focus on the facts of your disability, and should show that you fulfill the criteria of disability, as defined by the Canada Pension Plan.

As described above, you may want to send in any or all of the following:

- a covering letter from you;
- letters from doctors;
- letters from other health professionals;
- letters from past employers, or vocational rehabilitation personnel;
- documentation about other disability benefits you may be receiving; and
- letters from friends and family.

For the best chance of success, you should have:

- sent a letter to ESDC within 90 days of the denial letter saying that you wish to appeal the decision.
- requested and reviewed your CPP-D file.
- obtained doctors' letters that provide the medical reasons your disability is severe and prolonged.
- included other support letters, where possible, that help describe the full extent of your disability.
- written a letter that explains, in your own words, how your condition affects you on a daily basis and limits your ability to work.

Before the package is sent in, make a copy of all the documentation for your records. It is also a good idea to send the documentation via registered mail. Make a note of when you mail the package, and send it to:

CPP Applications and Appeals Division
Service Canada
BC & Yukon Region
PO Box 1177
Victoria, BC
V8W 2V2

Conclusion

Once the reconsideration request is sent in, you will have to wait a few months for a decision. You can send in additional information during that time, especially if there is any change in your condition.

ESDC may also ask you to see a doctor of their choosing or may ask for updates.

It is important to comply with these requests; if you ignore them, you will put your appeal at risk.

ESDC will send you a letter that tells you whether your appeal has been accepted or denied.

If Your Reconsideration Request is Successful

Congratulations! You can expect to receive a retroactive payment that is back-dated to the time that your disability was recognized by CPP. Usually, this is a cheque for a few thousand dollars. You are also entitled to receive a monthly CPP-D cheque. This amount will depend on the contributions you have made to the Plan. Remember, CPP benefits are taxable. You may want to ask ESDC to withhold a certain amount for your taxes.

If Your Reconsideration Request is Not Successful

There may be a number of reasons why your appeal was not successful at the reconsideration stage. Because this guide only focuses on the reconsideration, we recommend that you seek the advice of an advocate or lawyer to find the best way to proceed. Please refer to our Tribunal Guide for information on how to proceed to the next level of appeal.

Remember, you have the right to appeal to the Social Security Tribunal (SST). Your appeal must be submitted within 90 days of receiving the results of the reconsideration.

Appendix A | Contributions Required to Qualify for CPP-D

To qualify for CPP-D, you must have worked and contributed or paid into CPP for a certain amount of time.

The Minimum Qualifying Period (MQP)

The MQP is the minimum period of time that you must have worked and contributed to CPP in the years immediately before you became disabled (as defined in the CPP legislation) in order to be eligible for CPP-D benefits.

The MQP is calculated by looking at the number of recent calendar years in which you have made contributions to CPP. In order to qualify for CPP-D, you must prove that you became disabled by the end of your MQP. The end of a person's MQP is usually December 31 of his or her last qualifying year.

If you have worked only four years, then you must have made valid contributions to CPP in **each** of these four years in order to be eligible for CPP-D.

If you have worked more than four years, then in most cases it is necessary for you to have made valid contributions to CPP in at least **four out of the last six years** before you became disabled. This is known as the "four out of six year rule." It applies to anyone who became disabled **on or after January 1st, 1998**.

But if ESDC determines that you became disabled earlier, **between January 1, 1987 and December 31, 1998**, the rules are different. You must have worked and contributed to CPP in either:

- **two of the last three years** before you became disabled, or
- **five of the last ten years** before you became disabled.

Finally, if you are applying for CPP-D after February 29, 2008, and if you have made contributions to CPP for **25 years or more**, then you do not need to have contributions in four out of the last six years. You can qualify if you worked and contributed to CPP in just **three of the last six years** before you became disabled. (**Note**: ESDC is currently limiting its application of this rule to people who became disabled on or after December 1, 2006, but there is a good argument the rule should apply to anyone who applies after February 29, 2008, regardless of when they became disabled.)

Special Provisions

In some situations, or special provisions, you may be eligible for CPP-D, even if your contributions do not meet the standard requirements. If you do not have the required contributions, you should consider the following provisions as you prepare your reconsideration request.

Late Applicant Provision

This may be used by people who did not apply for CPP-D as soon as they became disabled. When people wait too long to apply, the four out of six year rule may mean they are ineligible for benefits.

When someone applying for CPP-D has not paid enough into CPP under the current contribution requirements, ESDC automatically looks at her or his contributions to see when they last paid enough into CPP to qualify for benefits. For example, if someone has enough contributions between 1987 and 1997 (but not after that date) the rules that would apply to them would be the ones that were in place between 1987 and 1997.

Under the Late Applicant Provision, an applicant must prove they were disabled by the MQP date and prove that the disability has been continuous from that date until the present day.

Child Rearing Drop-Out Provision

Parents/Guardians who have taken time out of work to raise children under the age of seven and have received the Family Allowance or Child Tax Credit can apply for this provision. The years that the parent had little or no earnings can be excluded from the four out of six year rule calculation. Although you would still need four years of valid contributions, this provision extends the time during which they can be made.

Incapacity Provision

When you are unable to apply for CPP-D benefits because of the severity of your physical or mental condition, this provision allows you to apply at a later date. You still need to meet the MQP requirements, but you may receive more retroactive benefits.

Other Issues Related to Contributions

- If you worked in Quebec, your Quebec Pension Plan contributions can be combined with your CPP contributions.
- If you have worked in another country that has a social security agreement with Canada, contributions to the social security program in that country may be used to help you meet the CPP contribution requirement.
- If you are separated or divorced (including a common law relationship), you may claim part of your ex-partner's CPP contributions during the time that you were living together. This is called "credit splitting" and these contributions or credits may help you qualify for CPP-D even if you have not worked.

Appendix B | CPP Legislation Definition of Disability

Section 42(2) of the Canada Pension Plan defines disability. It says that:

(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a **severe** and **prolonged** mental or physical disability, and for the purposes of this paragraph,

i) a disability is **severe** only if by reason thereof the person in respect of whom the determination is made is **incapable regularly of pursuing any substantially gainful occupation**, and

ii) a disability is **prolonged** only if it is determined in prescribed manner that the disability is likely to be **long continued** and of **indefinite duration** or is likely to result in death; and

(b) a person shall be deemed to have become or to have ceased to be disabled at such time as is determined in prescribed manner to be the time when he became or ceased to be, as the case may be, disabled, but in no case shall a person be deemed to have become disabled earlier than fifteen months before the time of making any application in respect of which the determination is made.

(R.S.C. 1985, c.30 (2nd Supp.), s. 2(2)

Appendix C | Contacts and Resources

Employment and Social Development Canada (ESDC) - Service Canada

> For applications and Reconsideration Requests

The mailing address for Service Canada depends on which province or territory you live. Contact Service Canada by phone to find out which mailing address you should use. For BC residents, the contact information is:

PO Box 1177 Victoria, BC V8W 2V2
Ph: 1-800-277-9914 (English)
Ph: 1-800-277-9915 (French)
TTY: 1-800-255-4786
Website: http://www.servicecanada.gc.ca/

Social Security Tribunal

PO Box 9812

Station T CSC

Ottawa, ON

K1G 6S3

Website: http://www.canada.gc.ca/sst-tss/cu-cn-eng.html

Email: info.sst-tss@canada.gc.ca

Telephone: 1-877-227-8577 (toll-free in Canada and the US)

613-952-8805 (from outside Canada and the US, call collect)

TTY: 1-800-465-7735

Fax: 1-855-814-4117 (toll-free in Canada)

Appendix D | Letter to Your Doctor(s)

Date
Name
Return address

Dear Doctor _____:

My application for Canada Pension Plan Disability benefits was recently denied, and I am writing to ask you to write a letter to support my request for reconsideration.

In order to qualify for CPP disability benefits, I must provide medical evidence to show that: ever since my MQP date (_____*), my disabilities have prevented me from maintaining "substantially gainful" employment in any job (not just my previous job); and that my condition is not likely to improve for the foreseeable future.

ESDC denied my application for benefits on the basis of
(_____
_____**). This is the main point I need to address in my reconsideration.

If you are willing to provide a letter, could you please address this point, and also state:
How long I have been your patient;
A list of all my medical conditions and symptoms;
A description of all the functional limitations arising from my impairment;
A list of all the medications and treatments I have tried, and an indication of whether they have helped or not;
A realistic (rather than an optimistic) prognosis;
Comments on how my impairment regularly prevents me from pursuing and maintaining gainful employment; and
Comments on whether I could realistically be retrained for other types of work.

Please also provide any reports in my file that you think might support my application for CPP-D.

Please let me know in advance whether you will charge a fee and, if so, how much it will be. I have limited resources and would appreciate it if you could provide the letter at a reduced rate.

Thank you in advance for your help.

Sincerely,
[Name & Signature]

*The date of the Minimum Qualifying Period is usually given in the denial letter to your application.

*Insert the reason(s) why ESDC denied your application, as set out in the denial letter.

Appendix E | Advocacy Resources

Disability Alliance BC

Advocacy Access Program
For CPP-D advocacy and information.
#204 – 456 West Broadway
Vancouver, BC V5Y 1R3
Phone: 604-872-1278
Toll-free: 1-800-663-1278
Website: www.disabilityalliancebc.org

The Legal Services Society of BC

For the Electronic Law Library.
Website: www.bcpl.gov.bc.ca/ell/

The Society also operates the LawLine.
Phone: 604-408-2172 |Toll-free: 1-866-577-2525

PovNet

Website of advocacy information and updates on various community issues.
Website: www.povnet.org

The CPP Series is available at: www.disabilityalliancebc.org/money.htm

Prepared by Disability Alliance BC's CPP Disability Benefits Advocacy Program

204 - 456 W. Broadway, Vancouver, BC V5Y 1R3 | tel 604.872.1278

Fax 604.875.9227| Toll Free 1.800.663.1278

Information in this guide is based on the legislation that was current at the time of writing. Legislation and policy may be subject to change. Please check the date on this guide

Welfare Law Legislative Update: November 2014 to September 2015

*Prepared by Alison Ward, Barrister and Solicitor, Community Legal Assistance Society, October 1, 2015

There have been a number of significant changes to welfare law since the last Provincial Advocacy Training Conference in late October 2014.

SUMMARY

1. Annualized earnings exemption rolled out for all people receiving disability assistance (January 1/15)

2. Child support and spousal support claims no longer mandatorily assigned to the Ministry of Social Development and Social Innovation ("MSDSI") (April 30/15)

3. Changes to lifetime & other bans on welfare eligibility due to convictions for welfare fraud (August 1/15)

    a) End to welfare eligibility bans arising from criminal or statutory convictions for welfare fraud

    b) introduction of new rules for collection of "offence overpayments," i.e. amount of overpayment on which a criminal or statutory fraud conviction was based.

4. Child support and CPP orphans benefits received while on welfare exempted as unearned income (September 1/15)

5. Single parent employment initiative (September 1/15)

6. Increase to earnings exemption for all parents on income assistance (September 1/15)

7. Eligibility Criteria for General Health Supplements and Medical Services Only redrafted and MSO for one year for all parents who leave income assistance for employment (September 1/15)

8. New Forms Regulation and monthly stub (September 1/15)

DETAILS

1. Annualized Earnings Exemption for recipients of disability assistance

On January 1, 2015, the Ministry of Social Development and Social Innovation ("MSDSI") replaced monthly earnings exemptions with the Annual Earnings Exemption (AEE) for all clients

receiving disability assistance. This was a roll out of a pilot project from 2014, in which *some* recipients of disability assistance had an AEE.

The new AEE limits are equal to 12 times the old monthly earnings exemption for each type of family unit. Under the AEE, recipients of disability assistance can keep up to the following amount of earned income each calendar year:

- $9,600 for a single person with the Persons with Disabilities (PWD) designation;
- $12,000 for family units with two adults, where only one has the PWD designation; and
- $19,200 for family units in which both adults have the PWD designation.

These amounts are equal to 12 times the previous monthly earnings exemption.

Recipients of disability assistance must still complete a monthly report (i.e. stub) when they earn any income, and should keep track of their income themselves to know if they are close to hitting the AEE. If someone earns over the AEE, their disability benefits will end for the calendar year, but they will retain Medical Services Only coverage with MSDSI for some Schedule C health benefits.

2. Child support and Spousal Support claims no longer automatically assigned to MSDSI

Effective April 30, 2015, applicants for, and recipients of, any form of welfare benefit are no longer legally required to assign their rights to child support or spousal support to MSDSI. This amendment is closely related with a later September 1, 2015 amendment which exempts child support as unearned income for all applicants for – and recipients of – any form of welfare benefits. There are no changes to the rules regarding spousal support, and any spousal support received continues to be deducted dollar for dollar from welfare benefits.

This amendment replaced statutorily-required assignments of rights to child and spousal support to MSDSI with voluntary assignments. MSDSI must consent to accept a voluntary assignment. Where MSDSI accepts a voluntary assignment, the case is referred to contract counsel for MSDSI. MSDSI's Family Maintenance Program has been eliminated. A client can end a voluntary assignment to MSDSI at any time by written notice.

The "family maintenance services" that MSDSI may be able to provide under a voluntary assignment are limited to (free) legal help either in obtaining an initial order or agreement for child support or spousal support, or in defending against a payor's application to reduce the amount of ongoing child or spousal support or to cancel or reduce arrears.

A welfare worker (EAW) will decide if they can refer the person for family maintenance services. To be eligible for family maintenance services from contract counsel with MSDSI, the person in receipt of welfare benefits must:

a) identify the potential payor of support;

b) know that the payor lives in BC; and

c) have information to suggest that the payor earns more than the Child Support Guideline minimum amount of $10, 280 per year.

IF an EAW refuses someone family maintenance services, the person has the right to apply for reconsideration of that decision (but not to appeal that decision to the Employment and Assistance Appeal Tribunal, as it is not a decision to refuse, discontinue or reduce welfare benefits or a supplement).

3. Changes to lifetime and other bans on welfare eligibility due to convictions for welfare fraud

a) End to welfare eligibility bans arising from criminal or statutory convictions for welfare fraud

Effective August 1, 2015, the welfare legislation was amended to eliminate all bans on eligibility for welfare due to:

- Convictions under the *Criminal Code* in relation to obtaining welfare funds by fraud or false or misleading representation;
- statutory convictions under the welfare legislation in relation to obtaining welfare benefits by false or misleading representation; AND
- declarations of ineligibility that made by a civil court when someone was successfully sued on an overpayment.

People with such convictions, or declarations of ineligibility, are now eligible for **regular** welfare benefits (whether income assistance, PPMB or PWD). As a result, the category of hardship assistance that was previously available to people with bans or declarations of ineligibility has been eliminated.

b) Introduction of new rules for collection of "offence overpayments"

While there are no more bans on eligibility due to convictions, the August 1, 2015 amendments create new consequences that apply to people who would previously have been affected by bans. The gist is that benefits will be reduced by a minimum of $100 per month for each

convicted person in a family unit, for varying lengths of time depending on the kind of offence the person(s) was convicted of.

This reduction in benefits is no longer conceived of as a sanction or punishment: rather the legislation provides that the purpose of the $100 deduction is to repay MSDSI for the overpayment the client received. The heart of these changes are in sections 89 and 89.1 of the *Employment and Assistance ("EA") Regulation*, and sections 74 and 74.1 of the *Employment and Assistance for Persons with Disabilities ("EAPD") Regulation*, which mirror each other.

Those sections create two categories of overpayments:

a) "overpayments;" and
b) "offence overpayments."

Overpayments

"Overpayments" are exactly that: run of the mill, overpayments determined by the local MSDSI office, the Ministry's Prevention, Loss Management Services ("PLMS") department, or through the appeal process. The minimum deduction for such overpayments remains $10 per month. No other changes affect regular overpayments.

Offence Overpayments

"Offence overpayments" are a new category. They are defined in section 89(1) of the EA Regulation and section 74(1) of the EAPD Regulation as follows:

> "*an overpayment that is or was provided to or for a family unit as a result of a criminal code offence or Act offence for which a recipient in the family unit has been or is convicted, whether the conviction occurred before or after the date this section came into force."*
>
> **Minimum deductions:** Where someone has an "offence overpayment," section 89(3) of the EA Regulation, and section 74(3) of the EAPD Regulation, provide that there is a minimum deduction from welfare benefits of $100 per month, for each recipient in a family unit who has a conviction under either the Criminal Code or the welfare legislation.
>
> **Duration of minimum deduction**: In addition to minimum amounts of deductions, there is also a new minimum duration for the new $100 deduction. The duration of the deduction depends on what the person was convicted of, as follows:
>
> - For someone with a *Criminal Code* conviction in relation to obtaining welfare funds by fraud or false or misleading representation, the $100 per month deduction applies to their family unit **until the amount of the "offence overpayment" has been repaid in full.** The amount of the "offence

overpayment" would be determined in the criminal court documents related to the conviction.

- For someone with a conviction under the welfare legislation for providing MSDSI with false or misleading information, the $100 per month deduction applies:

    a) for **12 months of benefits for a first conviction** (unless the amount of the overpayment is less than $1200, in which case deductions stop when the amount of the overpayment is repaid in full).

    b) for **24 months of benefits for a second conviction** (again, unless the amount of the overpayment is less than $2400, in which case deductions stop when the amount of the overpayment is repaid in full.

    c) for a third or subsequent conviction, **until the amount of the third or subsequent overpayment is repaid in full.**

Exceptions to Minimum Deductions for Offence Overpayments

The August 1/15 amendments give MSDSI a discretion NOT to apply a minimum $100 deduction in some circumstances. These exceptions are found in new section 89.1 of the EA Regulation, and new section 74.1 of the EAPD Regulation.

These sections provide that MSDSI has a discretion not to apply the $100 deduction for a benefit month if:

a) MSDSI is satisfied that the family unit is **homeless or at risk of becoming homeless**; OR

b) MSDSI is satisfied that a $100 deduction "**would result in danger to the health of a person in the family unit."**

In addition, the minimum $100/month deduction does <u>not</u> apply:

- To someone who is receiving special care in a licensed community care facility under the *Community Care and Assisted Living Act* or a specialized adult residential care setting; OR

- To a family unit that includes someone with an offence overpayment if the person with the offence overpayment is not part of the family unit for that particular month (e.g. they may be temporarily absent, etc).

4. Child support and CPP orphans benefits exempted as unearned income

Effective September 1, 2015, child support is exempted as unearned income for all applicants for and recipients of welfare. This means that welfare applicants and recipients can keep all child support payments they receive, without them being deducted from their welfare benefits. There is no dollar cap on the amount of child support that is exempt each month. Child support benefits can now be used for the purpose for which they are intended under family law; i.e. the benefit of the child.

Amounts received for spousal support payments continue to be considered "unearned income" by MSDSI and are deducted dollar for dollar from any welfare benefits the recipient is entitled to.

Effective September 1, 2015, CPP orphans benefits are also exempted as unearned income for all applicants for and recipients of welfare. CPP orphans benefits are a benefit paid to the surviving natural, adopted, or *de facto* child/children of a deceased contributor to the Canada Pension Plan, until the child turns 25 years old. The monthly children's benefit is a flat rate that is adjusted annually; currently it is $234.87 per month. To qualify, the deceased parent must have made "enough" contributions to the CPP at the time of their death (i.e. If the deceased's CPP contributory period is longer than 9 years, then they must have contributed to CPP either a) one-third of the calendar years in their contributory period; or b) 10 calendar years, whichever is LESS. If the deceased parent's contributory period for CPP was less than 9 years, they must have contributed to CPP for a minimum of 3 years.

Although they are now exempted as unearned income, welfare recipients must still report the amount of any child support and/or CPP orphans benefit they receive on their monthly stub.

5. Single Parent Employment Initiative ("SPEI")

Effective September 1, 2015, single parents who have been receiving income assistance, PPPMB or disability assistance for at least the past 3 months may qualify for MSDSI's new Single Parent Employment Initiative ("SPEI"). A single parent who has not been on assistance for at least the past 3 months may also be approved for SPEI, if exceptional circumstances exist.

Eligibility for SPEI is determined by case managers with Employment Programs of BC, who are located at WorkBC Employment Services Centre.

Through SPEI, a single parent may qualify for:

- Up to 12 months of funded training for an in-demand job or a paid work experience placement, if they are assessed as needing training to gain employment. The single parent can remain on income assistance/PPMB/PWD for up to 12 months while in this program.

- Some help with child care costs while participating in training or work experience placement and, if they then leave welfare benefits for employment, for one year after that.

  This aspect of the SPEI is unclear to me. MSDSI's promotional material says single parents will be asked to apply for child care subsidy through the Ministry of Children and Family Development in order to access child care supports. It is not clear whether MSDSI will provide any additional assistance with child care. I have not seen any regulatory change that would enable them to do so.

- Transit costs to and from school. Eligibility for this help will be assessed by an Employment Program of BC case manager.

- To have the amounts of any training allowances, bursaries, scholarships and grants (other than student loan funds), and/or RESP disbursements they receive exempted as income up to the amount of the education costs and day care costs they face for their approved program of studies

- Up to 12 months of Medical Services Only benefits if they leave income assistance for employment after completion of their training (see also section 7 of this handout below).

If an Employment Program of BC case manager approves someone to attend training or work experience as part of SPEI, the person must sign a new employment plan with MSDSI to reflect their approved participation. If attendance at training is not part of their employment plan, then the person will not be able to receiving ongoing welfare benefits while attending the training program or paid work experience placement. .

The main regulatory amendments made in relation to the SPEI are:

a) EA Regulation section 16:

   The rules about when students can remain eligible for income assistance have been amended to allow full time students in a funded program of studies (i.e. for which student loans may be available) to receive income assistance if they are pre-approved for SPEI.

b) Section 8 of Schedule B to the EA Regulation and the EAPD Regulation:

   The amendment to the EA Regulation allows MSDSI to exempt training allowances, scholarships, bursaries, grants and RESP disbursements as income for recipients of income assistance in the SPEI who are full time students in a funded program of studies. The amount that can be exempted is the total of the student's "day care costs" and "education costs" for a program of studies

   Note that the definitions of "education costs" and "daycare costs" that apply to all recipients (not just those in the SPEI) have been slightly expanded in both the EA and EAPD Regulation. For example, "education costs" now include reasonably necessary student fees, supplies and equipment (not just books, tuition, transportation and

mandatory school fees). This means that students should be able to keep slightly more of certain funding they receive.

6. Increase to earnings exemption for all parents on income assistance

Effective September 1, 2015, the earnings exemption for all recipients of income assistance who care for dependent children under the age of 19 have been increased by $200/month.

Current earnings exemptions for people receiving income assistance and PPMB benefits are summarized below:

- Family unit without children under 19, on income assistance: $200/ month
- Family unit caring for dependent child under 19 (whether single parent or two parent household), on income assistance $400/ month
- Family unit caring for a disabled dependent child under 19 (whether single parent or two parent household), where the Ministry is satisfied the child's physical or mental condition precludes a parent from working more than (on average) 30 hours per week $500/ month
- Family unit that includes a person with PPMB designation (with or without children) $500/ month

7. Eligibility Criteria for General Health Supplements and Medical Services Only redrafted and MSO for one year for all parents who leave income assistance for employment

Amendments to the EA Regulation and EAPD Regulation effective September 1, 2015 completely redrafted the sections of the legislation that set out who qualifies for general health supplements under Schedule C to the regulations; and who retains coverage for "medical services only" ("MSO") after ceasing to be eligible for welfare benefits.

The sections affected are sections 66.1 to 76 of the EA Regulation, and sections 61.01 to section 69 of the EAPD Regulation.

The main intent of these amendments seems to be two-fold:

a) To provide that **all parents caring for dependent children under 19, who leave income assistance due to employment income, retain MSO coverage for one year after leaving income assistance for employment** (see section 66.4 of the EA Regulation); and

b) To simplify the drafting and structure of these sections, as they had been extraordinarily complicated.

These amendments do not seem to have been intended to effect substantive changes to eligibility for Schedule C coverage or Medical Services Only, other than providing that all parents caring for dependent children who leave income assistance for employment retain MSO coverage for one year.

That said, these sections of the regulations remain extraordinarily detailed, and it remains to be seen how implementation of these amendments will play out. Advocates should be on the alert for any change in the Schedule C benefits or MSO coverage that their clients are able to access. If you notice any such changes, please contact CASL for consultation and advice.

8. New Forms Regulation and Monthly Stub

Effective September 1, 2015, there is a new Forms Regulation under the welfare legislation. It introduces a new format for the monthly stub that recipients must submit to MSDSI by the 5th of each month, to declare any changes in their income, assets or situation. A copy of the new stub is on the next page.

Among other changes, the new stub requires child support amounts received to be reported separately from spousal support amounts received. A new category for "Work BC Financial Support" (related to the SPIE) has been created. A separate category has been created for reporting OAS/GIS benefits, which used to be lumped together with a box that was also used to report any private pension income. Overall, the categories on the new stub seem somewhat clearer than they used to be. This may assist clients to report their income, assets and other circumstances more easily.

Ministry of Social Development and Social Innovation

MONTHLY REPORT

TO CONTINUE TO RECEIVE ASSISTANCE: COMPLETE THIS FORM AND SUBMIT TO THE MINISTRY BY THE 5TH OF NEXT MONTH, OR ONLINE THROUGH YOUR MY SELF SERVE ACCOUNT (MYSELFSERVE.GOV.BC.CA)

Notice: Information on this form is collected under the authority of the *Employment and Assistance Act* and Regulation and the *Employment and Assistance for Persons with Disabilities Act* and Regulation and will be used for verification of continuing eligibility for assistance. The accuracy of the information provided on this form will be checked by comparing it against information held by other provincial, federal and private agencies. Collection, use and disclosure of the information is as authorized by the *Freedom of Information and Protection of Privacy Act*. If you have questions about the collection, use or disclosure of this information, contact the ministry.

Declaration: I understand that the ministry may disclose this information to verify continuing eligibility for assistance under the above Acts and Regulations. I declare that all of the information provided on this form to the Ministry of Social Development and Social Innovation is true and complete.

APPLICANT 1 SIGNATURE	DATE	APPLICANT 2 SIGNATURE	DATE
PRINT NAME		PRINT NAME	
TELEPHONE	SOCIAL INSURANCE NUMBER	TELEPHONE	SOCIAL INSURANCE NUMBER

NEXT CHEQUE ISSUE ▶

BENEFIT MONTH | TOTAL ALLOWANCE | SHELTER PORTION | INCOME DECLARED | INCOME DEDUCTED | OTHER DEDUCTIONS | TOTAL CHEQUE

CASE ID | CASELOAD

SINCE YOUR LAST DECLARATION:			**ARE YOU STILL IN NEED OF ASSISTANCE?**		
HAS YOUR FAMILY UNIT RECEIVED OR DISPOSED OF ANY ASSETS?	☐ YES ☐ NO		ANY CHANGES TO YOUR SHELTER COSTS?	☐ YES ☐ NO	
	Applicant 1	Applicant 2	ANY CHANGES IN DEPENDANTS OR PERSONS LIVING IN THE HOME?	☐ YES ☐ NO	
ATTENDING / ENROLLED IN SCHOOL / TRAINING?	☐ YES ☐ NO	☐ YES ☐ NO		Applicant 1	Applicant 2
ARE YOU LOOKING FOR WORK?	☐ YES ☐ NO	☐ YES ☐ NO	ANY EMPLOYMENT CHANGES?	☐ YES ☐ NO	☐ YES ☐ NO
HAVE YOU MOVED OR ENTERED A FACILITY?	☐ YES ☐ NO	☐ YES ☐ NO	ANY OUTSTANDING WARRANTS FOR YOUR ARREST?	☐ YES ☐ NO	☐ YES ☐ NO

DECLARE ALL INCOME (Submit proof) ENTER "0" IF NONE

INCOME DESCRIPTION	AMOUNT		INCOME DESCRIPTION	AMOUNT	
	Applicant 1	Applicant 2		Applicant 1	Applicant 2
EMPLOYMENT INCOME			WORKERS' COMPENSATION		
EMPLOYMENT INSURANCE			PRIVATE PENSIONS (EG: RETIREMENT, DISABILITY)		
SPOUSAL SUPPORT / ALIMONY			TRUST INCOME		
CHILD SUPPORT			OAS / GIS		
WORKBC FINANCIAL SUPPORT			CANADA PENSION PLAN (CPP)		
STUDENT FUNDING (EG: LOANS, BURSARIES)			TAX CREDITS (EG: GST CREDIT)		
ROOM / BOARD INCOME			CHILD TAX BENEFITS		
RENTAL INCOME			INCOME TAX REFUND		
ALL OTHER INCOME OR MONEY RECEIVED			INCOME OF DEPENDENT CHILDREN		

PLEASE EXPLAIN ALL CHANGES INCLUDING INCOME:

HR0081 (15/06/03) OPC 7530903053 (250/Pk)

Community Law Program

WHO ARE WE?

The Community Legal Assistance Society has been providing free legal services to marginalized British Columbians since 1971. CLAS currently delivers legal services through four programs: the Community Law Program, the Mental Health Law Program, the Human Rights Clinic, and the Community Advocate Support Line.

COMMUNITY LAW PROGRAM - HOW CAN WE HELP?

Housing

We can help you if:

- You lost your Residential Tenancy Branch hearing and you want to ask a judge to review the decision;
- There is an Order of Possession requiring you to leave your home;
- You have been evicted from your co-op;
- You are in arrears with your co-op, which puts you in danger of being evicted; or
- Your home is being foreclosed upon.

Income security

We can help you if:

- You lost your appeal to the Employment and Assistance Appeal Tribunal and you want to ask a judge to review the decision; or
- You have a Social Security Tribunal (SST) decision about your government pension benefits, including Canada Pension Plan, Canada Pension Plan disability or Old Age Security. You want to appeal the SST decision or have a court review the SST Appeal Division decision.

Employment Insurance

We can help you if:

- You have a Social Security Tribunal (SST) decision about your Employment Insurance benefits. You want to appeal the SST decision or have a court review the SST Appeal Division decision.

Workers' Compensation

We can help you if:

- You lost your appeal to the Workers' Compensation Appeal Tribunal (WCAT) and want WCAT to reconsider their decision, or you want a court to review the decision.

300-1140 West Pender Street
Vancouver, BC V6E 4G1
www.clasbc.net

Phone: 604-685-3425
Toll Free: 1-888-685-6222
Fax: 604-685-7611

Human Rights

We can help you if:

- You need information about filing a federal human rights complaint with the Canadian Human Rights Tribunal or the Canadian Transportation Agency; or
- You have a decision from the BC Human Rights Tribunal, the Canadian Human Rights Tribunal, or the Canadian Transportation Agency and you want a court to review this decision.

Mental Health

We can help you if:

- You have a decision from a BC Mental Health Review Panel and you want a court to review this decision; or
- You have a decision from the Review Board under the *Criminal Code* and you want a court to review this decision.

OTHER PROGRAMS AT CLAS

Mental Health Law Program

The Mental Health Law Program represents individuals who have been involuntarily detained under the BC *Mental Health Act* and people who have been found not criminally responsible under the mental disorder provisions of the *Criminal Code*.

BC Human Rights Clinic

The BC Human Rights Clinic provides information and assistance to file a complaint with the BC Human Rights Tribunal through their information line and Short Service clinics held every Monday between 9:30am and 4pm at the BC Human Rights Tribunal.

The Human Rights Clinic may also represent people once their complaint is accepted for filing by the Human Rights Tribunal. You must apply for representation no later than 30 days after the date your complaint is accepted for filing.

The Human Rights Clinic has its own telephone line and website: 604-622-1100; www.bchrc.net

Community Advocate Support Line

The Community Advocate Support Line is a dedicated telephone support line exclusively for advocates and community workers in BC. It is staffed by a lawyer who gives advocates brief legal information and legal advice about family law and poverty law topics to support advocates' work on behalf of clients.

Community Advocate Support Line at CLAS

The Community Advocate Support Line (CASL) is a dedicated support service for BC advocates and community workers. CASL is staffed by lawyer Alison Ward, who can give advocates legal information and advice about specific client files they are working on in family and poverty law. CASL is funded by the Law Foundation of B.C.

Advocates and community workers in BC can reach CASL by phone at:

From the Lower Mainland:	(604) 681 CASL (2275)
Toll Free within BC:	1 888 781 CASL (2275)

These numbers are for the use of advocates and community workers only. **Please do not release them** to your clients or to the general public.

Community Advocate Support Line case priorities

CASL provides advice and assistance in relation to the following areas of law:

- income assistance;
- debt collection and bankruptcy;
- family law;
- residential tenancy and other housing issues
- judicial review
- consumer contracts;
- employment insurance;
- Canada Pension Plan benefits;
- foreclosures;

If you have a legal question about a client whose problem falls outside our case priorities, please contact CASL and we will review the situation with you.

Information you must give to the Community Advocate Support Line

To access legal advice through CASL, you must provide Alison with the full legal name, address and phone number (if any) of your client. You will also need to provide Alison with the full legal names of any opposing parties involved in your client's legal issue. Our professional responsibilities as lawyers require us to review and record this information; it will of course be kept confidential. This means that you should generally obtain your client's consent to release this information to CASL before calling.

We look forward to working with you through CASL, and to hearing your feedback about this service.

Rita Hatina
Assistant Executive Director, Community Legal Assistance Society
Suite 300 – 1140 West Pender Street, Vancouver, BC V6E 4G1
Tel (604) 685-3425; toll-free (1-888-685-6222)
rhatina@clasbc.net

BCPIAC
Public Interest Advocacy Centre
208-1090 W. Pender St, Vancouver BC V6E 2N7 Coast Salish Territory
604.687.3063 fax 604.682.7896 www.bcpiac.com

FOR IMMEDIATE RELEASE

Increasing BC Hydro rates drive request for an electricity affordability program for BC's poor

September 29, 2015 (Vancouver) Legal advocacy group, the BC Public Interest Advocacy Centre (BCPIAC) will ask the BC Utilities Commission (BCUC) to implement an electricity affordability program for BC Hydro's 160,000 low income residential customers. The proposal consists of three strategies to address the hardship caused by high hydro rates on low income customers:

- lifeline rates to keep rates more affordable for the poorest customers;
- low income customer service rules including more flexible arrears payment arrangements and waiver of reconnection fees; and
- emergency bill assistance to avoid disconnection.

BC Hydro has increased residential electricity rates by 47% in the last 10 years, and is on track to increase them by at least 10.5% in the next three years. Rates are projected to continue to rise significantly in future years as BC Hydro proceeds with multi-billion dollar projects such as Site C dam which have been exempted from a full public review by the BCUC.

BC Hydro's rate increases have grossly outstripped increases in income for low income British Columbians. For example, BC social assistance rates have been frozen since 2007 at $610 per month for basic assistance and $906 for disability assistance, and in the last 10 years the BC general minimum wage has only gone up by $2.45 an hour.

"Electricity is an essential service, and low income BC Hydro customers have no spare money to pay higher electricity costs. Since electricity is essential to survival, people can only pay their electricity bills at the expense of competing household necessities, such as food and medicine" said Trish Garner, community organizer with the BC Poverty Reduction Coalition.

"About 10% of BC Hydro residential customers live below Statistics Canada's Low Income Cut-off", said Sarah Khan, one of the lawyers at BCPIAC who is bringing this issue to the BCUC, adding that "Continuous rate increases and stagnant incomes are causing low income people to struggle to pay for their BC Hydro bills."

BC Hydro offers no rates or terms and conditions that specifically apply to low income customers. The only programs available to these customers are energy saving kits and in more limited cases, energy efficiency home upgrades. While these programs are important, they are not offsetting BC Hydro's rate increases.

BC Hydro has just filed a Rate Design Application with the BCUC, and BCPIAC will intervene in this proceeding on behalf of the following groups to request low income programs: Active Support Against Poverty, BC Old Age Pensioners' Organization, BC Poverty Reduction Coalition, Council of Senior Citizens' Organizations of BC, Disability Alliance BC, Together Against Poverty Society, and Tenant Resource & Advisory Centre.

-30-

For further information, please contact:

Sarah Khan and Erin Pritchard, BCPIAC
Ph: 604-687-3063 skhan@bcpiac.com

Trish Garner, BC Poverty Reduction Coalition
Ph: 604-417-8885, trish@bcpovertyreduction.ca

Gudrun Langolf, Council of Senior Citizens' Organizations of BC
Ph: 604 266-7199, langolfgudrun@gmail.com

Stephen Portman, Together Against Poverty Society
Ph: 250-361-3521 (w) or 250-361-6083 (c), sportman@tapsbc.ca

BCPIAC
Public Interest Advocacy Centre
208-1090 W. Pender St, Vancouver BC V6E 2N7 Coast Salish Territory
604.687.3063 fax 604.682.7896 www.bcpiac.com

BACKGROUNDER – SEPTEMBER 29, 2015

BCPIAC's Low Income electricity affordability proposals for BC Hydro's Rate Design Application

BC Hydro currently offers no rate affordability programs for its 161,287 low income customers

People living in poverty have a hard time paying for essential services such as electricity when their incomes are stagnant. Low income BC Hydro customers have no spare money to pay higher electricity costs, and since electricity is essential to survival, people can only pay their electricity bills at the expense of competing household necessities, such as food and medicine.

BC Hydro currently offers no rates or terms and conditions of service that specifically apply to low income customers. It offers two programs to its low income customers: i) an Energy Savings Kit comprised of a few energy saving products which, if fully installed, might save $30 per year, and ii) in more limited cases, energy efficiency home upgrades.

While such energy efficiency programs are important, they are not a stand-alone response to low income customers' increasing inability to afford their power bills – these programs are only one element of what advocates say must be a comprehensive low income rate strategy.

Ontario, Quebec and Manitoba offer bill assistance programs to low income electricity customers who are having difficulty paying their bills. Ontario has recently introduced a special monthly credit for its low income customers, and both Ontario and Manitoba are expanding these programs. The US has an extensive low income home energy assistance program that is funded in part by the Federal Government and is available in all 50 states.

Low income people increasingly unable to afford electricity due to rate increases

BC Hydro has increased residential electricity rates by 47% in the last 10 years, and is on track to increase them by at least 10.5% in the next three years. Rates are projected to continue to rise significantly in future years as BC Hydro proceeds with multi-billion

dollar projects such as the Site C dam which have been exempted from a full public review by the BC Utilities Commission (BCUC).

While BC Hydro's electricity rates have increased dramatically, there have been extremely minor increases in income for low income people in BC. Over the last 10 years, BC social assistance rates have only gone up by $100 or less (for a single person) and the BC general minimum wage has only gone up by $2.45 an hour, as set out in the chart below:

Year	BC Hydro Residential Rate Increases	Ministry of Social Development and Social Innovation (MSDSI) Income Assistance Rates for a single person		General Minimum Wage
		Basic Assistance	Disability Assistance	
2006	1.54%	$510.00	$856.00	$8.00
2007	0.10%	$610.00	$906.00	$8.00
2008	2.34%	$610.00	$906.00	$8.00
2009	8.74%	$610.00	$906.00	$8.00
2010	6.11%	$610.00	$906.00	$8.00
2011	8%	$610.00	$906.00	$8.75/$9.50
2012	3.9%	$610.00	$906.00	$10.25
2013	1.44%	$610.00	$906.00	$10.25
2014	9%	$610.00	$906.00	$10.25
2015	6%	$610.00	$906.00	$10.25/$10.45
2016	4% cap	$610.00*	$906.00*	$10.60 est.
2017	3.5% cap	$610.00*	$906.00*	$10.87 est.
2018	3% cap	$610.00*	$906.00*	$11.09 est.
Total 2005-2018	74.16%	19.61%	5.84%	38.62%

**there are no planned increases for MSDSI income assistance*

BC Hydro's Rate Design Application is an opportunity to seek assistance for low income customers

BC Hydro filed its Rate Design Application (RDA) with the BCUC on September 24, 2015. In this process, the BCUC will hear evidence and submissions from BC Hydro and intervener groups and determine rate structures and terms and conditions of service for residential, business and industrial customers.

Over the last 35 years BC Hydro has only filed three RDAs – in 1980, 1991, and 2007. After the 2015 RDA is completed, it could be 10 years or more before BC Hydro files another one.

In the RDA, the BC Public Interest Advocacy Centre ("BCPIAC") will be representing the following coalition of groups that represent the interests of low and fixed income BC Hydro customers: Active Support Against Poverty, BC Old Age Pensioners' Organization, BC Poverty Reduction Coalition, Council of Senior Citizens' Organizations of BC, Disability Alliance BC, Tenant Resource and Advisory Centre and Together Against Poverty Society.

BCPIAC will ask the BCUC to order rate relief and special terms and conditions for low income customers so that these customers can continue to pay for electricity without prejudicing access to other household necessities, such as food and medicine.

Proposed low income electricity bill assistance programs

BCPIAC plans to ask the BCUC to order implementation of three programs to assist low income residential customers.

All BC Hydro residential customers who have incomes under Statistics Canada's Low Income Cut Off (LICO) would be eligible to participate in these programs. About 190,000 BC Hydro customers (11%) have incomes below LICO.

The programs are:

1. Lifeline rate for low income customers

- Implement a lifeline rate at 5 cents per kWh for the first 250 kWh of electricity per month for low income residential customers (saving about $7.43 per month per low income customer); and
- Waive the Basic Charge of 17.64 cents/day for low income residential customers (saving about $5 per month per low income customer).

This rate will result in savings of about $13/month ($150/year) for a low income customer.

2. Emergency bill assistance

- Implement a low income emergency bill assistance program of up to $500 per year for low income households who have arrears with BC Hydro and are facing disconnection; and
- All low income customers who receive emergency bill assistance must take part in BC Hydro's free Energy Conservation Assistance Program, a program to increase home energy efficiency.

3. **Low income terms and conditions**

- Implement terms and conditions for low income customers, including:
    - waiver of security deposits and the ability to build up a security balance over time (6 months);
    - flexible payment arrangements, including modifications to the equal payment plan program;
    - elimination of late payment fee;
    - suspension of electricity service disconnections during cold weather periods and for customers using lifesaving medical equipment; and
    - waiver of reconnection fees.

Finally, we will recommend areas where energy efficiency programs for low income customers can be improved or enhanced.

BC Hydro's Rate Design Application can be found at:
http://www.bchydro.com/ex/rr/pdfs/RDA.pdf

Human Rights in British Columbia.

Human Rights in BC

(CLAS) Community Legal Assistance Society

Poverty Law – Mostly JR's
Disability, Tenancy, WCB
I.A., E.I, OAS,

Mental Health Law
MHA Civil
Criminal (Not Crim Resp)

Human Rights Clinic
Advocacy, Representation, Information and Education

Clinic is like legal aid for human rights cases and funded by the MOJ

Come to us for help in getting started or for representation

Tribunal is the court

Get the forms and file the complaint with them. They will supply Members (judges) for mediation and hearing. They will set dates, decide all issues on application and will "manage" the case.

BC Human Rights Tribunal
1170 - 605 Robson Street
Vancouver, B.C. V6B 5J3
(604) 775-2000 phone
(604) 775-2020 fax
www.bchrt.bc.ca

Human Rights in BC

Conflict Notice

CLAS and the BC Human Rights Clinic are actively involved on behalf of clients involved in human rights cases and participants in workshops or training agree that they have no expectation of privacy with respect to any information they may share with the class.

Human Rights ...

- What are human rights?

Charter of Rights and Freedoms

- *Equality Rights* Section 15

- **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- (2) Subsection allows for discrimination if based on affirmative action. Code terms this “Special Programs”

Special Programs

42 (1) It is not discrimination or a contravention of this Code to plan, advertise, adopt or implement an employment equity program that
(a) has as its objective the amelioration of conditions of disadvantaged individuals or groups who are disadvantaged because of race, colour, ancestry, place of origin, physical or mental disability, or sex, and
(b) achieves or is reasonably likely to achieve that objective.
(2) ...
(3) On application by any person, with or without notice to any other person, the chair, or a member or panel designated by the chair, may approve any program or activity that has as its objective the amelioration of conditions of disadvantaged individuals or groups.
(4) Any program or activity approved under subsection (3) is deemed not to be in contravention of this Code.

S. 42 Special Programs
Affirmative Action

Amata Transition House	Restrict hiring to women for employment positions and to restrict recipients of it services to women and their dependent children
BC Centre for Disease and Control	Chee Mamuk Aboriginal Program, STI/HIV Prevention and Control. Restrict hiring to persons of Aboriginal ancestry. The restriction applies to full and part-time, permanent or casual employees and independent contractors.
Women's Information Safe House (WISH) Drop In Center Society	Hiring restricted to women, including transgendered women, for all staff positions

Jurisdiction
Constitution Act 1867

Federal	Provincial
Federal Government	Provincial Government
Banking	Credit Unions
Transport Cross Borders	Transport only in BC
Telecommunications	Call Centers
Indian Act	
Armed Forces	
Any Federally regulated entity	Provincially regulated entity

Provincial or Federal

Complicated – Not always clear e.g.

Complicated – Not always clear e.g.

- *McElrevy v. BC Corps of Commissionaires and others*, 2004 BCHRT 160 – No jurisdiction by BCHRT for Security worker monitoring Armed Forces Base.

- First nations –"Indianess" v. gas station on nation land.

Provincial or Federal

- Federal – Commission investigates before accepting.
  - 1 year from last act of discrimination
- Provincial in BC – Direct access – No investigation.
  - 6 months from last act of discrimination
- Continuing contravention may extend timeline for filing and bring in earlier events of the same nature.
- Two kinds of continuing contraventions...
- Tribunal has discretion to accept late filed complaints – Public Interest – substantial prejudice. e.g. *Blanchard v. Rice*

Grounds and Areas

Must be a relationship between Ground and Area

Only governs “public –commercial” relationships

- Grounds
- Who Gets Protection
- Race, Ancestry Colour, Sex, Age, Family Status, Religion, Sexual Orientation etc....

- Areas
- When do they get protection
- Employment, Tenancy, Services, Purchase of property etc...

Provincial Human Rights in BC

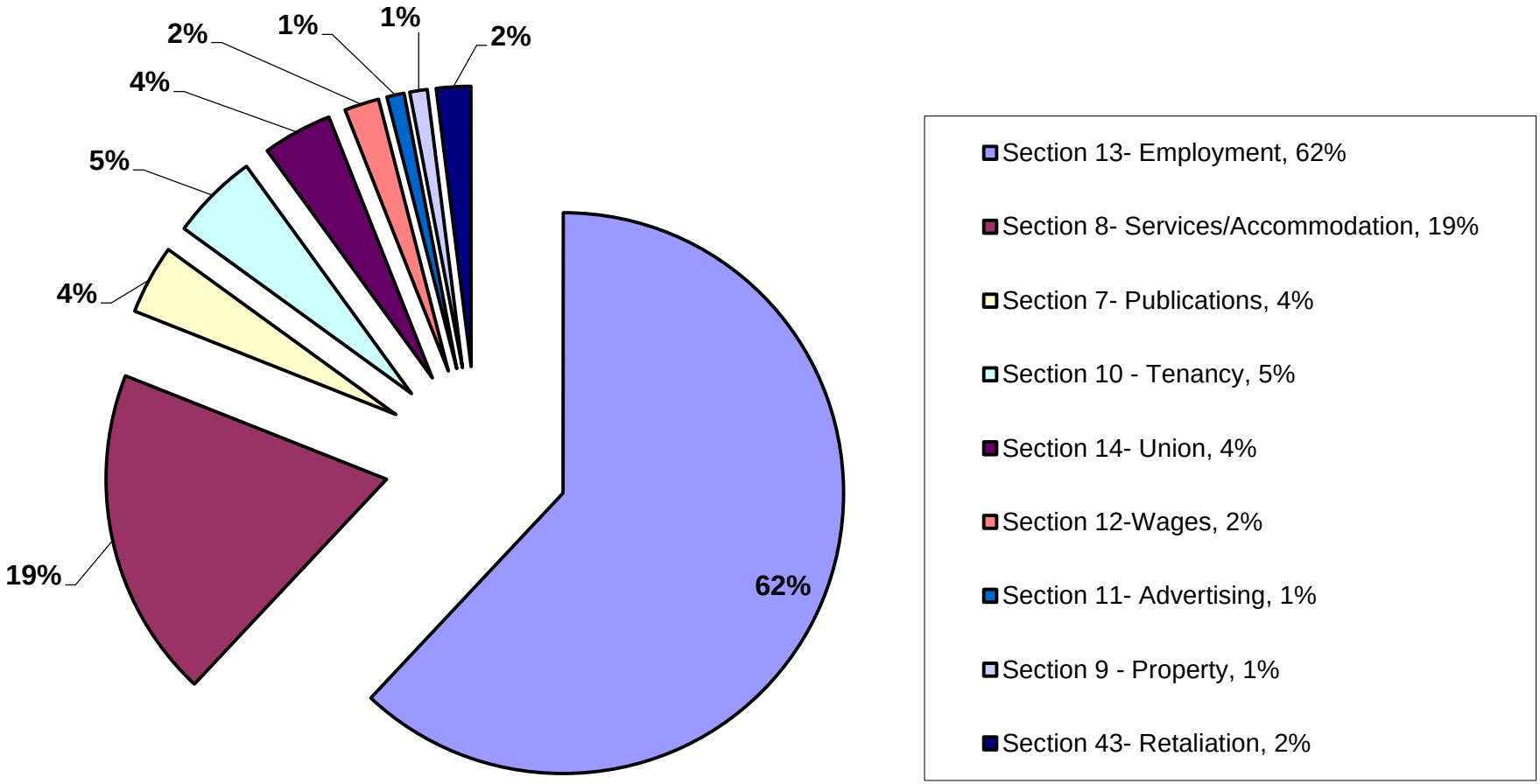
- BC Human Rights Codes defines discrimination
- Code establishes BC Human Rights Tribunal.
- Rules of Practice and Procedure provides rules for “Just and Timely” resolution of complaints and describes processes.

Human Rights in BC
Areas of Protection

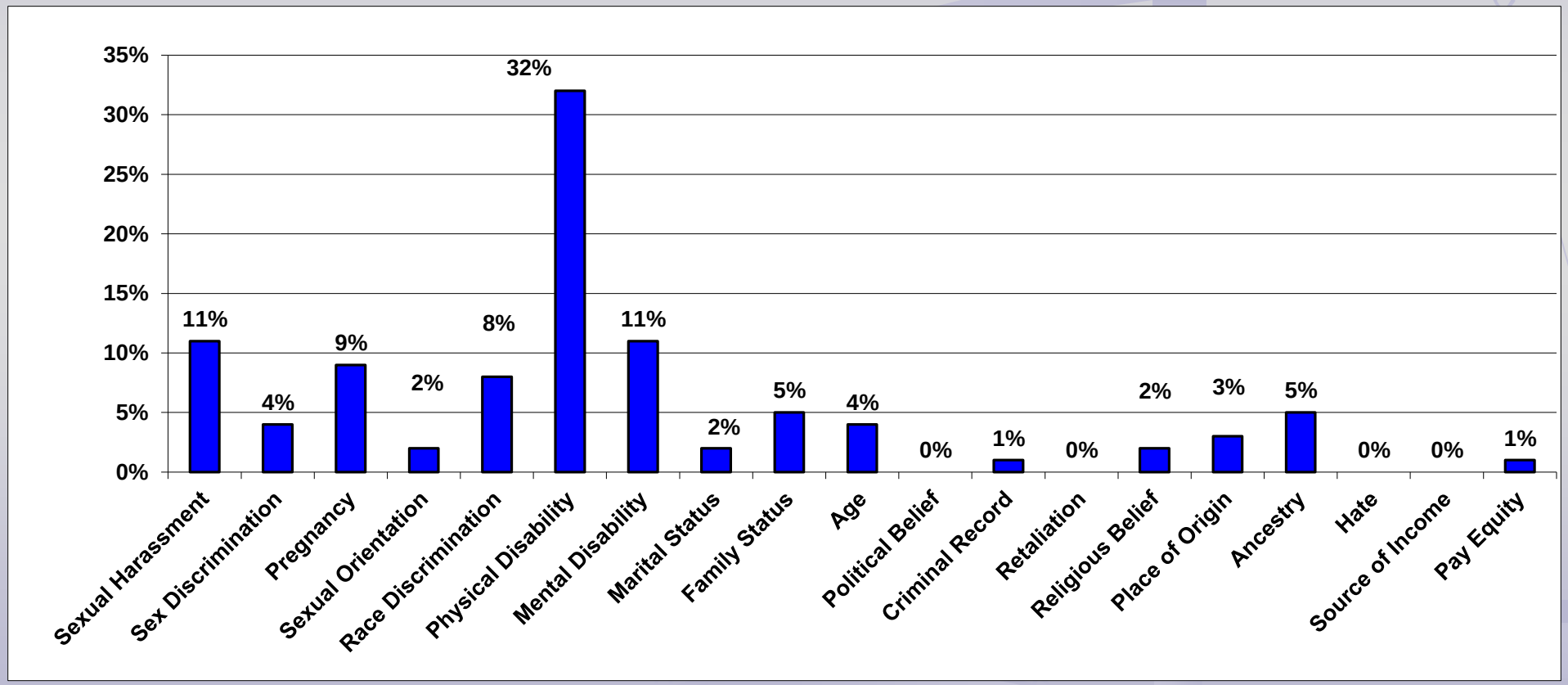
- Code Sections S.7-14 and S.43

- S.7 – Discriminatory Publication – Hatred
- S.8 – Accommodation, Service and Facility (Stratas, Bus line, Prov. Govt., Schools, Stores, etc)
- S.9 – Purchase of Property
- S.10 – Tenancy Premises
- S.11 – Employment Advertisement (Classifieds etc)
- S.12 – Discrimination in wages – similar or substantially similar work. Not of same value.
- S.13 – Employment
- S.14 – Unions or Employers Organization or Occupational Associations
- S.43 – Retaliation

BCHRT - Area of Protection Complaints Accepted



BCHRC
Calls by Ground of Protection



Human Rights in BC
Ground of Protection

- Sec 13 – Employment - A person must not discriminate against a person because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or criminal conviction of that person.

Not covered in all sections so need to check. (see chart)

	Protected Areas			
Prohibited Grounds	Employment	Public Services & Accommodations	Purchase of Property	Tenancy
Race	✓	✓	✓	✓
Colour	✓	✓	✓	✓
Ancestry	✓	✓	✓	✓
Place of Origin	✓	✓	✓	✓
Political Belief (as long as it does not cause harm to others)	✓	✗	✗	✗
Religion	✓	✓	✓	✓
Marital Status (includes protection if you are married, single, widowed, divorced, separated, or living common law)	✓	✓	✓	✓
Family Status (includes having children or not having children)	✓	✓	✗	✓
Physical or Mental Disability	✓	✓	✓	✓
Sex (includes protection for males and females, sexual harassment, pregnancy discrimination and transgendered discrimination)	✓	✓	✓	✓
Sexual Orientation (includes protection for heterosexual, bi-sexual, gay men and lesbian women)	✓	✓	✓	✓
Age (19 and over)	✓	✓	✗	✓
Criminal or summary conviction	✓	✗	✗	✗
Source of Income	✗	✗	✗	✓

Human Rights in BC

- Discrimination in Employment not necessarily by Employer
  - *Pettie v. Safeway and Don Gavin*
- May extend to failure to protect against customers acts.
  - *Jalbert v. Moore*
  - *May include independent contractors – BUT...*

  Contracted "Employee" not in employment for purposes of Code.
  - *Test - Montreal Locomotive... control; ownership of tools;* schedule, pay, uniform, other jobs, location etc...
    - *Steel v. Rahn*
    - *Chili House*
    - *Roth v. Beaver Creek*

Human Rights in BC
What is Discrimination?

- Discrimination - *Andrews v. Law Society of British Columbia, [1989] 1 SCR 143* – Essentially different treatment based on a personal characteristic of the individual

- Need not be sole or overriding reason, but only a factor.

- Section 2 of the *Code* specifically sets out that intention is irrelevant with respect to discrimination*: "Discrimination in contravention of this Code does not require an intention to contravene this Code."*

WCB Bullying

S.5.1 WCA as amended

The amendments to the Act read in part;

Mental disorder

5.1 (1) Subject to subsection (2), a worker is entitled to compensation for a mental disorder that does not result from an injury for which the worker is otherwise entitled to compensation, only if the mental disorder

(a) either

(i) is a reaction to one or more traumatic events arising out of and in the course of the worker's employment, or

(ii) is predominantly caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment,

S.5.1 Cont…

(b) is diagnosed by a psychiatrist or psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders at the time of the diagnosis, and

(c) is not caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.

S.5.1

(2) The Board may require that a psychiatrist or psychologist appointed by the Board review a diagnosis made for the purposes of subsection (1) (b) and may consider that review in determining whether a worker is entitled to compensation for a mental disorder.

(3) Section 56 (1) applies to a psychiatrist or psychologist who makes a diagnosis referred to in this section.

(4) In this section:

"psychiatrist" means a physician who is recognized by the College of Physicians and Surgeons of British Columbia, or another accredited body recognized by the Board, as being a specialist in psychiatry;

"psychologist" means a person who is registered as a member of the College of Psychologists of British Columbia established under section 15 (1) of the *Health Professions Act* or a person who is entitled to practice as a psychologist under the laws of another province.

Due to the length of time that it takes to get an appointment with a psychiatrist (they are covered by MSP) that WSBC will allow a worker to visit a psychologist and they will cover the cost of the initial assessment as MSP won't.

Also there is to be a 3 day turnaround on a full psych assessment (hopefully) – seems to be running at 10 days now

30% of cases are now being accepted.

S 5.1 Policy

Definition - Bullying and harassment

“includes any inappropriate conduct or comment by a person towards a worker that the person knew or ought to have known would cause that worker to be humiliated or intimidated, but

Excludes any reasonable action taken by an employer or supervisor relating to the management and direction of the workers or the place of employment.” [Management Rights]

Human Rights in BC Accommodation

- In *Ontario (Human Rights Commission) and O'Malley v. Simpson Sears Ltd, [1985] 2S.C.R. 536, 23 DLR (4th) 321*, the Supreme Court of Canada stated that,
- *"[A]... rule honestly made for sound economic or business reasons equally applicable to all to whom it is intended to apply may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply."* ***Treating everyone the same no defence.***
- *Adverse Effect Discrimination –* ***Riceman v BC Hydro.***

Human Rights in BC

- In British Columbia *(Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*") the Supreme Court of Canada established a three-stage analysis for determining whether a standard is a BFJ:

- In order to establish this justification, the defendant must prove that:
  - a. That the employer established the standard for a purpose rationally connected to the performance of the job;
  - b. That the employer adopted the standard in an honest and good faith belief that it was reasonably necessary to the fulfilment of that legitimate and work-related purpose; and
  - c. That the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer. (at para. 54)

Cassidy v. BCAS –BFOR

Human Rights in BC Accommodation

- *Wu v. Ellery*

  Accommodation to the point of "undue" hardship means that an employer must incur some hardship. That hardship might involve expense, inconvenience, and/or disruption, so long as it does not unduly interfere with its business. The burden is on the employer to show that it has offered a reasonable accommodation such that any further accommodation would constitute undue hardship.
- Meioron (Employment – BFOR) Ability to do the essential duties
- Grismer (Services – BFJ)

Accommodation – Renaud

Not perfect accommodation but reasonable accommodation. All parties must engage in process. Employer, employee, union etc..

Accommodation
Family Status

Definition

In *Petterson v. Gorcak*, 2009 BCHRT 439, the Tribunal held that the ground of family status under the *Code* can encompass the circumstance where the discrimination results from the status of being the parent of a particular child.

The decision of the Canadian Human Rights Tribunal in *Lang v. Employment and Immigration Commission,* [1990] C.H.R.D. No. 8, [1990] 12 C.H.R.R. D/265 and other arbitral authorities, including *Campbell v. Shahrestani*, [2001] B.C.H.R.T.D. No. 36, have concluded that the term "family status" in s. 13(1) of the Code includes the relationship of parent and child.

In *Attorney General of Canada v. Johnstone,* 2013 FC 113 the Federal Court of Appeal found that the Canadian Human Rights Tribunal's conclusion that family status includes childcare obligations was reasonable.

Accommodation

The general proposition has been that an employer will only need to accommodate the parent due to the child's needs when there is a "serious interference with a substantial parental or other family duty" due to the familial relationship.

For the past several years, the settled state of the law in BC was articulated in *Health Sciences Assoc. of B.C.* v. *Campbell River and North Island Transition Society*, 2004 BCCA 260 ("Campbell River") and *Miller v. Northern Health Authority and Prince George Regional Hospital*, 2006 BCHRT 284, (*Miller*)

In the usual case where there is no bad faith on the part of the employer and no governing provision in the applicable collective agreement or employment contract, a *prima facie* case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a "serious interference with a substantial parental or other family duty or obligation" of the employee. (*Campbell River*)

Miller – 5 young kids, 1 with special needs.

Accommodation

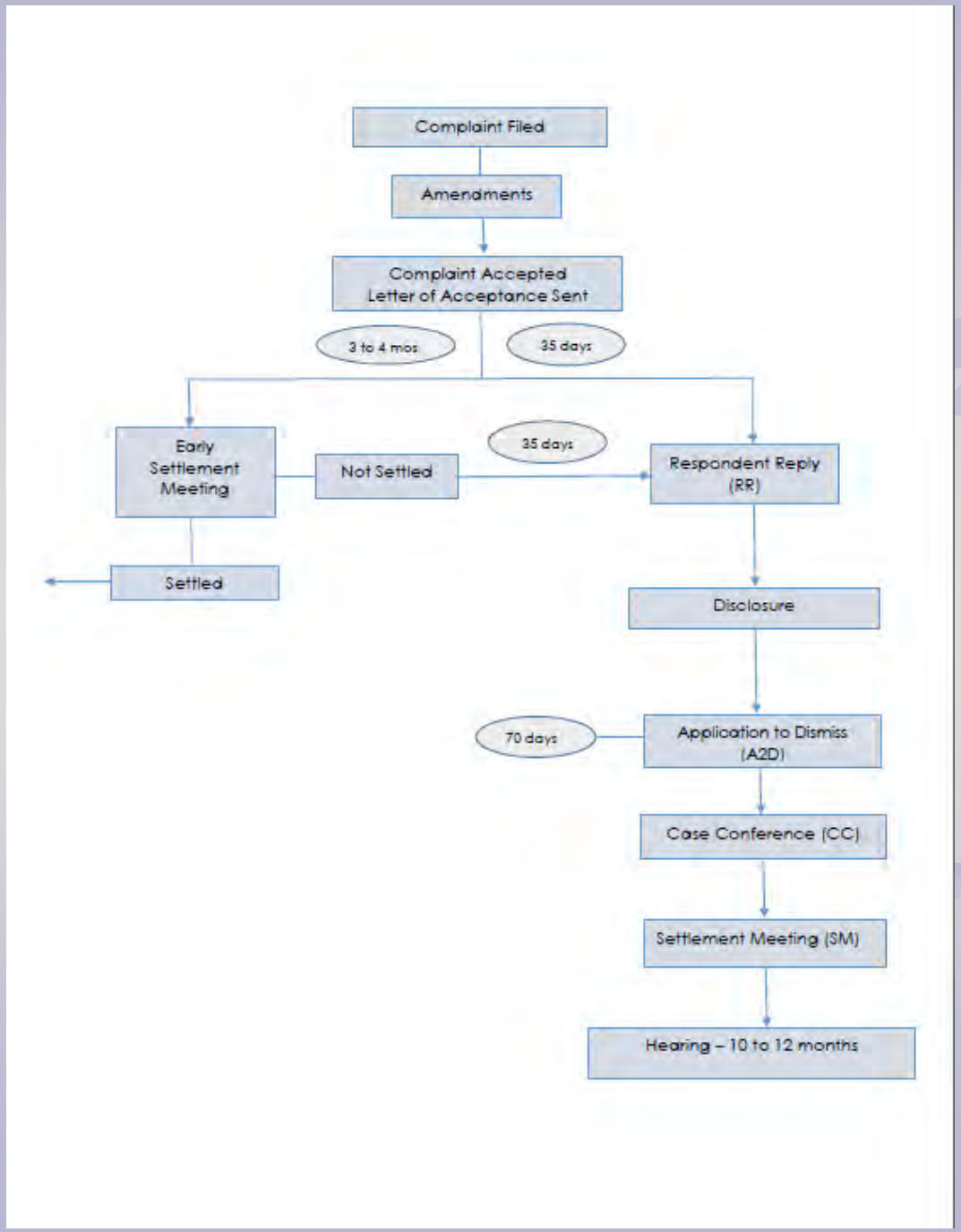
In 2013, the Federal Court was provided with the opportunity to review determine the question of what constitutes discrimination on the basis of family status in the case of *Attorney General of Canada v. Johnstone,* 2013 FC 113.

Ms. Johnstone had been working as a border services officer on rotating shifts. She requested full-time employment working fixed day shifts that would allow her to arrange childcare for her young children. CBSA policy limited fixed day shifts as requested by Ms. Johnstone to part-time employment. Consequently, Ms. Johnstone was not eligible for benefits available to full-time CBSA employees.

Accommodation

As the Federal Court of Appeal stated in upholding the decision in *Johnstone;*
I conclude from this analysis that in order to make out a *prima facie* case where workplace discrimination on the prohibited ground of family status resulting from childcare obligations is alleged, the individual advancing the claim must show that;

- a child is under his or her care and supervision;
- that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice;
- that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and
- that the impugned workplace rule interferes, in a manner that is more than trivial or insubstantial, with the fulfillment of the childcare obligation.


Complaint Filed
Amendments
Complaint Accepted
Letter of Acceptance Sent
3 to 4 mos
35 days
Early
Settlement
Meeting
Not Settled
35 days
Respondent Reply
(RR)
Settled
Disclosure
70 days
Application to Dismiss
(A2D)
Case Conference (CC)
Settlement Meeting (SM)
Hearing – 10 to 12 months

Human Rights in BC Dismissal

- 27 (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:
- (a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;
- (b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;...

Dismissal

27(1)..

- (c) there is no reasonable prospect that the complaint will succeed;
- (d) proceeding with the complaint or that part of the complaint would not
- (i) benefit the person, group or class alleged to have been discriminated against, or
- (ii) further the purposes of this Code;

Dismissal

27(1)

- (e) the complaint or that part of the complaint was filed for improper motives or made in bad faith;
- (f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;
- (g) the contravention alleged in the complaint or that part of the complaint occurred more than 6 months before the complaint was filed unless the complaint or that part of the complaint was accepted under section 22 (3).

Human Rights in BC
General Remedies 2 Parts…

Remedial Not Punitive. (To make C whole)

1. Injury to Dignity

2. Real losses

Severance
Loss of wages
Compensation for Benefits
Tax Gross up
Attending Hearing
Other miscellaneous (faxing, resumes, gas, etc...)
Legal Expenses ???
Education or retraining
Reinstatement

Wage loss

The important factors are: (Byers v. City of Prince George)
(1) The character and responsibility of the employment function
(2) The employee's age
(3) The employee's length of service with the employer
(4) The availability of equivalent alternative employment
(5) How hard the person looked for work (mitigation)

Benefits and Ltd

Two ways to get paid
> If complainant re-insures themselves then they get the cost of the re-insurance. E.g. $50 per month.
> If the complainant does not re-insure themselves then they are entitled to re-coupe whatever the actual costs paid out were. E.g. $800 for braces, $300 for glasses etc.

DANGER: What if C does not insure themselves and they are injured during reasonable notice/severance period???

Costs

Generally speaking the Tribunal does not award costs. Each party is expected to pay for their own costs, including legal fees, costs of disclosure (copying) etc...

HOWEVER.. Recently the Tribunal has determined that it has the power to order costs if it deems it necessary to “ameliorate the affects of discrimination.” ($60K in legal fees)

Improper conduct
A complaint being justified in part is not a bar to an award of costs against the complainant.

The Tribunal routinely orders costs where it deems that there has been improper conduct. This can take the form of delay tactics, not being truthful, having improper motives for filing, disclosing without prejudice information, failing or being late to disclose documents, being late in raising jurisdictional issues, threatening behaviour.

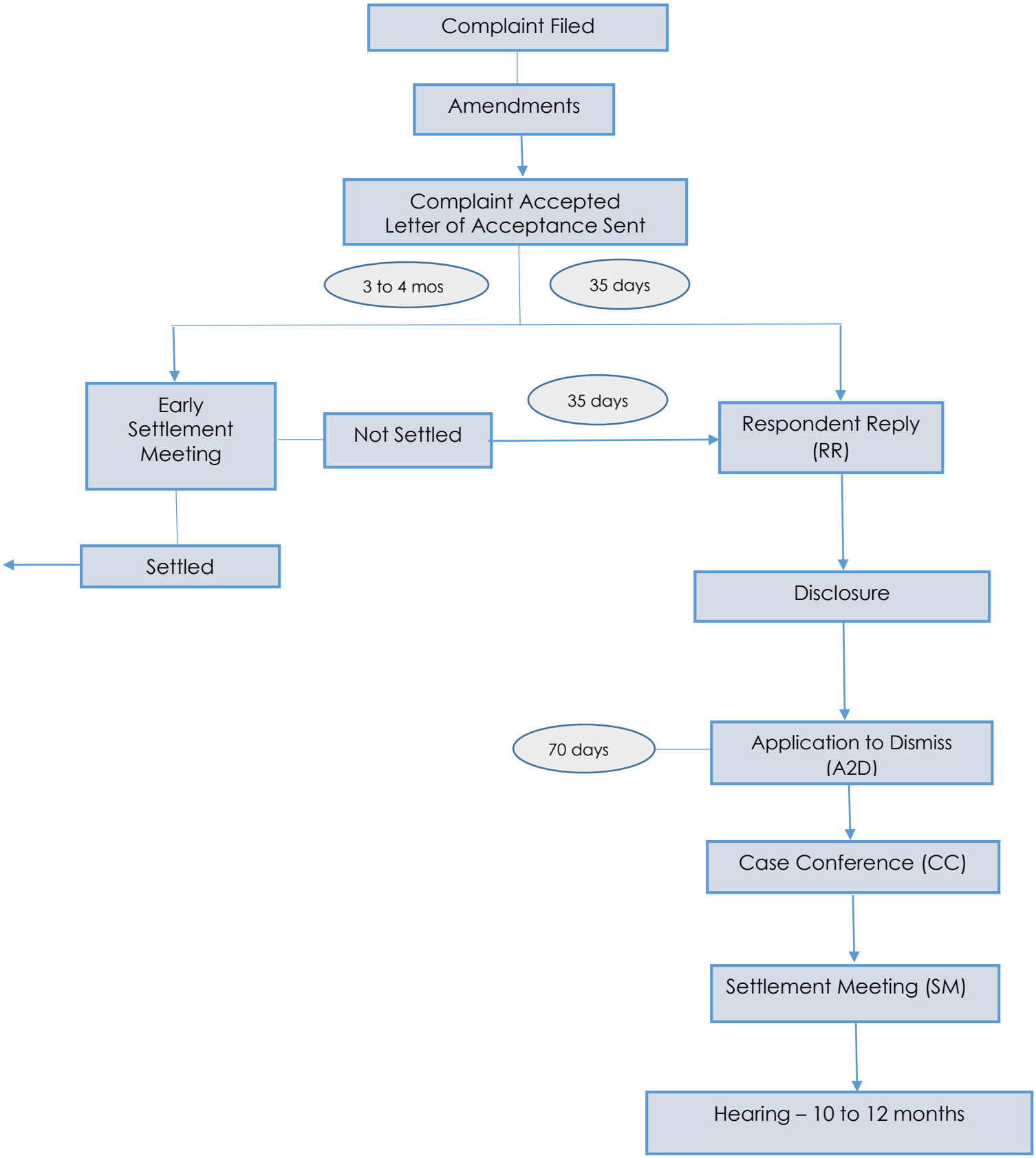
$28K awarded in SELI case.

Human Rights in BC Remedies

- Highest Injury to dignity (I2D) $75,000 (JR)
- SELI $3-4 Million total Injury to Dignity award
- Highest Sex harassment (I2D) $25,000
- Highest lost wages award Kerr $395K and Kelly $380k
- Most cases in the $5,000-$10,000 range
- Pregnancy $15,000

The End…

Presented by Robyn Durling
of the BC Human Rights Clinic


Complaint Filed
Amendments
Complaint Accepted
Letter of Acceptance Sent
3 to 4 mos
35 days
Early
Settlement
Meeting
Not Settled
35 days
Respondent Reply
(RR)
Settled
Disclosure
70 days
Application to Dismiss
(A2D)
Case Conference (CC)
Settlement Meeting (SM)
Hearing – 10 to 12 months

	Protected Areas			
Protected Grounds	***Employment***	***Public Services & Accommodation***	***Purchase of Property***	***Tenancy***
Race	✓	✓	✓	✓
Colour	✓	✓	✓	✓
Ancestry	✓	✓	✓	✓
Place of Origin	✓	✓	✓	✓
Political Belief (as long as it does not cause harm to others)	✓	✗	✗	✗
Religion	✓	✓	✓	✓
Marital Status (includes protection if you are married, single, widowed, divorced, separated, or living common law)	✓	✓	✓	✓
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Sex (includes protection for males and females, sexual harassment, pregnancy discrimination and transgendered discrimination)	✓	✓	✓	✓
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Criminal or summary conviction	✓	✗	✗	✗
Source of Income	✗	✗	✗	✓